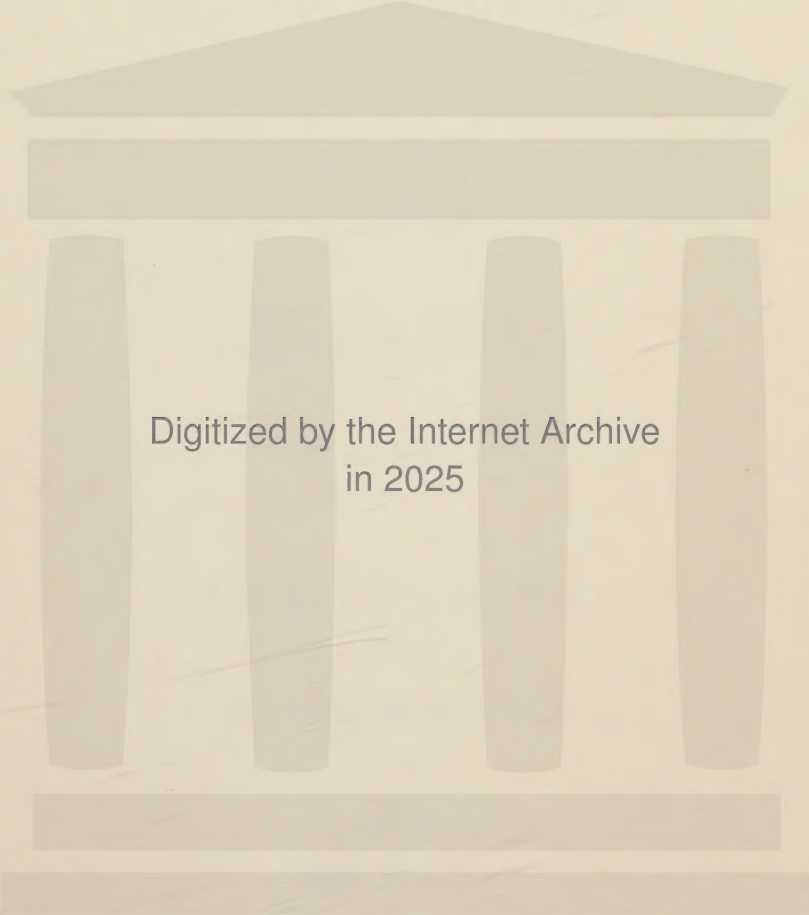




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CALIFORNIA REPORTER

278 PACIFIC REPORTER

207 Cal. 298

CALIFORNIA DELTA FARMS, Inc., v. CHINESE AMERICAN FARMS, Inc.*
(Sac. 4148.)

Supreme Court of California. May 29, 1929.

Rehearing Denied June 27, 1929.

1. Conspiracy $\S$ 28—Intentional acts to carry out contract to convey land to corporation, majority of whose stockholders were aliens ineligible to citizenship, constituted "conspiracy" (Alien Land Act 1920, $\S$ 10, as amended by St. 1923, p. 1020, $\S$ 9).

Intentional acts of two parties in concert after December 9, 1920, to carry out provisions of contract for conveyance of agricultural land to corporation majority of whose stock was beneficially owned by persons ineligible to citizenship, with knowledge of the alienage, constituted "conspiracy," in violation of Alien Land Act 1920 (St. 1921, p. lxxxiii) $\S$ 10, as amended by St. 1923, p. 1020, $\S$ 9.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

2. Conspiracy $\S$ 24—Act lawful if done by one person may be unlawful if done or attempted by several.

An act may be lawful if done by one person and unlawful if done or attempted by a concert of action on the part of two or more persons.

3. Conspiracy $\S$ 37—Successful fruition of conspiracy does not bar prosecution for conspiracy itself.

The successful fruition of a conspiracy is no bar to a prosecution for the conspiracy itself.

4. Contracts $\S$ 107—Contract founded on act penalized by statute is void.

When a statute pronounces a penalty for an act, a contract founded on such act is void, though the statute does not pronounce it void nor expressly prohibit it.

5. Aliens $\S$ 10—Transfer knowingly violating Alien Land Act is invalid as between parties (Alien Land Act 1920, $\S$ 10, as amended by St. 1923, p. 1020, $\S$ 9).

Transfer made knowingly in violation of Alien Land Law effective Dec. 9, 1920 (St. 1921, p. lxxxiii) $\S$ 10, as amended by St. 1923, p. 1020, $\S$ 9, is invalid whether vendor was cognizant of extent of alienage in corporate purchaser, and statute renders illegal consideration underlying executory provisions of such contract, as against vendor's contention that alien would get a defeasible title and that defect therein could not be raised between the parties but only by the state.

6. Aliens $\S$ 10—Corporation prevented from completing land purchase contract because of alienage of majority of its stockholders held entitled to accounting and lien for payments on price (Alien Land Law 1920, $\S$ 10, as amended by St. 1923, p. 1020, $\S$ 9).

Where contract for transfer of land to corporation failed because majority of beneficial owners of corporation's stock were aliens ineligible to citizenship under Alien Land Law

1920 (St. 1921, p. lxxxiii) $\S$ 10, as amended by St. 1923, p. 1020, $\S$ 9, vendee was entitled to accounting in equity as of December 9, 1920, the effective date of statute and lien on property for amount found due it for its payments on purchase price less proper set-offs, since contract when made and until December 9, 1920, was valid as against every one other than the state.

7. Vendor and purchaser $\S$ 54—Vendee's full equitable title matures only on full payment of purchase price.

Equitable doctrine that vendee under land contract is owner of property applies only to payments made on purchase price, and full, equitable title matures only on full payment of price.

8. Aliens $\S$ 10—Statute authorizing alien ineligible to citizenship to acquire title to realty to satisfy lien thereon held not to authorize completion of existing land contract to alien purchaser (Alien Land Act, $\S$ 7, as amended).

Provision of Alien Land Act (St. 1921, p. lxxxiii) $\S$ 7, as amended (Deering's Gen. Laws 1923, p. 1, Act 261, $\S$ 7) that act shall not apply to realty acquired in enforcement or satisfaction of any lien existing upon "or interest in such property" so long as realty so acquired remains property of alien acquiring it in such manner, and in limiting time for which land so acquired may be held to two years, held to constitute an exemption of real property acquired in satisfaction of any lien on such property or on any interest therein, and did not permit completion of executory contract to purchase on theory that alien purchaser, ineligible to citizenship, had equitable interest.

9. Vendor and purchaser $\S$ 335—Vendee in default not entitled to lien may have judgment for purchase money paid if consideration has failed without his fault (Civ. Code, $\S$ 3050).

Under Civ. Code, $\S$ 3050, vendee, though not entitled to lien for purchase money, may, even when in default, have judgment for purchase money paid if consideration for contract has without his fault failed.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by California Delta Farms, Inc., against Chinese American Farms, Inc., which filed cross-complaint. From the judgment, defendant appeals. Reversed, with directions.

Adopting opinion in 268 P. 1050. See, also, 255 P. 1097, and 278 P. 232.

A. B. Bianchi, Manson & Allan, Albert H. Elliot, and Bianchi & Hyman, all of San Francisco, for appellant.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for respondent.

PER CURIAM. In this cause a rehearing was granted and argument and additional briefs from both sides followed. After careful reconsideration of the issues, we are satisfied with the opinion of the court in bank,

★Rehearing denied.

written by Mr. Justice PRESTON, and hereby readopt the same as the opinion of this court herein as follows, to wit:

The able briefs on file in this cause cover a wide range of subjects, but we will consider only a few of them, as we have been led to the conclusion that the appeal is controlled by the provisions of the Alien Land Law, which became effective December 9, 1920 (Stats. 1921, p. lxxxiii), and particularly by section 10 thereof, which reads as follows:

"If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars or both."

This provision was broadened to cover any violation of the act by an amendment passed in 1923 (Stats. 1923, p. 1020).

The complaint in this action sets up a contract of sale and purchase, dated August 1, 1919, between plaintiff and one C. C. Wing, a native-born citizen of Chinese descent, covering 3437.58 acres of agricultural land, situate in San Joaquin county. Said contract provided that the total purchase price should be \$893,770.80, \$50,000 of which was paid upon execution thereof, and the balance of \$843,770.80 was to be paid in yearly installments terminating January 1, 1928. The final balance of the purchase price remaining due on said date, to wit, \$291,770.20, was to be paid by the assumption and discharge of an assessment made by Delta Farms Reclamation District 2030, amounting to \$325,436, then outstanding as a lien upon said land, upon which reclamation bonds, bearing 6 per cent. interest, had been authorized and would be payable in approximately equal amounts annually from 1928 to 1938, inclusive.

It is further pleaded that all payments called for by said contract were made up to January 1, 1922, on which date there became due and payable \$51,563.70, a like sum on January 1, 1923, and a like sum on January 1, 1924; that the total of said sums, plus interest on contract and other items due thereunder, less payments amounting in the aggregate to \$151,649.63, made thereon, left a balance due of \$231,263.42; that plaintiff had demanded repeatedly from said defendant payment of the said installments due on the purchase price, together with interest, assessments and taxes, and, after waiting more than 30 days, declared the rights of said defendant under said contract forfeited. The prayer is that said contract be declared no longer binding upon plaintiff, that said defendant be directed to deliver same up for cancellation, and that possession of said premises be ordered surrendered to plaintiff. The complaint was filed September 15, 1924.

Defendant, in a second amended answer and cross-complaint, admitted said default in

payments, but set up, as an alleged waiver of plaintiff's right to claim a forfeiture under the contract, certain acts and conduct of plaintiff. The pleading alleges: That said C. C. Wing, an American-born Chinese, was acting on behalf of a corporation, to be thereafter organized, and which was later organized and became the defendant herein; that the \$50,000 paid upon said contract prior to the formation of said corporation was more than 80 per cent. advanced by Chinese aliens, which fact plaintiff well knew, and that after said corporation was formed and transfer of said contract made thereto, although more than 50 per cent. of the issued and outstanding capital stock thereof stood of record in the name of native Chinese, eligible to citizenship, nevertheless at all of said times more than 50 per cent. of said stock so issued, to wit, 80 per cent. thereof, was actually, equitably and beneficially owned by aliens ineligible to citizenship, and this situation continued throughout the time covered by said contract. Further: "That the Alien Property Law of 1913, hereinabove particularly referred to, was changed and a new alien land law passed by initiative proceedings approved by the electors of the state of California November 2, 1920, Statutes of 1921, p. lxxxiii, in effect December, 1920, and which said Alien Land Law of 1920 was amended in 1923 by act of the Legislature of the state of California, and that from and after the time of the effective date of the Alien Land Law of 1920 the contract and agreement herein referred to as Exhibit A became impossible of performance; that the agreements, understandings, plan, and scheme of the plaintiff and defendant corporations to effect a transfer of the real property mentioned in said agreement became and were and now are in violation of the terms and provisions of said Alien Land Law of 1920 and 1923"; that by reason of said statute respondent was not able to carry out said agreement to convey or transfer merchantable or any title to or interest in the land the subject of the contract; that the agreement had become void in that the consideration therefor had wholly failed; that the terms of said agreement had become impossible of performance on the part of either party; that the objects and purposes of the agreement had become unlawful, and this without fault on the part of appellant.

It was further pleaded that at the time of the commencement of this action, appellant had paid to respondent under said contract the sum of \$466,702.26, which sum, with interest thereon, appellant was entitled to have returned to it; that appellant had enjoyed the possession and benefits of said real property during all the times mentioned in the complaint and was ready, able, and willing and offered (and alleged that it had theretofore offered, also) to return possession of said real property to respondent, together with all benefits and profits which had ac-

crued to it, together with interest at 7 per cent. from the dates when same was received and to restore plaintiff to its original position and status and to do all things in equity the court might determine to be meet and equitable to restore respondent to its original position, provided respondent pay to appellant the sum of \$244,135.99, together with interest at 7 per cent. per annum, said sum representing the total amount of payments made by appellant on account of said contract, together with the value of improvements made upon said property, after deducting therefrom the proceeds, income, revenues, and every other receipt or money accruing to appellant from said possession and farming operations upon said property.

The prayer of the cross-complaint was that it be decreed, determined and adjudged that there had been a total failure of consideration in connection with said agreement; that the same had become impossible of performance by the parties; that said agreement be declared of no force and effect in law or equity; and that the purposes and objects thereof had become and were unlawful and that said agreement was for that reason void; and that said court determine the respective rights of the parties thereto after a full accounting and that equity in the premises be done; that plaintiff have and be restored to possession of said real property upon payment to defendant of the sum of \$244,135.99, or such other sum, of greater or lesser amount, based upon a full accounting between the parties.

Plaintiff filed an answer denying the allegations of the cross-complaint, claiming, among other things, that it was without any knowledge or information whatsoever relative to the alleged participation of ineligible aliens in the transaction and their ownership of stock of defendant; that it was innocent of any intention to violate the provisions of the Alien Land Law; that defendant was an insolvent corporation, without funds or assets other than its pretended interest in said real property, and praying that the prayer of its complaint be granted.

From the findings and admissions of the pleadings, the following pertinent facts appear: (1) That the majority of the stock of defendant corporation has at all times herein been beneficially owned by Chinese aliens, hence by persons ineligible to citizenship in the United States (numerically the stockholders being about 1000, with 95 per cent. aliens, all Chinese); (2) that on December 9, 1920, when said Alien Land Law came into effect, there had been paid to plaintiff on account of said contract the sum of \$297,557.21; (3) that up to and including January 1, 1922, there was no dereliction whatever on the part of defendant in making the payments called for by said contracts of sale and purchase; (4) that between January 1, 1922, and the time of commencement of this action, there had accrued upon said contract, and was then

due and owing as a balance, the sum of \$236,186.11; (5) that defendant went into possession of said property on January 1, 1920, and remained in possession thereof until the rendition of judgment herein on May 29, 1926; (6) that said property, and the whole thereof, is agricultural land and was during all times herein cultivated by said defendant and its lessees and sublessees as agricultural land; (7) that when said Alien Land Law of 1920 went into effect no particular attention was paid thereto by either party, but defendant, acting in apparent good faith in all other respects, proceeded until January 1, 1922, to carry out literally the terms of said contract, and apparently used its best efforts to continue to comply with said contract, but partially failed, as above noted; (8) that plaintiff in this action likewise gave no heed to the enactment of said statute, the court finding that it had no actual knowledge of the exact alien ownership of said stock, but the court also found that defendant corporation was organized for the purpose of taking over said contract and that it was known to plaintiff that ineligible aliens would be the owners, to some extent at least, of said stock and that 80 per cent. of the first payment on said contract was made by persons who were ineligible aliens and that during the whole period between the date of said contract and the commencement of this action, aliens, ineligible to citizenship, were owners and holders of at least part of the stock of said corporation.

The question for solution is the effect of said section 10 of the Alien Land Act of December 9, 1920, upon the contract here involved. The validity of this section of the act has been upheld. In *re Akado*, 188 Cal. 739, 207 P. 245. Criminal prosecutions have been carried on under it. *People v. Cockrill*, 62 Cal. App. 22, 216 P. 78; In *re Okahara*, 191 Cal. 353, 216 P. 614. Prosecution of the seller and buyer under a general conspiracy statute occurred in Washington. *State v. McGonigle*, 144 Wash. 252, 258 P. 16.

[1-3] The acts of the parties intentionally done with knowledge of the alienage of defendant and in concert to carry out the provisions of this contract were after December 9, 1920, a clear violation of this statute, so clear that it occurs to us that extended discussion is unnecessary. It is true the statute does not punish criminally the substantive act of making or receiving the transfer of title, but it is an accepted holding that an act may be lawful if done by one person and unlawful if done or attempted by a concert of action on the part of two or more persons. In *re Akado*, *supra*; and, also, 5 R. C. L. § 9, p. 1070. It is also true that the successful fruition of a conspiracy is no bar to a prosecution for the conspiracy itself. The completion of this contract would form conclusive proof of a conspiracy under the act if plaintiff possessed knowledge of the extent of the

ownership of defendant's stock by ineligible aliens.

[4] We then come to the application of the well-known doctrine that, "Where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it." *Berka v. Woodward*, 125 Cal. 119, 127, 57 P. 777, 780 (45 L. R. A. 420, 73 Am. St. Rep. 31); *Smith v. Bach*, 183 Cal. 259, 262, 191 P. 14; *Wallace v. Zinman*, 200 Cal. 585, 588, 254 P. 946.

[5] But counsel for respondent contend that this rule is here inapplicable, stating their views as follows:

"Even if it were true that a criminal conspiracy was consummated by conveying title to an alien, yet under the 1920 law the alien would get a defeasible title and the defect of the title still could not be raised between the parties."

This contention really forms the foundation upon which respondent rests its claims. In other words, it declares the existence of an exception to the general rule and cites in support of this contention such cases as *Suwa v. Johnson*, 54 Cal. App. 119, 203 P. 414; *In re Akado*, supra; *In re Okahara*, supra; *Mott v. Cline*, 200 Cal. 434, 253 P. 718.

In the first-mentioned cause the lessor attempted to avoid his lease to a Japanese alien under the provisions of the Alien Land Act of 1913 (St. 1913, p. 206), declaring agricultural lands thereafter acquired by aliens ineligible to citizenship subject to escheat at the hands of the state. The court, following some of our own decisions and a score or more from other jurisdictions, said:

"The question presented is not new and the act of 1913 discloses no intention on the part of the Legislature to provide any new rule for its determination. It has uniformly been held under statutes forbidding ownership of land by aliens that, an alien grantee takes a defeasible estate, 'free from attack by any one except the government' in a direct proceeding." *Suwa v. Johnson*, supra, at page 121 (203 P. 414).

It is true that some of the provisions of the 1913 act are carried into the 1920 act, but section 10, above quoted, is entirely new and is sui generis. It provides an additional deterrent, one which may reach the owner of the soil about to be conveyed to the alien. It is true that in *Re Akado*, supra, some unfortunate expressions are found, parenthetically intimating that this action might not change the rule announced in *Suwa v. Johnson*, supra, in the respect before us, but there is much other language therein found indicating that the Legislature was applying a drastic policy "to prevent any attempts to create relations between such aliens and other persons whereby the title to land would be taken by any other person and the use thereof would be enjoyed by the alien." *In re Y. Akado*, supra, pp. 742, 743 (207 P. 246). "Furthermore, it is to the interest of the state that

all persons owning land should be effectively deterred from attempting to evade or frustrate the provisions of the act forbidding the acquisition of such land by such alien, by means of colorable conveyances and unrecorded trusts." *In re Y. Akado*, supra, p. 742 (207 P. 246).

In *Re Okahara*, supra, it is said:

"The purpose of the Alien Land Law, as is well said in *O'Brien v. Webb* [(D. C.) 279 F. 117] supra, 'was apparently to prevent ownership and legal interest in farming lands from passing to aliens who never could become citizens.'"

And in *Mott v. Cline*, supra, at page 445 (253 P. 724) it is said:

"This question depends largely upon the legislative intent and upon whether or not the objects sought to be attained are within the police power of the state. There is no direct language upon this point, but there is general language which necessarily implies an intention to prevent an executory contract from ripening into a fee simple. * * * It is appellant's view that the option provision has been rendered void by section 10 of the act of 1920, which makes it a crime punishable as a misdemeanor or felony to conspire to effect a transfer of real property or an interest therein in violation of the law. This is the only act that is made a public offense and penalized by imprisonment or fine or by both (*In re Akado*, 188 Cal. 739 [207 P. 245]). The exaction imposed for all other violations of the act inhibiting transfers is that the conveyance is rendered void as to the state and the real property escheats to the state upon action brought by the Attorney General or district attorney of the county in which the violation occurs. *People v. Cockrill*, 268 U. S. 258 [45 S. Ct. 490, 69 L. Ed. 944]. Our statute follows the common law as to the escheat proceedings. It cannot be said that *Ah Chue* violated any provision of the conspiracy section."

These authorities not only do not offer comfort to respondent's position, but clearly point to the opposite conclusion. We see no room for the contention that this provision is not effective to invalidate any contract made knowingly in defiance of its terms. The object of the law was to strengthen the act of 1913 and to make effective the inhibition against allowing our agricultural lands to get either directly or indirectly into the hands of aliens ineligible to citizenship. This view is confirmed by the act of 1923 (Stats. 1923, supra), which, as above noted, extends the provision to cover conspiracies to violate any of the provisions of the act. The executory provisions of the contract before us, if knowingly acted upon, are within the condemnation of this section. The police power is used in its "highest and truest sense" in confining the ownership of the soil to persons who are and from whom may be made citizens of the republic (*Mott v. Cline*, supra, and other cases there cited). We therefore interpret said section of the act as an innovation upon the common law and effective to

destroy and render illegal the consideration underlying the executory provisions of the contract before us.

If respondent knowingly acted with appellant in any effort to effect a transfer of the lands here involved it would be committing an offense. Appellant, which is little less than an aggregation of ineligible, and the stockholders and agents thereof, would after December 9, 1920, certainly be conspiring to violate said section if it pursued its efforts to obtain title to the lands, and this is true whether the seller was or was not cognizant of the extent of the alienage in the corporate ownership.

[6] Appellant invokes the rule announced in *Montgomery v. Meyerstein*, 186 Cal. 459, 199 P. 800 and 195 Cal. 37, 231 P. 730, to the effect that if a contract fails for any reason not due to the default of the vendee he may recover from the vendor in an accounting the amount paid on the purchase price less proper credits and set-offs. And under this head it demands an accounting in equity as of December 9, 1920, and a lien on the property for the amount found due it. This, we hold, it is entitled to have. It has already appeared that it was in possession of the lands from January 1, 1920, to the date of the judgment, May 29, 1926. It also appears that subsequent to the effective date of said act it has paid large sums of money to respondent amounting to some \$151,649.63. While appellant is certainly entitled to no affirmative advantage growing out of anything occurring subsequent to December 9, 1920, and while it was proceeding in violation of the statute, still we see no reason resting in law or equity to deny it the rights accruing to any other person or corporation up to said date. And this embraces the right to employ any remedies the law affords to eligible persons to secure those rights. Under the universal doctrine announced in *Suwa v. Johnson*, supra, and *Mott v. Cline*, supra, and elsewhere, the contract when made was not void but valid and binding as against everyone other than the sovereign state, which condition obtained until December 9, 1920. Appellant could have legally assigned, prior to said date, its rights under said contract to an eligible person. *Mott v. Cline*, supra. The provisions of section 7 of said Alien Land Act are in part as follows:

"* * * The provisions of this section and of sections two and three of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon or interest in such property so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure

a debt." Deering's Gen. Laws 1923, p. 1, Act 261, § 7, p. 82.

[7, 8] Under this section the act itself allows appellant to secure to itself the proceeds of an accounting in equity as to all lawful matters pertaining to said transaction, including the assertion of a lien upon the property for the amount found due, and this carries the right to continue in possession of the property until same is satisfied. But respondent not only denies consolation to appellant from the provision of the act last above quoted but advances a construction thereof which will allow such contracts as we have before us to ripen into full title without penalties, civil or criminal, of said statute. The contention is that in equity the vendee under a contract of purchase is the owner of the property; hence the exemption of "the interest in such real property" is effective to allow the completion of title. We can give this contention no weight.

The equitable doctrine above referred to is sometimes applied, but only to the payments made on the purchase price; the full equitable title matures only upon the full payment of such price. *Montgomery v. Meyerstein*, supra. This doctrine would not allow the completion of the contracts before us, as about one-third only of the purchase price had been paid on the effective date of the act. Moreover, this equitable doctrine has often been held inapplicable in the construction of statutes conferring or withholding rights in real property. *Belieu v. Powers*, 54 Cal. App. 244, 201 P. 620; *Allen v. Wilson*, 178 Cal. 674, 174 P. 661. But the whole contention of respondent is based upon a misconstruction of the language of this proviso. For we construe the meaning to be as though it read as follows: An exemption for "real property acquired in satisfaction of any lien upon such property or upon any interest therein." This construction would allow the foreclosure of mortgages and other liens held by the alien, and in so doing would concede to him the right to acquire the property if necessary with the restriction that he must dispose of same within two years after so acquiring it. Still again this question is settled contrary to respondent's contention by the holding in *Mott v. Cline*, supra, where it is stated that there is general language which necessarily implies an intention to prevent an "executory contract from ripening into a fee simple." It is also stated "It was the purpose of the act to cut off instantaneously the right to thereafter acquire the fee." It is true that the executory contract there under consideration was a lease with an option to purchase. Nevertheless, it was an executory contract based upon a valuable consideration and every reason for applying the doctrine to that contract exists with respect to the contract before us.

It may be that respondent is not in pari delicto with appellant as to matters occurring subsequent to December 9, 1920. If this indeed be true, an accounting as to such mat-

ters may be had to ascertain if the value of the use and occupation of this property by appellant is greater than the payments and benefits received from it and, if so, respondent would be entitled to have such excess credited on its obligation to appellant arising out of payments made and other legal benefits received from it that are properly referable to said contract and antedate December 9, 1920.

[9] The question of rescission and the rules governing this subject are not, strictly speaking, involved here, as the rights of the parties are not determined by these rules. Civil Code, § 3050, governs the situation and provides as follows:

"One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration." *Montgomery v. Meyerstein*, supra.

Although not entitled to the lien, the vendee may, even when in default, have judgment for the purchase money paid if the consideration for the contract has, without his fault, failed. *Merrill v. Merrill*, 103 Cal. 287, 35 P. 768, 37 P. 392; *Wilson v. Smith*, 69 Cal. App. 211, 213, 230 P. 963; *Haile v. Smith*, 113 Cal. 656, 664, 45 P. 872.

It is likewise unnecessary to extend this discussion by a consideration of the claim that appellant has estopped itself to resist a forfeiture under the contract by its subsequent conduct. The rule we have invoked is one of public policy which is not controlled by the subsequent conduct of the parties. To give ear to this plea would be to admit life in a contract during the period we have declared it to be illegal for it to operate.

The judgment is reversed with directions to the court below to proceed in said cause in a manner not inconsistent with the holding herein made.

On Petition for Rehearing.

WASTE, C. J. Appellant has filed a petition for a rehearing, in which it renews the contention, heretofore made, that: "Construed as contended for by the defendant, section 10 of the Alien Land Law 1920 (St. 1921, p. lxxxiii) would violate article 1, § 10, and article 14 of the Amendments to the Constitution of the United States." This contention has had due consideration and the petition for a rehearing is denied.

CALIFORNIA DELTA FARMS, Inc. (a Corporation), Plaintiff and Cross-Defendant, Respondent, v. CHINESE AMERICAN FARMS, Inc. (a Corporation), Defendant and Cross-Complainant, Appellant. (Sac. 3987.)

Supreme Court of California. May 29, 1929.

In Bank.

Appeal by defendant from a judgment of the Superior Court of San Joaquin County; George F. Buck, Judge, in an action for forfeiture of contract for purchase of real property. Reversed.

Adopting opinion in 268 P. 1055. See, also, 255 P. 1097.

A. B. Bianchi, Manson & Allan, Albert H. Elliot, and Bianchi & Hyman, all of San Francisco, for appellant.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for respondent.

PER CURIAM. In this cause a rehearing was granted and argument and additional briefs from both sides followed. After careful reconsideration of the issues, we are satisfied with the opinion of the court in bank, written by Mr. Justice PRESTON, and hereby readopt the same as the opinion of this court herein as follows, to wit:

"Appellant correctly states the question presented on this appeal as follows: 'This is an appeal taken from an order denying the motion of appellant to set aside and vacate the judgment, and for the entry of another and different judgment on the findings made, upon the ground that the conclusions of law were incorrect, erroneous and not consistent with or supported by the findings of fact.'

"The appeal is ruled by the case of *California Delta Farms, Inc., v. Chinese American Farms, Inc.* (Sac. No. 4148) 278 P. 227, this day decided, to which reference is hereby made. This is true because the facts upon which the determination in that case was made appear from the findings of fact. This motion, being based upon the same findings, the conclusion reached must of necessity be the same. It is unnecessary to order or give another judgment as the reversal in the main cause will necessitate a consideration by the court below of some issues made by the answer and cross-complaint which could not be fully disposed of under the findings of fact as made."

The order is reversed.

207 Cal. 347

**DOOL et al. v. FIRST NAT. BANK OF CAL-
EXICO et al. (L. A. 10889).★**

Supreme Court of California. June 6, 1929.

Rehearing Denied July 3, 1929.

1. Equity ☞66—Court held empowered to require reimbursement for advances under void trust deed after incompetent mortgagor regained reason as condition of quieting title (Civ. Code, § 38).

Where decedent was mentally incompetent within Civ. Code, § 38, when he executed deed of trust and delivered it to bank, but bank, at decedent's request, after recovery of his reason, and at request of decedent's executors after his death, advanced moneys in good faith in reliance on validity of trust deed, trial court had power to require executors to reimburse bank for money so advanced as condition to quieting executors' title to realty covered by trust deed, in application of maxim that "he who seeks equity must do equity."

2. Equity ☞66—Plaintiff's moral obligation to pay, notwithstanding legal insufficiency of defendant's remedy, underlies rule that one seeking equity must do equity.

The controlling principle underlying the equitable maxim that "he who seeks equity must do equity" is the moral obligation of plaintiff to pay, notwithstanding the legal insufficiency of defendant's remedy.

3. Equity ☞66—That defendant's claim is barred by lapse of time does not render it unavailable in enforcing rule that one seeking equity must do equity.

That defendant's claim against plaintiff is barred by lapse of time does not render such claim unavailable to defendant in seeking to apply maxim that "he who seeks equity must do equity."

4. Pleading ☞409(4)—No pleading of maxim that one seeking equity must do equity is required, where plaintiff's pleading or proof discloses plaintiff's inequitable position.

No pleading setting up maxim that "he who seeks equity must do equity" is required on part of defendant seeking reimbursement, where plaintiff's pleading or proof discloses plaintiff's inequitable position.

5. Insane persons ☞67—Court had power to provide for sale of property to satisfy requirement of reimbursement of defendant made as condition of canceling trust deed.

Where trial court determined that defendant bank was entitled to reimbursement for advances made by it in reliance on validity of deed of trust as condition to canceling trust deed which it found void because executed by incompetent person, it had power to provide for sale of property covered by trust deed to satisfy requirement of reimbursement, if such requirement was not complied with within a reasonable time.

In Bank.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by Donald Dool and another, as executors of the last will and testament of Edward Dool, deceased, against the First National Bank of Calexico and others. From an adverse judgment, plaintiffs appeal. Affirmed.

C. Sherman Anderson, Frank L. Muhleman, and Muhleman, Anderson & Palmer, all of Los Angeles, for appellants.

Ault & MacKinnon, of Calexico, and Clyde R. Burr, of Los Angeles, for respondents.

PER CURIAM. This is an appeal by the plaintiffs on the judgment roll alone from a conditional judgment in an action to set aside certain promissory notes and a trust deed and to quiet the title of the plaintiffs as executors of the will of Edward Dool, deceased, in and to certain real property in the county of Imperial, of the alleged approximate value of \$278,500.

It was alleged in the complaint, in the first cause of action, that Edward Dool, on March 4, 1925, and for a long time prior thereto, was the owner of said real property; that on said date he was indebted to the defendant bank in sums not exceeding \$25,000 and was reputed to be indebted to one H. H. Peterson in the sum of \$2,012.58, and to one Mauldin & Co. in the sum of \$7,620.55; that on said 4th day of March, 1925, said Edward Dool suffered a stroke of paralysis, seriously affecting his mind and body; that on the 27th day of March, 1925, the defendant bank procured the signature of said Edward Dool to a certain purported deed of trust and to four certain purported promissory notes, to wit, two notes for \$28,561.34 and \$4,000, respectively, payable to the defendant bank, one note for \$2,012.58, payable to said H. H. Peterson, and one note for \$7,620.55, payable to Mauldin & Co., which trust deed included and embraced, among other properties, the real property described in paragraph III of the complaint; that from the date of said stroke of paralysis, to and including the 27th day of March, 1925, and for a long time thereafter, said Edward Dool was not able to understand or comprehend the nature, extent, effect, or purpose of the instruments signed by him on March 27th, being entirely without understanding by reason of such illness, and that said trust deed and notes were and are void; that, pursuant to the power granted by the purported trust deed, the defendant bank had declared the whole amount evidenced by said notes to be due and payable for breach of the obligations contained in the trust deed; and that the trustees thereunder had published notice that said real property would be sold on February 17, 1928, pursuant to the terms of the trust deed.

In the second cause of action it was further alleged that the defendant bank, in addition to the amounts specified in said promis-

sory notes, claims certain amounts by way of advancements made on the strength of said purported trust deed for interest, taxes, etc., in the sum of \$32,462.25, which amounts actually owing are uncertain and unliquidated, and that, for the purpose of ascertaining the amounts actually owing from the estate of Edward Dool to the defendant bank, it is necessary that an accounting be had between the estate and the defendant bank. A third cause of action alleged that the purported trust deed was void for uncertainty in the designation of the beneficiaries thereunder. A fourth count was a cause of action in the ordinary form to quiet title. The plaintiffs prayed that said notes and trust deed be declared void, that the defendants be required to set forth the nature of their several claims, and that the title of the plaintiffs in and to said property be quieted, and that, if said purported notes and trust deed be found by the court to be valid, an order be made requiring an accounting to determine the exact amount due and for a temporary injunction pending the trial of the action.

A demurrer to the third cause of action was sustained. The plaintiffs declined to amend that cause of action, and the defendants answered the remaining three counts. The question of the mental capacity of the decedent was submitted to a jury, which returned a verdict on April 4, 1928, finding that, at the time Edward Dool signed said notes and trust deed, he was incapable of understanding the nature, purpose, or effect of said instruments. Following the verdict, the parties stipulated, subject to the objection of the plaintiffs, that the same was incompetent, irrelevant, and immaterial in the light of the verdict, that the amounts laid out, expended, and advanced by the defendant bank by way of taxes, assessments, and interest on prior incumbrances, chargeable against certain of said real property, between June 8, 1925, and January 3, 1928, less credits, totaled the sum of \$34,427.14. The action was commenced on February 15, 1928.

The court made its findings, wherein it adopted the verdict of the jury, and found that, at the time the alleged notes and trust deed were signed, the decedent was entirely unable, by reason of his illness, to comprehend the nature, purport, or effect of those instruments, and concluded that the same were and are of no effect. The court further found, with certain exceptions not necessary to be noted, that the title to the real property described in the trust deed was in Edward Dool on March 4, 1925, and the possession thereof in the plaintiffs, as executors, subject to the will of the decedent; that shortly after the execution of said notes and trust deed said Edward Dool became so improved in his health that from the 28th day of April, 1925, to the date of his death, he was able to transact and carry on and understand the ordinary

duties and incidents of his business; that between the dates last aforesaid he allowed and induced the defendant bank, and since that time and until the commencement of this action the plaintiffs, as executors of the will of the decedent, allowed and induced the defendant bank, to lay out and expend from time to time certain sums of money, the amounts of which, and the purposes for which, the same were expended are set forth at length in the findings, showing the same to have been expended for taxes, assessments, interest on prior incumbrances, etc., chargeable against the property in question and in the sum of \$34,427.14; that each of the items aggregating said sum was laid out and expended by the defendant bank in good faith and in reliance upon the validity of said trust deed, and with the inducement and knowledge of Edward Dool during his lifetime and of plaintiff executors after his death, and that each item and the whole thereof so expended benefited the property described in paragraph III of the complaint, and has redounded to the benefit of the plaintiffs in this action.

As conclusions of law, the court decided that the defendant bank was entitled to be reimbursed for the advances made by it in the payment of taxes and in the protection of said property against prior liens to the extent of \$34,427.14, with interest at the legal rate from the date of each payment, prior to the taking effect of any relief or judgment granted to the plaintiffs; that upon such reimbursement the plaintiffs would be entitled to a judgment that said notes and trust deed are void and of no effect, and, further, that upon such reimbursement the plaintiffs would be entitled to judgment quieting their title as against all claims of the defendants or any of them. The court further decided that, if the plaintiffs failed to make such reimbursement within a reasonable time, the defendant might apply to the court for the ascertainment of the amount due at the time of such application, and obtain an order directing that all of the property described in paragraph III of the complaint be sold at public auction by the county sheriff to satisfy the amounts found to be due the defendant bank, such sale to be made in the manner and form and with all of the incidents of a sale of real property under execution, as provided in part 2, title 9, c. 1, of the Code of Civil Procedure.

On the foregoing findings and conclusions of law, the court entered judgment in accordance therewith. The defendants have separately appealed from the judgment, in so far as it declares said notes and trust deed to be null and void, but the record on that appeal has not been perfected, and we are therefore not now called upon to consider the merits of that appeal.

[1] In support of the plaintiffs' appeal herein, it is first contended that it was beyond the power of the court to require reimburse-

ment of moneys paid out by the defendant bank, for the reason that said notes and trust deed were found to be void because the person who signed the same was entirely without understanding, as contemplated by section 38 of the Civil Code. See *Ripperdan v. Weldy*, 149 Cal. 667, 673, 87 P. 276; *Jacks v. Estee*, 139 Cal. 507, 73 P. 247. The defendants rely on the well-known maxim of equity that "he who seeks equity must do equity." Counsel for neither side have cited any precedent directly in point as applied to the unusual facts of this case. Reliance is placed by defendants' counsel upon numerous cases declaring the general equitable principle which underlies the requirement of reimbursement, and by analogy argue their applicability to the case at bar. For example, the case of *Booth v. Hoskins*, 75 Cal. 271, 17 P. 225, and the many subsequent cases to the same effect, are cited wherein it has become the settled law of this state that, in an action by a mortgagor to quiet his title against an outlawed mortgage, the court may require as a condition to the relief sought that the plaintiff first pay the amount of the mortgage debt. Our attention is also directed to the line of cases commencing with *Weber v. San Francisco*, 1 Cal. 455, and cases of similar import such as *Couts v. Cornell*, 147 Cal. 560, 82 P. 194, 109 Am. St. Rep. 168, and *Holland v. Hotchkiss*, 162 Cal. 366, 123 P. 258, L. R. A. 1915C, 492, holding that, where a property owner seeks to quiet his title against the purchaser of a tax deed, the equitable relief will not be granted, except upon condition that the property owner reimburse the purchaser in the amounts expended by the latter in pursuit of the title. The defendants also fortify their position by reference to 1 Pomeroy's *Equity Jurisprudence* (4th Ed.) §§ 385 and 388, where the maxim that "he who seeks equity must do equity" is discussed, and to the text of *California Jurisprudence* (vol. 10, pp. 508-511), where the same subject is elaborated upon with supporting authorities in this state. It is there stated: "One of the most familiar maxims of equity, which, however, has not been declared by the Civil Code, is that he who seeks equity must do equity. This maxim means 'that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adverse party, and growing out of or necessarily involved in the subject matter of the controversy.' The rule that he who seeks equity must do equity is applied because of the broad principle that equity is peculiarly a form of conscience, and it will not give relief which will enable a party to escape payment of all of a sum of money where it can perceive that in justice

he should pay a part, unless he is ready to pay, and accompanies his demand with an offer to pay, the part which is just. The particular kind of equitable relief applied for is immaterial. Under this principle no one will be permitted to hold that which he has secured from another under a contract whose force he is seeking to destroy while it is still executory, unless he can show that there are equitable circumstances in the case justifying him in doing so."

[2] The controlling principle underlying the well-established rule is the moral obligation of the plaintiff to pay, notwithstanding the legal insufficiency of the defendant's remedy. As applied to the present appeal, it appears that the defendant bank, at the request of the decedent after the recovery of his reason, and at the request of the plaintiffs after his death, advanced certain moneys in good faith and in full reliance upon the validity of the trust deed and the provision therein securing the repayment of advances for the benefit of the property described therein. It cannot be questioned that upon such payment a moral obligation arose to repay the same. So far as the decedent was concerned, a legal obligation also arose to repay the moneys so advanced at his request and for his benefit, and *assumpsit* would undoubtedly have been an appropriate remedy if invoked during his lifetime. It must be remembered that we are now considering the obligations flowing from transactions between the defendant bank and a person restored to reason and fully capable of incurring the obligations. We are not now concerned with the fate of the notes embraced within the trust deed nor with the validity of the trust deed itself as affecting the title to the real property in question. But we are bound to consider that, at the time the defendant bank was dealing with Edward Dool in his right mind with reference to advances for the benefit of the property, the trust deed was an executed writing, duly recorded, unimpeached and valid on its face, of which the decedent, while sane, must be presumed to have had notice, and with reference to which both parties acted. Clearly, Edward Dool, in his lifetime, could not have quieted his title against the bank which had enriched his property at his request without subjecting himself to the requirement of reimbursement. This would be so even assuming that in his lifetime he might have obtained a judgment setting aside the notes and trust deed on the ground of want of mental capacity to execute them. In that event, equity would be concerned with protecting him against his void act and deed, but a court of equity would have been feeble indeed if it could not have prevented him from employing this instrument as a means to induce the payment of money by the bank for his benefit with no obligation of reimbursement.

[3, 4] And we think the plaintiff executors

are in no better position. It is true they act in a representative capacity as trustees for the beneficiaries under the will. *Thompson v. Wood*, 115 Cal. 301, 47 P. 50; 11 Cal. Jur., p. 212. The devisees in the present case are the successors in interest of the testator, and are not in the position of purchasers within the doctrine of *Faxon v. All Persons*, 166 Cal. 707, 137 P. 919, L. R. A. 1916B, 1209. We deem it to have been entirely within the province of the trial court to consider it unconscionable to permit the plaintiffs to have their title quieted without the reimbursement of the advances made by the defendant bank at the request of the plaintiffs and their testator and for the benefit of the property the title to which is sought to be quieted. The plaintiffs insist that the defendant bank should have filed a claim against the estate. It may be assumed that the bank successfully could have pressed a timely claim against the estate. By the lapse of time such remedy has been barred, but the obligation has not been extinguished. It is the affirmative action of the plaintiffs in seeking the equitable relief, and not the legal infirmity of the defendant's remedy, that is the determinative factor. No pleading to that effect on the part of the defendant seeking reimbursement is required where the pleading on behalf of the plaintiff or the proof discloses the inequitable position of the plaintiffs. A court of equity may, and frequently does, refuse to entertain a party's application for relief where the facts disclose that the party seeking the relief must do, or offer to do, equity before the court in good conscience may grant him the relief sought. Likewise, if the facts proved disclose that a court should not grant the equitable relief sought without requiring that the party seeking the relief do equity, it is of no material consequence that the other party has misconceived his rights or omitted to add a prayer for relief on his own behalf.

[5] The plaintiffs further contend that the court was without power to provide for a sale of the property to satisfy the requirement of reimbursement in the event that the same be not complied with within a reasonable time. We find no merit in the contention. This order was but a means employed to carry the court's order for reimbursement into effect. It was more favorable to the plaintiffs than the usual conditional order that, if the reimbursement be not made within the specified time, judgment will be entered for the party entitled to the reimbursement.

It is also contended that the court committed prejudicial error in sustaining the demurrer to the third cause of action. The deed of trust specified the "First National Bank of Calexico, et al." as the "beneficiary." The body of the instrument plainly discloses the beneficiaries referred to as "et al." to wit, H.

H. Peterson and Mauldin & Co. The beneficiaries were thus made certain, and we find no fatal defect in the trust deed in this regard.

The judgment is affirmed.

207 Cal. 314

WATTSON v. ELDRIDGE et al., Board of Public Works. (L. A. 11272.)

Supreme Court of California. May 31, 1929.

1. Dedication ⚡46, 64—Land dedicated to specific purpose must not be diverted to any other purpose, but dedication must be construed with reference to primary object.

Land which has been dedicated to definite and specific purpose must be used in conformity with terms of dedication, and not diverted to any other purpose or use, but dedication must be understood and construed with reference to its primary object.

2. Dedication ⚡58—Dedicator is presumed to have intended use according to usages known at time and those justified by change of conditions.

Dedicator is presumed to have intended property to be used in such way by public as will be most convenient and comfortable and according to not only proprieties and usages known at time of dedication, but also to those justified by lapse of time and change of conditions.

3. Dedication ⚡58—Municipality held authorized to improve canal areas as surface streets, where canals were intended primarily as highways.

Municipality held authorized to improve canal areas as surface streets as against contention that land dedicated to specific purpose cannot be devoted to any other use, where canals were intended to serve primarily as highways, but were used as well for recreational purposes.

4. Constitutional law ⚡93(1)—Lot owners had no special vested interest in canals under which they could prevent improvement of canal areas as surface streets.

Where city's legislative body declared that public convenience and necessity required that canals be abandoned and transformed into surface streets, owners of lots held not to have special vested interest in canals under which they could prevent proposed improvement or of which they could be divested only by eminent domain proceedings.

5. Navigable waters ⚡35—That storm drain was to be constructed on tidelands was not fatal to legality of proceedings for improvement of canal areas as surface streets.

That storm drain was to be constructed on tidelands held not fatal to legality of proceedings for improvement of canal areas as surface streets, since municipalities have right to extend necessary public improvements on to tide lands lying within their corporate boundaries,

especially where United States government gave consent to construction of proposed storm drain.

In Bank.

Application by R. A. Wattson for a writ of mandate prayed to be directed to Arthur Eldridge and others, as members of and constituting the Board of Public Works of the City of Los Angeles, to compel them to execute a certain contract for street improvements. Writ granted.

Superseding opinion, 272 P. 1095.

Arthur M. Ellis, of Los Angeles, for petitioner.

Hewitt, McCormick & Crump, of Los Angeles, for respondents.

Jess E. Stephens, City Atty., and Herman Mohr, and William H. Neal, Deputy City Attys., and E. R. Young, all of Los Angeles, amici curiæ.

PER CURIAM. This proceeding had its inception in the District Court of Appeal, Second Appellate District, Division 2, wherein petitioner sought the issuance of a writ of mandate to compel the respondents, as members of and constituting the board of public works of the city of Los Angeles, to execute a contract, duly awarded to petitioner under public bid, for the filling in and improving as surface streets certain areas or parcels of land theretofore used and employed as canals or artificial waterways. A prior proceeding instituted by the city of Venice was involved in *Schultz v. City of Venice*, 200 Cal. 50, 251 P. 913, but, because of the technical defects in the record on appeal in that case, the determination therein announced will not be deemed binding in the present proceeding. Before the return date of the alternative writ issued by the District Court of Appeal herein, the parties stipulated as to certain facts material to the issues now presented, and agreed upon the appointment, thereafter duly ordered, of a commissioner who was to receive evidence and report to the court his findings upon certain other material matters as to which the parties were unable to reach an understanding. In due time Mr. James H. Howard was appointed as such commissioner. Following a rather extended hearing, the commissioner made and filed with the District Court of Appeal his findings of fact and report, wherein he concluded, in substance, that the respondent board of public works was mistaken in its belief that the city of Los Angeles could not rightfully and properly fill in and improve as public streets all those certain strips or parcels of land designated in the ordinance of intention and theretofore used as canals. The commissioner's conclusion as to the propriety of the proposed improvement was based on his finding "that said canals have been continuously used by the public as public waterways for all purposes of public ways for more than twenty years prior to the passage of the ordinance of in-

tention * * * namely since about the year 1905, and the same constitute and are public streets in the city of Los Angeles." Having reached a conclusion opposed to that of the commissioner, the District Court of Appeal declined to make the writ peremptory. A brief reference to the unique historical background of the lands with which we are herein dealing will materially assist in the solution of the principal question presented which has to do with the propriety of a proceeding instituted under the Street Improvement Act of 1911 (St. 1911, p. 730), and looking to the filling in and improving as surface streets certain areas theretofore used for canal purposes.

In the year 1905 the Abbot Kinney Company, a corporation, conceived the idea of creating a city to be known as "Venice of America," having a system of waterways and canals resembling those of the Old World city. It thereupon set about reclaiming a tract of marshland lying along the coast line in the county of Los Angeles. The lands so reclaimed were subdivided and laid out in lots and blocks. Intercommunicating canals converging into an artificial lagoon and connected with the adjacent ocean ran through the tract. A map designating these lands as "Venice of America" tract was filed with the county recorded of the county of Los Angeles. There appeared on this map in the areas designated as canals the words "Not to be dedicated." The banks of the canals were cemented, and strips of land adjacent thereto were planted with trees and shrubs and otherwise ornamented. In due time, the lots into which the tract had been divided were sold largely to residential buyers, who thereafter built and occupied residences thereon. On May 11, 1909, the Abbot Kinney Company conveyed to the city of Venice for sidewalks and parkways certain strips of land, approximately twelve feet in width, along each side of the several canals. Thereafter, and on May 20, 1912, it transferred and conveyed to said city, with but one exception, all of those certain areas or "lots" theretofore designated and used as canals. This latter instrument provides that "the premises herein conveyed shall be used by said second party and its successors solely and only for permanent waterways, and canals, free to the public forever." Subsequently, and on March 10, 1925, the Abbott Kinney Company executed and delivered to the same grantee a deed purporting to convey "for public street purposes" the identical canal areas theretofore conveyed "solely and only for permanent waterways and canals." The respondents have urged throughout that this latter deed was and is ineffective for any purpose, for the reason that the Abbot Kinney Company had by its 1912 deed completely divested itself of any interest it might theretofore have had in said canal areas. This conclusion of the respondents would seem to be unimpeachable, for, as

declared in *Slavich v. Hamilton*, 201 Cal. 299, 306, 257 P. 60, 63, "if the dedication of the property * * * was complete in the first instance, the property thereby became public property, and the owners lost all control over it. If the dedication was complete by their acts, whether express or implied, it was thereafter irrevocable by them, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on their part. The property dedicated has become public property, impressed with the use for which it was dedicated." In our subsequent treatment of the subject we will therefore regard the dedication of these canal areas to the public use to have been complete and final as of the year 1912. At this point it should be stated that in the month of November, 1925, the city of Venice consolidated with the city of Los Angeles.

Among other things, the parties have stipulated "That at all times from the construction and opening of said canals in the Venice of America tract by the Abbot Kinney Company in the spring of 1905 until the conveyance of the same to the city of Venice in the month of May, 1912, the said company was in the possession of and exercised dominion over said canals, waterways and appurtenances, including bridges over the same, stairways, and landings, and over the walks and parkways along the sides, and banks thereof. That the side of said canals were lined with concrete walks or banks, as were also said bridges, said stairways and landings. That said Abbot Kinney Company at all times during said period maintained said canals, waterways and appurtenances at its own cost and expense, and employed persons who attended to the care, upkeep, superintendence and management of said canals, waterways and appurtenances.

"That during all of said time said canals, waterways and appurtenances were so kept and maintained open to the free use and enjoyment of the public generally and by the owners and occupants of lots and premises in said Venice of America tract and were so used and enjoyed openly and continuously and without interference or hindrance for boating, swimming, bathing and aquatic sports, amusement and recreation, and the said Abbot Kinney Company maintained and operated and the public used gondolas, canoes and other water craft in said canals and waterways for transportation along the same for the purpose of public pleasure and convenience and for the rental or use of which a charge was made.

"That upon the conveyance of said canals and waterways to the city of Venice, on or about the 20th day of May, 1912, the said city of Venice took possession thereof and the appurtenances pertaining thereto, and exercised dominion and control over the same in like manner as had theretofore been done by the said Abbot Kinney Company. That the

said city of Venice at all times until its consolidation with the city of Los Angeles in the month of November, 1925, operated and maintained said canals and waterways at public cost and expense and out of the public funds of said city, and employed persons to, and who did superintend the operation of said canals and waterways and attend to the upkeep and maintenance thereof and appurtenances thereto, including said parkways and walkways along the banks or margins thereof. That at all times from the conveyance of said canals and waterways to the said city of Venice, as aforesaid, to the consolidation of said city with the city of Los Angeles, said canals, waterways and appurtenances were open to the free use of and were used by the public generally and by the owners and occupants of premises in said Venice of America tract openly and without interruption or interference for boating, bathing and swimming, and for purposes of pleasure and recreation, and also for transportation of household goods and supplies. That said canals and waterways were also used for transportation of passengers for hire in launches, the operators of which paid licenses to the city of Venice."

[1-3] In support of their position that the municipality is without authority to "divert" these canal areas to surface streets, the respondents rely upon the universally accepted rule of law that land which has been dedicated to a definite and specific purpose must be used in conformity with the terms of the dedication, and not diverted to any other purpose or use. *Harter v. San Jose*, 141 Cal. 659, 75 P. 344; *Archer v. Salinas City*, 93 Cal. 43, 51, 28 P. 839, 16 L. R. A. 145. With this rule we have no quarrel. However a dedication must be understood and construed with reference to its primary object and purpose. *Godfrey v. City of Alton*, 12 Ill. 29, 52 Am. Dec. 476. In *Hall v. Fairchild-Gilmore-Wilton Co.*, 66 Cal. App. 615, 624, 227 P. 649, 653, it is declared that "nothing is improper which conduces to that object." The real question always is, therefore, whether the use in a particular case, and for a designated purpose, is consistent or inconsistent with such primary object. Whether or not a particular use amounts to a diversion from that for which the dedication was made depends on the circumstances of the dedication and the intention of the party making it. It has been held that such use is authorized as is fairly within the terms of the dedication and reasonably serves to fit the property for enjoyment by the public in the manner contemplated. *Spires v. Los Angeles*, 150 Cal. 64, 68, 87 P. 1026. In other words, the dedicator is presumed to have intended the property to be used in such way by the public as will be most convenient and comfortable and according to not only the proprieties and usages known at the time of the dedication, but also to those

justified by lapse of time and change of conditions.

While the several intercommunicating canals constructed in and through "Venice of America" were used as well for recreational purposes, they must of necessity, and because of the peculiar plan and construction of said city, be held to have been intended by the builder of that city to serve primarily as highways over which persons resident therein and the public generally might pass. In *Chicago, etc., R. Co. v. Minneapolis*, 232 U. S. 430, 442, 34 S. Ct. 400, 403 (58 L. Ed. 671), the court concludes that an artificial waterway or canal "is none the less a public highway, established to afford an appropriate place of public passage," and further along in its opinion quotes with approval the following: "The way sought to be established,' * * * 'a canal or waterway, with walks along each side' was 'clearly a public way, subject to the rules governing public ways.'" There cannot, therefore, be any question but that a canal is a highway of a peculiar kind. 9 Cor. Jur. 1125, § 1. The dedication of a highway to public use authorizes any ordinary use for highway purposes. With changing conditions of travel and use a city has the right to adapt and appropriate its highways from time to time to such uses as in its judgment would be most conducive to the public good, and the courts should be slow to interfere with the exercise of this discretion. *Jones v. City of Houston* (Tex. Civ. App.) 188 S. W. 688, 689.

In our opinion, it would be most unreasonable to conclude that the Abbot Kinney Company by its dedication of the canal areas "for permanent waterways and canals free to the public forever" intended thereby to indelibly and irrevocably impress upon these lands a trust solely for canal purposes. A liberal interpretation, and one more conducive to the public good, which the dedicator is presumed to have had in mind when making the dedication, warrants the conclusion that it was merely intended by the employment of the quoted language to secure to the public generally some manner or means of ingress and egress. When these canals were originally acquired by the city of Venice from the Abbot Kinney Company, it may not have been actually contemplated by any of the parties to the acquisition and grant that they would be used for surface highways or streets, yet it may properly be said to have been within the legal contemplation of all that they were to be used for all purposes by which the object of their creation—as public highways or thoroughfares—could be promoted. It cannot reasonably be supposed that the dedicator intended otherwise than that they should respond to whatever demands, new improvements, and increased facilities might make upon them, so only that such demands must always be consistent with their character and purpose as public highways. In our opinion, the filling in and improving of these canal areas

as surface thoroughfares constitutes but a new adaptation of their original dedication to the advancement of public convenience—a more suitable and more economical enjoyment of them by the public as highways. The contemplated improvements would rather increase than diminish their fitness and convenience as public highways. We conclude, therefore, that the improvement of the canal areas as surface streets is fairly within the scope of the powers which it was reasonably contemplated the municipal authorities might exercise from time to time during the years subsequent to the original dedication for public purposes.

[4] It is contended by the respondents that the owners of lots in the Venice of America tract have a special vested interest in the canals and waterways of which they can only be divested by proceedings in eminent domain. It is difficult to conclude what interest has been vested in these lot owners which might be subjected to monetary appraisal. These canals are artificial, and have been artificially filled with sea water. Their construction had nothing to do with a natural water course. There is a well-defined distinction between the rights of property owners abutting on an artificially constructed canal built to carry the waters of a natural water course and the rights of those abutting on an artificial canal constructed to carry an artificial supply of water. Whatever might be the rights of the former, it is well established that the latter do not, merely by reason of their location geographically, acquire the right to have the artificial canal maintained and the flow of water therein continued. See *Murchie v. Gates*, 78 Me. 300, 4 A. 698, 700; 1 *Wiel on Water Rights*, 56. If the lot owners possess the asserted right, it is a right to require the canals maintained and filled with water to such an extent as to render them of some beneficial use as waterways. The asserted right would necessarily imply an obligation on the part of some agency, public or private, to continue perpetually such maintenance and supply. Such a right would ordinarily be founded in contract, express or implied. Here we find none. The Abbot Kinney Company did not contract to do so when it laid out the tract and sold the lots. Nor do we find such a contractual obligation on the part of the city as to such lot owners. Finally, the legislative body of the city has declared that the public convenience and necessity require that the canals be abandoned and, as highways, be transformed into streets for the uses with which public highways are ordinarily improved, and we conclude that the abutting property owners have not such rights as may be successfully interposed to prevent the proposed improvement.

[5] Nor do we find any particular merit in the contention touching asserted irregularities in the proceedings looking to the performance of the proposed work. In accord-

ance with the requirements of the statute (Stats. 1923, p. 106), the ordinance of intention states in general terms the character of the work and the location of the proposed improvement, and refers to the plans and specifications for a more detailed description thereof. That a storm drain is to be constructed on tidelands is not, in our opinion, fatal to the legality of the proceedings, for the authorities recognize the right of municipalities to extend necessary public improvements on to tidelands lying within their corporate boundaries. Since the institution of this proceeding, the United States government has given its consent to the construction of the proposed storm drain.

Let a peremptory writ of mandate issue as prayed.

99 Cal. App. 121

RITTER v. SUPERIOR COURT IN AND FOR COUNTY OF LOS ANGELES.

(Civ. 6526.)

District Court of Appeal, Second District, Division 1, California. May 23, 1929.

Divorce ⚭312—Trial court cannot change custody of minor children pending appeal from interlocutory divorce decree containing order as to their custody.

Where interlocutory divorce decree contains order as to care, custody, and control of parties' minor children, trial court cannot act in such matter pending appeal therefrom, but any change of custody pending such appeal must be made through juvenile court or by some other separate proceeding.

Application by Mabel A. Ritter for a writ of prohibition to the Superior Court in and for the County of Los Angeles. Alternative writ made peremptory.

Brooks Gifford and William E. Fox, both of Pasadena, for petitioner.

James R. Jaffray, of Los Angeles, and John T. Houser, for respondent.

YORK, J. An affidavit was filed setting forth certain matters alleged to have occurred since the 20th day of June, 1928, and since entry of an interlocutory decree of divorce, in which interlocutory decree the custody of three minor children had been fixed and determined. It appears that the trial court issued an order directing the plaintiff and petitioner herein to show cause why the custody of said minors should not be changed, and that that hearing is now pending in the superior court and is the matter towards which the writ is directed.

The trial court made an order as to the custody of the children, first, on May 23, 1928, and thereafter, on the 30th day of June,

1928, an interlocutory decree of divorce was entered in said action, which decree in terms recited the same conditions as to the custody of the children as the order of May 23, 1928; that thereafter the defendant filed notice of appeal from said interlocutory decree, and from the whole thereof, on September 19, 1928.

The contention between the parties upon this hearing is as to whether or not said notice of appeal stays the hands of the trial court in said action, the respondent court contending that there is no appeal from the order made and entered on the 23d day of May, 1928, and that that order is still in full force and effect and subject to modification by the trial court.

We are of the opinion that by reason of the fact that the interlocutory decree contained an order as to the care, custody, and control of the children, and as the appeal from that judgment has been perfected, during the pendency of the appeal the trial court may not act in said matter. If there be any change of conditions, which for the welfare of the children requires a change of custody pending appeal, such change of custody (while the appeal is pending) will have to be made through either the juvenile court or by some other and separate proceeding other than the divorce action between the parties. *Vosburg v. Vosburg*, 137 Cal. 493, 70 P. 473; *Ex parte Queirolo*, 119 Cal. 635, 51 P. 956: " * * * The effect of the appeal in instances of this character is to remove the subject matter of the adjudication from the jurisdiction of the court below pending the appeal, and suspend the power of that court to enforce its order or judgment until the appeal is determined."

It is therefore ordered that the alternative writ be made peremptory.

We concur: CONREY, P. J.; HOUSER, J.

99 Cal. App. 217

JENSEN, Director of Department of Institutions, v. McCULLOUGH, County Treasurer.
(Civ. 6427.)

District Court of Appeal, First District, Division 2, California. May 29, 1929.

Mandamus ⚭182—Supreme Court may recall peremptory writ of mandate on uncontested motion to limit application to individuals named in petition.

Peremptory mandate may be recalled on uncontested motion for correction to confine its operation to individuals named in petition.

Original mandamus by Earl E. Jensen, Director of the Department of Institutions of the State of California, against C. F. McCullough, as Treasurer of San Benito County,

Cal. On motion to recall peremptory writ of mandate (271 P. 568) for correction. Motion granted.

U. S. Webb, Atty. Gen., and R. L. Chamberlain and Chas. A. Wetmore, Jr., Deputy Attys. Gen., for petitioner.

Wyckoff & Gardner, of Watsonville, and A. M. Runnels, of Hollister, for respondent.

PER CURIAM. The respondent moves that the peremptory writ of mandate heretofore issued herein be recalled for the purpose of correction.

The writ was issued pursuant to the judgment in favor of the petitioner ordering a peremptory writ as prayed in the petition. *Jensen v. McCullough* (Cal. App.) 271 P. 568. The cause was determined upon the demurrer to the petition, and the issues were therefore confined to the allegations of the petition. *Metropolitan Life Ins. Co. v. Welch*, 202 Cal. 312, 314, 260 P. 545. The issues raised by the petition related to the failure of the respondent to remit to the state the amounts found due from the county of San Benito to the state of California for the care of four defective children committed to the Sonoma State Home. Though the petition prayed for general relief, and the proceeding was conceded to be a test case to determine the constitutionality and application of the state statute requiring the county to remit to the state payment for the care of defective children generally, the petitioner now does not contest the application for a correction of the peremptory writ so as to confine its operation to the individuals named in the petition.

The motion to correct the peremptory writ is therefore granted, and a corrected writ, reading as follows, is ordered served forthwith upon respondent:

"Peremptory Writ of Mandate.

"The People of the State of California to C. F. McCullough, as Treasurer of the County of San Benito, State of California, respondent above named:

"You are hereby commanded and required to pay to the State Treasurer of the State of California, the sum of Three Hundred (\$300) Dollars, on account of the commitments of the inmates named in the petition on file herein from the County of San Benito to the Sonoma State Home for the period from December 1, 1926, to May 1, 1927; and you are further commanded and required to pay to said State Treasurer the sum of Four Hundred and Sixty (\$460) Dollars, on account of the commitments of the inmates named in the petition filed herein from the County of San Benito to the Sonoma State Home for the period of May 1, 1927, to December 1, 1927; and you are required and commanded to make such payments at the time of the next set-

tlement of the County Treasurer of San Benito County with the State of California pursuant to section 3866, Political Code, of the State of California; and we do also command that you make due return to us before this court how you have executed this writ within twenty (20) days after the date of service hereof.

"Witness the Honorable Joseph S. Koford, Presiding Justice of the District Court of Appeal, First Appellate District, Division Two, at the court room thereof in the City and County of San Francisco in said State, and the seal of said Court. Dated nunc pro tunc as of the 27th day of September, 1928.

"By the order of said Court: "

"Clerk of the District Court of Appeal, State of California, in and for the First Appellate District."

99 Cal. App. 87

**HENRY COWELL LIME & CEMENT CO.
v. MITCHELL et al. (Civ. 6111.)**

District Court of Appeal, First District, Division 1, California. May 22, 1929.

Execution ☞288—In action to recover value of property sold at sheriff's sale, evidence did not sustain finding that plaintiff was not owner thereof.

In action to recover value of personal property, which plaintiff claimed under assignment, but which was sold at sheriff's sale under judgment against assignor's lessor, evidence held insufficient to sustain finding that plaintiff was not owner of property or entitled to its possession.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by the Henry Cowell Lime & Cement Company against Jap E. Mitchell and others. From the judgment, plaintiff appeals. Reversed.

F. L. Hatch, of San Francisco, and Light & Lane, of Glendale, for appellant.

U. Grant Hayden, of Fresno, for respondents.

TYLER, P. J. Action to recover the value of certain personal property alleged to belong to plaintiff, which was sold at sheriff's sale. The property so sold is claimed to be of the value of \$6,674.16. Plaintiff acquired the property by assignment from one W. W. Taft, as hereinafter set forth. Defendant Mitchell by separate answer denied that plaintiff owned the property, or that it was of the value alleged in the complaint, or had a greater value than \$1,540. As a separate defense he further alleged that it consisted of certain concrete building blocks and

was purchased by him at sheriff's sale; the same having been seized by virtue of a writ of attachment in an action brought against the Fresno Glazed Cement Pipe Company. Defendant Grummett, by separate answer, also denied that the property was of the value alleged, and further denied that plaintiff was the owner thereof or entitled to its possession. The court found plaintiff not to be the owner of the property, and judgment was in favor of the defendant.

It is claimed in support of the appeal that there is no evidence in the record to sustain the findings. The history of the case, as disclosed by the evidence, shows that in February, 1917, one W. W. Taft leased from the Fresno Glazed Cement Pipe Company, a corporation, its plant for the manufacture of cement pipe for irrigation purposes. Taft entered into possession under the lease and manufactured a quantity of pipe, which he kept on hand in the yard of the premises. In the same year the Riverside Portland Cement Company, a creditor of the Fresno Glazed Cement Pipe Company, the lessor, attached the plant and all material, raw and manufactured, in Taft's possession. Taft replevined the property in an action against the sheriff, giving the usual bond and retaking possession. This action was finally determined in the year 1921. Meantime Taft, while in possession of the property, sold out in 1917 all of the pipe so attached in said action.

The findings in the case above referred to show that Taft's lease was void in fraud of creditors and the property seized was held to be the property of the Fresno Glazed Cement Pipe Company. Taft thereafter continued in possession of the plant and manufactured certain pipe, buying and paying for the needed material, and also paying for the necessary labor to manufacture it. While thus employed, respondent John Grummett had obtained a judgment against the Fresno Glazed Pipe Company, and he caused an execution to issue thereon, commanding the sheriff to levy upon the property of the cement company to satisfy the judgment. Under this writ the sheriff levied upon a quantity of material at the plant and the pipe manufactured by Taft during the year 1921, and advertised it for sale. Taft thereupon served a third party claim upon the sheriff. At the time this notice was served, the pipe on hand had been struck off to respondent herein, Jap E. Mitchell. The remaining property was turned over to Taft on his third party claim. Taft assigned his interest to the plaintiff herein, Henry Cowell Life & Cement Company, and this action was brought by such company for the conversion of the pipe sold under the Grummett execution.

The trial court found, in effect, that the execution sale was legal in all respects; that

Taft stood by and permitted the sale to be made; that he was not entitled to the possession of the property sold and was not the owner thereof. A reading of the record shows that the conclusion of the trial court was based upon the mistaken theory that the pipe sold was the property involved in the case of Riverside Portland Cement Company v. Fresno Glazed Cement Pipe Company, and which had been repossessed by Taft in his action against the sheriff, as above set forth. There is no evidence in the record to sustain this finding, or that the Fresno Glazed Cement Pipe Company had any interest in the property sold under the Grummett judgment. On the contrary, the only evidence upon the subject shows that the pipe repossessed by Taft in the Riverside Portland Cement Company action was disposed of by Taft and that the property here involved was subsequently manufactured by him at his own expense.

The evidence without conflict supports plaintiff's allegations as to its ownership of the property. This being so, it follows that the judgment must be reversed.

It is so ordered.

We concur: KNIGHT, J.; CASHIN, J.

99 Cal. App. 290

CHEESEMAN v. CHEESEMAN. (Civ. 3784.)

District Court of Appeal, Third District, California. June 4, 1929.

1. Witnesses $\S$ 40(1)—Law fixes no minimum age for receiving testimony of child, though it must be accepted with caution.

While testimony of child of tender years is to be accepted with great caution, the policy of the law no longer fixes a minimum age at which it will be received.

2. Divorce $\S$ 303(3)—Finding of licentious conduct, authorizing modification of divorce decree to deprive father of right to visit infant daughter, held supported by evidence.

Finding of licentious conduct of father towards his infant daughter, authorizing modification of divorce decree to deprive him of right to visit her, held supported by the evidence.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Rose C. Cheeseman was granted divorce from Evans R. Cheeseman. From an order modifying the decree, defendant appeals. Affirmed.

Perry F. Backus, of Los Angeles, for appellant.

Knight & Reynolds and John Perry Wood, all of Los Angeles, for respondent.

THOMPSON, J. This is an appeal from an order modifying a final decree of divorce so

as to deprive the father of the right to visit or associate with his infant daughter on account of his immoral conduct and baneful influence over the child.

[1] In March, 1926, plaintiff was granted a final decree of divorce from the defendant on the ground of willful desertion, and she was awarded the custody of their only infant child Margaret, subject to the usual order permitting the father to visit the child at any and all reasonable times and places and to take her out with him twice a week between the hours of 3 and 7 o'clock p. m. On May 4, 1927, an order to show cause was issued, to determine why said decree should not be modified so as to absolutely prohibit the father from "seeing, visiting or communicating" with his daughter, on account of his licentious conduct toward the child. This citation was heard upon affidavits and oral testimony adduced. The application was bitterly contested. The transcript of testimony consists of 250 pages. After a careful examination of the child, Margaret, who was 6½ years of age, as to her qualifications for mental understanding and intelligence, by stipulation she was cautiously interrogated by the judge of the court and critically cross-examined by counsel for the appellant. Every reasonable precaution seems to have been exercised to guard against improper testimony. While the evidence of a child of such tender years should be accepted with great caution, the policy of the law no longer fixes a minimum age at which it will be received. 28 R. C. L. 463, § 50. This witness possessed at least ordinary intelligence; she was attending the B second grade at school, and her evidence is convincing of licentious conduct on the part of appellant toward the child, which is most reprehensible and appalling, and which acts are punishable by the provisions of sections 288 and 288a of the Penal Code of California.

At the conclusion of the evidence the court adopted findings and modified the final decree of divorce and awarded the sole and exclusive custody of the child to plaintiff, restraining and prohibiting the defendant from visiting or associating with the child at any time or place. In substance the court found that plaintiff is a fit and suitable person to have the care and custody of the minor child; but, upon the contrary, that the defendant was frequently guilty of vulgar, lewd, and lascivious conduct toward the child, which acts were specifically enumerated, and that he is an immoral person unfit to associate with his infant daughter, and that his contact with her would be highly detrimental and injurious to her character and welfare.

[2] The appellant contends that the findings are not supported by the evidence. In an elaborate brief the appellant's chief argument is that the story of the child is unbelievable and is the result of inducement on the part

of the mother and others. After a critical examination, however, this court is unable to say that the story of the child bears any evidence of falsity. Without being unduly led in the course of her examination, the child exhibited a knowledge of the details of lascivious affairs which could scarcely be taught to a child or so accurately recited by means of mere tutoring. Other witnesses corroborate the truthfulness of the child's story by the relating of certain material circumstances.

Ordinarily the weight and sufficiency of testimony must be left with the trial judge. We see no reason for departing from that rule in the present case. The findings are amply supported by the evidence, and we are of the opinion that the child was qualified to testify and that her evidence was credible. No errors in the trial of the case are charged, except as to certain hearsay statements of the child which were made to a nurse, which objection was subsequently waived by counsel for the defendant when he said: "Very well, I will withdraw the objection at the present time." The objection was not renewed.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 182

MERCANTILE INV. CO. v. HOW et ux.
(Civ. 3758.)

District Court of Appeal, Third District, California. May 28, 1929.

1. Appeal and error $\S$ 989—Appellate court inquires only whether there is substantial evidence supporting findings attacked as insufficiently supported by evidence.

When findings are attacked for insufficiency of evidence to support them, power of District Court of Appeal begins and ends with inquiry whether there is substantial evidence, contradicted or uncontradicted, which of itself will support findings of trial court.

2. Appeal and error $\S$ 931 (1)—Appellate court assumes trial court resolved conflict in testimony for prevailing party, on appeal from findings attacked as unsupported by evidence.

Where findings are attacked for insufficiency of evidence to support them and testimony is in conflict on any material point, District Court of Appeal must assume that trial court resolved conflict in favor of prevailing party.

3. Vendor and purchaser $\S$ 44, 341 (3)—Finding that purchaser had lien for money paid less value of occupancy and that vendor's authorized agents induced purchase by false representations held supported by evidence.

In action to quiet title to realty in which defendants claiming interest in land consisting of lien for purchase money filed cross-complaint to recover part payments, evidence was sufficient to support finding that defendants were entitled

to lien for money paid less reasonable value of property while defendants occupied it, and that defendants were induced to enter into contract for purchase of property by false representations of plaintiff's agents authorized to negotiate sale, accept money from purchasers, and conclude sales.

4. Brokers ⇨96—Real estate broker, generally, is not authorized to collect purchase price, and owner is not answerable to third party for money paid broker.

Real estate broker's authority to negotiate sale, generally, does not carry with it express or implied authority to collect, as agent for owner, money on account of purchase price, and owner is not answerable to third party who has deposited with broker part or whole of purchase price.

5. Brokers ⇨96—Contract providing owner shall keep representative in broker's office to take charge of money taken in by broker contemplated collection of money from purchasers by broker.

Contract between owner and real estate broker appointing broker to negotiate sale of lots, and directing broker to keep books and records and to permit owner to keep representative in broker's office to receive money for owner which might come into broker's office, showed owner contemplated that broker would not only negotiate sales of lots but also collect money from purchasers and conclude sales.

6. Brokers ⇨96—Vendor authorizing broker to sell land and knowing of broker's sales and receipts of money from purchasers could not claim ignorance of broker's operations.

In suit to quiet title in which defendants counterclaimed for part of purchase price paid broker negotiating sale of property for owner, evidence that owner placed broker in charge of subdividing and selling property, placed representative in broker's office to look after its interest, and knew that broker was selling property and receiving payments from purchasers showed that operations of broker were so closely related to owner, and were so public and notorious, that officers of owner, as reasonable men, could not be heard to say they were ignorant of broker's operations.

7. Brokers ⇨103—Owner receiving and retaining money paid broker thereby ratified contract and acts of broker.

Where owner received and retained money paid by purchasers of land to brokers, who were authorized by owner to sell land, owner thereby ratified contract and acts of broker in receiving and retaining money.

Appeal from Superior Court, Los Angeles County; Douglas Edmonds, Judge.

Action by the Mercantile Investment Company against T. J. V. How and wife, in which defendants filed a counterclaim. Judgment for defendants, and plaintiff appeals. Affirmed.

Paul Barksdale D'Orr and A. L. Abrahams, both of Los Angeles, for appellant.

Keeler & French, of Los Angeles, for respondents.

PRESTON, Justice pro tem. Plaintiff and appellant Mercantile Investment Company, a corporation, brought this action to quiet title to a tract of land situate in the town of "Hollydale," Los Angeles county. An answer was filed by the defendants and respondents T. J. V. How and Mary E. How, his wife, in which they alleged that they had an interest in said real property consisting of a lien thereon for the sum of \$1,163.60, which sum they had paid to appellant on account of the purchase price of said property. The answer further alleged that the contract theretofore entered into between respondents and appellant had been rescinded by respondents on the ground of fraud.

Respondents also filed a cross-complaint in which they alleged that on March 5, 1924, appellant, through its agents, H. H. Townsend & Co., made a contract in writing with respondents to sell, and respondents had agreed to purchase, the real property in question for \$6,500; that prior to the making of said contract, appellant, through its said agents, made certain false and fraudulent representations to them for the purpose of inducing them to purchase said property, and said false representations did induce them to enter into the contract of purchase.

It was also alleged in the cross-complaint that various payments, amounting to \$1,163.60, were made to appellant by respondents on account of the purchase of said property before the true facts were discovered.

Appellant filed an answer to said cross-complaint, specifically denying all of the allegations thereof.

The case was tried by the court without a jury, and the court found that appellant was the owner of the real estate in question, but that respondents were entitled to a lien thereon for the amount of money they had paid, less the reasonable rental value of the property while respondents occupied it, or, a lien for the sum of \$469.37; and judgment was entered accordingly.

From this judgment Mercantile Investment Company prosecutes this appeal.

At the trial it was conceded that appellant was the owner of the real property in question, and the case was tried upon the issues made by the cross-complaint and the answer thereto. The court found, among other things, that appellant, through its agents H. H. Townsend & Co., with intent to deceive and defraud respondents, and to induce them to enter into said contract of purchase, did falsely represent and state to respondents that the Keiner Cotton Manufacturing Company owned 20,000 square feet of land in "Hollydale," and would immediately commence the construction and erection of a large

factory for the manufacture of cotton goods; that in truth and in fact, said Keiner Cotton Manufacturing Company did not own 20,000 square feet of land or any land in Hollydale, and were not going to immediately, or at all, commence the construction and erection of a large or any factory for the manufacture of cotton goods or at all; that said statements and representations were false and said appellant knew at the time said statements were made that the same were false; that appellant, also through its agents, at the same time and for the same purpose, falsely represented and stated that plans were being perfected for the erection by Lundius-Eccleston Motors Corporation, in Hollydale, of its first unit of a plant to cost \$2,000,000 and to cover 10 acres, and which was to be used for the purpose of manufacturing automobiles by said company, and that said motor corporation was bringing its mechanics and workmen from the East and would immediately construct 100 houses to be used as homes for said mechanics and working men. The court found that these statements were absolutely false and known to be false by appellant and made for the purpose of inducing respondents to purchase said property. Many other similar false statements and representations were found by the court to have been made by appellant through its agents for the purpose of inducing respondents to enter into said contract of purchase.

It is conceded that said statements and representations were made by H. H. Townsend & Co., to respondents, and that they were all false and known to Townsend & Co., when made, to be false. It is also apparently conceded by appellant that the price agreed to be paid by respondents for the property in question was far in excess of its real value.

Appellant contends "there is no evidence whatever that H. H. Townsend & Co. was either the actual or ostensible agent of appellant." This is the sole contention made on this appeal.

[1, 2] When the findings are attacked for insufficiency of the evidence to support them, our power begins and ends with an inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the findings of the trial court. If on any material point the testimony is in conflict, we must assume that the trial court resolved the conflict in favor of the prevailing party. *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25; *Gjurich v. Fieg*, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111. Therefore, we will simply epitomize only enough of the record to show whether or not the findings and judgment of the trial court have substantial support in the evidence.

Appellant was the owner of a tract of land in Los Angeles county called "Hollydale," which included the land in question. H. H. Townsend, doing business as "H. H. Townsend & Co.," had charge of the disposal of the

lots in the tract under a written contract which provided in part as follows: "Townsend agrees to keep in a manner prescribed by the company (appellant) a complete set of books and records truly and correctly portraying each and every transaction had by him in connection with the improving, subdividing and sale of said property, and to permit the company, at its own expense, to keep in his office a representative who shall at all times have access to said records and books, and who shall receive for the company all moneys, checks, notes, contracts and other things of value which may come into the office of said Townsend & Co. by, through or in connection with the sale of the property or any part or parcel thereof; it being understood and agreed that all moneys received are and shall be the sole and exclusive property of the company. * * * The company (appellant) agrees that out of the moneys received by it, whether the same be first or deferred payments, 50 per cent. shall be set aside for and paid to Townsend; settlements to be made on Tuesday of each week for all moneys received during the previous week. * * *

This contract was offered in evidence in the trial court and marked Plaintiff's Exhibit No. 1, but for some reason no copy of it is found anywhere in the record on appeal. We are therefore unable to determine its full terms; the above-quoted portions thereof were taken from respondents' brief. Appellant makes no mention or reference to this contract.

The method adopted by H. H. Townsend & Co. in selling these lots included signs posted on the premises with various and alluring inscriptions, which were calculated to attract the unwary; for example: "Hollydale Home and Industrial City—the Baby City—Watch me Grow. H. H. Townsend & Co."

There were also signs showing factories coming to "Hollydale," listed as "L. & E. Motor Company," "Keiner Cotton Manufacturing Company," "University Specialty Manufacturing Company," "Aunt Betty Produce Company," and others. The name of H. H. Townsend & Co. appeared on all these signs; the name of appellant, Mercantile Investment Company, the owner, did not appear on any of the signs.

Respondents, driving by the tract on or about March 2, 1924, and seeing the signs and improvements on the land, visited the "auditorium," situated on the tract, upon which was the sign: "Hollydale. H. H. Townsend & Co." There they met a salesman named Lindsley, who invited them to remain for lunch and listen to a lecture on the desirability of purchasing lots in "Hollydale." This, respondents did; then Lindsley showed them over the tract and the next evening visited respondents at their home. A day or two later Lindsley conducted respondents to the office of H. H. Townsend & Co. in Los Angeles. There H. H. Townsend informed them

that he was the agent of appellant and that he and appellant were really partners. Respondents agreed to purchase the property in question for \$6,500, and paid to Townsend a deposit of \$250, subject to a satisfactory contract being prepared, a receipt being given to them for said sum, which receipt was signed by H. H. Townsend & Co.

Subsequently a sale and purchase contract was prepared in the name of H. H. Townsend & Co., as sellers, and respondents, as purchasers, and respondents were at that time told that the reason for making the contract in the name of H. H. Townsend & Co., and not appellant, was that H. H. Townsend & Co. was the agent for appellant and that when the contract was fulfilled a deed would be issued to respondents by appellant. The total cash payment called for by the contract was \$1,000, which respondents paid. The balance was to be paid at the rate of \$50 per month, with interest at 7 per cent. per annum. Respondents paid various installments under said contract, amounting to a total sum of \$1,163.60 paid on account of the purchase price of said property.

On April 5, 1924, respondents sent a check made payable to H. H. Townsend & Co. for \$82.09. This check was cashed and contains the following indorsements on the back thereof: "H. H. Townsend & Company, Angus Davis," and below that "Pay to the Order of the Long Beach Branch, Security Trust & Savings Bank, Long Beach, California, Mercantile Investment Company."

On or about May 5, 1924, respondents made another check for \$81.80, payable to H. H. Townsend & Co., but before it was delivered, W. O. Campbell, who was the field manager for appellant, called upon respondents and requested that they give the check to him, which was done, and a receipt was issued by Campbell as follows:

"Long Beach, Calif., May 5, '24.

"Received of T. J. V. How check \$81.80 as payment on Lot 31—Blk 50—Hollydale. Payable to H. H. Townsend & Co.

"Mercantile Inv. Co.,

"By W. O. Campbell."

Thereafter, and on June 5, 1924, respondents received the following letter, to wit:

"Los Angeles, Calif., June 5, '24.

"Mr. & Mrs. T. J. V. How, R. R. 1—Box 663, Hynes, Calif. I am returning herewith your check of \$81.51 as payment and interest on your property at Hollydale, asking you to hold same until notified otherwise.

"Yours truly, Mercantile Inv. Co.,

"By W. O. Campbell."

H. H. Townsend disappeared, and after the receipt of this communication from appellant, no further payments were made by respondents.

Mr. E. A. Parkford, the president of the appellant corporation, was called as a witness for respondents, and testified that during the

greater period of the subdivision exploitations of Hollydale, he was looking after its affairs as executive officer, and between 1923 and 1924 he was on the tract once or twice a week at times and away for three or four or five months at a time, and during the occasion of his visits to Hollydale during the latter part of 1923 and the first five or six months of 1924, he saw the signs of H. H. Townsend & Co. on the property; that he knew the method used by Townsend in advertising and selling the property; and that his company was the owner of the property in question and that he was familiar with the terms of the contract between appellant and Townsend.

The court also found that appellant received all of the \$1,163.60 paid to H. H. Townsend & Co. by respondents. Appellant does not question this finding.

[3] From all these facts and circumstances it is difficult to perceive how the trial court could have reached any other conclusion than that H. H. Townsend & Co. were the agents of appellant, clothed with authority not only to negotiate the sale of lots in "Hollydale," but also to accept money from the purchasers and conclude the sales.

[4] We are not unmindful of the well-settled rule of law that a real estate broker's authority to negotiate a sale does not carry with it any express or implied authority to collect as agent for the owner money on account of purchase price, and the owner is not answerable to a third party who has deposited with the broker part or the whole of the purchase price. *Hicks v. Wilson*, 197 Cal. 269, 240 P. 289; *Gold v. Phelan*, 58 Cal. App. 472, 208 P. 1001; *Schnier v. Percival*, 83 Cal. App. 470, 256 P. 1109.

[5] In the instant case, however, the contract between appellant and H. H. Townsend & Co. goes further than merely appointing H. H. Townsend & Co. as brokers to negotiate the sale of lots in "Hollydale"; said contract directs H. H. Townsend & Co. to keep a complete set of books and records truly and correctly portraying each and every transaction had in connection with the improvement, subdividing or sale of said property, and to permit appellant to keep in Townsend's office a representative who shall at all times have access to said records and books, and who shall receive for appellant all moneys, checks, notes, contracts, and other things of value which may come into the office of said Townsend, by, through, or in connection with the sale of said property or any part thereof. Said contract further provided: "It being understood and agreed that all moneys received are and shall be the sole and exclusive property of the company (appellant). * * *

Appellant certainly by this contract contemplated and expected that H. H. Townsend & Co. would not only negotiate sales of lots in "Hollydale," but that H. H. Townsend & Co. would also collect money from purchasers and conclude sales for and in behalf of appel-

lant. Otherwise there would have been no necessity for the provisions in the contract that appellant's representative be on hand to take charge of the money and keep a check on Townsend's operations.

[6] Irrespective of the terms of the written contract between appellant and H. H. Townsend & Co., it seems inconceivable, under all the facts and circumstances appearing in evidence, that appellant would be entirely ignorant of negotiations, sales, contracts, and collections made by Townsend & Co. Appellant owned the tract of land, placed Townsend & Co. in charge of the subdividing, improvement, and sale thereof; placed their own representative in Townsend's office to look after their interest. Townsend placed his signs all over the property. The president of appellant corporation visited the land on numerous occasions and saw signs on the property and knew that Townsend was making sales and receiving payments, and knew the method used by Townsend in making sales, such as having lectures made in the "auditorium" on the land, etc.

[7] The operations of Townsend & Co. were so closely related to appellant, and were so public and notorious, that the officers of appellant, as reasonable men, cannot be heard to say that they were ignorant of them. *Mechem on Agency*, §§ 265, 266, 405; *Ballard v. Nye*, 138 Cal. 588, 72 P. 156; *Schnier v. Percival*, supra. No doubt exists, under the evidence, that H. H. Townsend & Co. had original authority from appellant to make the contract with respondents. Furthermore, if any doubt existed under the evidence as to the original authority of H. H. Townsend & Co. to make the contract with respondents and receive the money from them, appellant has ratified the contract and acts of H. H. Townsend & Co. by receiving and retaining the money paid by respondents.

It follows from what has been said that we are of the opinion that the finding that H. H. Townsend & Co. were the agents of appellant in the transaction with respondents finds substantial support in the evidence, and that the judgment should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 159

MORRELL v. CALDOW et al. (Civ. 6365.)

District Court of Appeal, First District, Division 1, California. May 28, 1929.

1. Corporations ⇨235—Stockholder's liability is measured by proportion which amount of his stock bears to whole of subscribed capital stock.

Liability of stockholder in corporation is to be measured by proportion which amount of

his stock bears to the whole subscribed capital stock of corporation.

2. Corporations ⇨269(1)—Plaintiff in action to enforce stockholders' liability has burden of proving amount of outstanding subscribed stock on date indebtedness was incurred.

In action to enforce liability of stockholders, plaintiff has burden to prove whole amount of outstanding subscribed stock on date the indebtedness was incurred.

3. Corporations ⇨269(2)—In action to enforce stockholders' liability, book entries which were incorrect and incomplete were properly excluded on issue of stock outstanding.

In action to enforce stockholders' liability evidence offered by plaintiff consisting of book entries kept by corporation covering various transactions, witness testifying that the book was incorrect, incomplete, and did not purport to set forth correct account of outstanding stock, was properly excluded.

4. Corporations ⇨269(2)—In action to enforce stockholders' liability, financial statement purporting to show condition prior to time indebtedness was incurred was properly excluded.

In action to enforce stockholders' liability, so-called financial statement issued by corporation, purporting to show assets and liabilities as of time prior to time liability was incurred, was properly excluded.

5. Corporations ⇨269(2)—In action to enforce stockholders' liability, proffered testimony of former state official regarding corporation's affairs subsequent to time in issue was properly rejected.

In action to enforce stockholders' liability, proffered testimony of former auditor of state corporation department as to recollections of corporation's affairs relating to period nearly year subsequent to time on which plaintiff was required to fix whole number of outstanding shares was properly rejected.

6. Attorney and client ⇨86—In action to enforce stockholders' liability, statement that defendants figured up close to 800 outstanding shares at time indebtedness was incurred held not admission.

In action to enforce stockholders' liability, statement by defendant's counsel during interchange between court and counsel regarding outstanding shares of stock at time indebtedness was incurred, that defendants figured up nearer 800 outstanding shares at time, held not a stipulation of fact or formal admission by defendants.

7. Pleading ⇨127(2)—In action to enforce stockholders' liability, allegations of answer held not to constitute admission as to total shares outstanding at time indebtedness was incurred.

In action to enforce stockholders' liability, where complaint alleged that at time indebtedness was incurred total shares of capital stock outstanding was 542, and answer denied total number of shares outstanding was 542, or any number of shares less than 542, but greatly in excess of that number, allegations in answer

did not constitute an admission there were 542 shares of stock subscribed at time.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by F. B. Morrell against Andrew Caldow and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Alvin Gerlack, of San Francisco, and Ingle Carpenter, of Los Angeles, for appellant.

John L. McNab, of San Francisco, for respondents.

KNIGHT, J. Defendants were stockholders in a corporation which, on October 16, 1922, executed and delivered to a payee therein named eight promissory notes in the sum of \$1,000 each. In due course these notes were indorsed to plaintiff. The corporation became defunct, and plaintiff thereupon commenced this action to recover from these defendants as such stockholders their proportionate share of the indebtedness created by said notes. Judgment was given in favor of defendants, and plaintiff has appealed.

[1, 2] As frequently held, the liability of each stockholder in a corporation is to be measured by the proportion which the amount of his stock bears to the whole of the subscribed capital stock of the corporation (Thomas v. Wentworth Hotel Co., 158 Cal. 275, 110 P. 942, 139 Am. St. Rep. 120); and in an action to enforce the liability of the stockholders, it is incumbent upon the plaintiff therein to prove the whole amount of the outstanding subscribed stock on the date the indebtedness was incurred, so as to enable the court to determine the proportionate liability of each stockholder (Knowles v. Sandercock, 107 Cal. 629, 40 P. 1047). In the present case the trial court found that the total subscribed stock was not 542 shares, as alleged in the complaint, and further found that "no competent evidence was admitted at the trial showing such number of subscribed and outstanding shares" at the time said notes were executed, and that consequently "the court had before it no evidence from which it could find the number of such subscribed and outstanding shares at the time alleged by plaintiff." The sole question presented by this appeal is whether, as appellant contends, the evidence adduced at the trial is legally sufficient to warrant this court in nullifying said finding.

[3-5] It appears that at the time of the general breakup of the corporation's affairs the records which the law requires a corporation shall keep with reference to its capital stock were lost, and consequently plaintiff was obliged to resort to other evidence to prove the amount of the outstanding subscribed stock at the time said indebtedness was incurred. In this regard it was sought to have admitted in evidence the entries made

in a book kept by said corporation, which covered various transactions and accounts of this and other corporations; but according to the testimony of the former secretary of said corporation, who was the only witness called to identify and explain said book, "the moneys of all these corporations were hodge podged together and all kept in one account"; and the witness further testified that said book was known to him to be incorrect, was not full and complete, and did not purport to set forth a correct account of the outstanding stock. The trial court, therefore, ruled that the book was not competent to prove the fact at issue. Plaintiff then tried to introduce in evidence a so-called financial statement issued by said corporation under its corporate seal purporting to show the assets and liabilities of said corporation as of November 15, 1922, but said statement was rejected by the court because the essential fact to be proved was the number of shares of outstanding stock on October 16, 1922, the date of the execution and entry of said notes, and it is evident that said statement was valueless for such purpose. Plaintiff also made effort to introduce the testimony of a former auditor of the state corporation department as to his recollections of said corporation's affairs. But such audit related to a period nearly a year subsequent to the date on which plaintiff was required to fix the whole number of outstanding shares, and for that reason the court ruled that the evidence was not competent. We are of the opinion that there was no error in the rulings of the trial court excluding the evidence above mentioned, and, having been excluded, nothing was established thereby.

[6] At the trial, during an interchange between court and counsel, and in response to a suggestion by the court that defendants contended that the number of outstanding shares of stock was nearly 700, the attorney for defendants replied that "they figured up nearer 800." Plaintiff contends that the foregoing statement amounted to an admission that the number of outstanding shares was not in excess of 800, and that such statement was binding upon the defendants. We cannot agree to such construction. There is nothing in the statement itself to justify such construction, and after reading that portion of the record of which the statement forms a part, it is at once apparent that the statement was not made as or intended to be a stipulation of fact, nor as a formal admission on behalf of defendants.

[7] Nor are we able to sustain plaintiff's remaining point that defendants' answers admitted that 542 shares of stock were subscribed on the date of the execution of said notes. With reference thereto the complaint alleged upon information and belief that at the time said notes were executed and delivered "the total number of shares of capital stock

of said Motion Picture Utility Corporation subscribed and outstanding was 542 shares. * * * The form of denial of said allegation contained in the answers was as follows: "Deny that at the time the notes alleged in the complaint were executed or delivered, or at the time the alleged indebtedness evidenced thereby was contracted or arose, or was incurred, the total number of shares of the capital stock of Motion Picture Utility Corporation subscribed and outstanding, or subscribed or outstanding, was 542 shares, or any number of shares less than said number of 542. But these defendants allege on information or belief that the number of shares subscribed and outstanding at said time in said Motion Picture Utility Corporation was greatly in excess of 542 shares. * * * It is apparent without discussion, we think, that such denial was legally sufficient to raise the issue. The form of denial used in the answers in the cases cited and relied upon by appellant were materially different from the one in the case at bar, and consequently we do not deem those cases in point.

In view of the foregoing state of the record, an interference with the trial court's finding above mentioned would be clearly unwarranted.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

99 Cal. App. 136

E. A. TEST, Inc., v. MABREY et al.
(Civ. 3737.)

District Court of Appeal, Third District, California. May 24, 1929.

1. Bills and notes  497(2)—Rule that burden is on payee's indorsee of proving that he took note obtained by fraud, duress, or for illegal consideration without notice, held inapplicable in absence of pleading such facts (Civ. Code,   3140, and   3133, subds. 3, 4).

In action on note by payee's indorsee, in which makers' answer failed to allege any defect or illegality in note, or that plaintiff had any knowledge of agreement between makers and payee for cancellation of note, and court found on conflicting testimony that plaintiff had no knowledge of any such agreement, rule that, when it is shown that note was obtained from maker by fraud or duress, or that consideration therefor was illegal, prima facie case of notice to subsequent holder is made out, and burden of proving that he took without notice and for value is thrown on him, did not apply, under Civ. Code,   3140, and section 3133, subds. 3, 4.

2. Appeal and error  1011(1)—Trial court's fact finding on conflicting evidence is binding on appeal.

Trial court's finding of fact on conflicting evidence sufficient to support such finding is binding on appellate court.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by E. A. Test, Inc., against Charles S. Mabrey, J. L. Flanagan, and another. Judgment for plaintiff, and named defendants appeal. Affirmed.

Robert H. Schwab, of Sacramento, for appellants.

Woodward, Briggs & Blewett, of Stockton, for respondent.

PLUMMER, J. Plaintiff had judgment against the appellants upon a promissory note executed by the appellants and indorsed to the plaintiff by R. J. Heeney, which note is in the words and figures following, to wit:

"\$2,000.00 Stockton, Cal. January 27, 1927.

"Twelve months * * * after date, without grace, we, or either of us, promise to pay to Richard J. Heeney or order, at Stockton, California, the sum of Two Thousand Dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon in like gold coin at the rate of seven per cent. per annum from date until paid; interest payable quarterly and if not so paid as it becomes due to be added to the principal and become a part thereof and bear interest at the same rate, but if default be made in the payment of the interest as above provided, then this note shall immediately become due at the option of the holder thereof; also to pay all legal expenses and attorney's fees which may be incurred in the collection of this note.

"J. L. Flanagan.

"Chas. B. Mabrey.

"Indorsed: R. J. Heeney."

From this judgment, the defendants Mabrey and Flanagan appeal.

[1] The answer of the appellants consists, first, of denials upon information and belief, and then, as a further answer, alleges as follows: "That heretofore, under and by agreement entered into between said defendants and said defendant R. J. Heeney, said Heeney agreed to surrender said promissory note sued upon in this action and cancel the same." There is no allegation in the answer of any defect or illegality in the note, or that the plaintiffs had any knowledge of the agreement just mentioned. The record shows that during the month of July, 1927, the defendant R. J. Heeney, purchased an automobile from the plaintiff for the sum of \$1,940.50, and as the principal consideration for the purchase thereof indorsed and delivered to the plaintiff the promissory note herein set forth. The date of the note and its indorsement to the plaintiff show that it was indorsed and delivered to the plaintiff a number of months prior to its maturity. A reading of the note shows that it is negotiable in form. The court found, upon conflicting testimony, that

the plaintiff had no knowledge of any agreement between the appellants and R. J. Heeney for the cancellation of the note in question. While, as we have stated, there was no pleading on the part of the appellants alleging any illegality, want of consideration, or other defect in the note in question, the trial court, over the objection of the plaintiff, allowed the appellants to prove that the appellant and R. J. Heeney had had some dealings in relation to the transfer and delivery of title to crypts in a certain mausoleum, and that in consideration of such transfer the note was to be delivered up to the appellants by the defendant Heeney and canceled. The court found, upon sufficient testimony to support its finding, that the plaintiff had no knowledge of this transaction. Upon this appeal the appellants cite the case of *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 P. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, in which case it is said: "It is also well settled that even in the case of negotiable paper, where an action is brought by a subsequent holder, when it is shown that the same was obtained from the maker by fraud or duress, or that the consideration therefor was illegal, a prima facie case of notice to such holder is made out, and the burden of proving that he took without notice before maturity and for value is thrown upon him." Nothing of that kind appears in this case. The note does not appear to have been executed on account of any fraud, duress, or illegal consideration. The infirmity, if any, in the note, so far as the makers and the original holder thereof are concerned, arose from subsequent transactions. The court found, as we have stated, upon conflicting testimony, that the plaintiff had no knowledge thereof at the time of the acceptance of the note, and that the plaintiff received said note for value and in due course of business.

[2] While the appellants raised the question of the indorsement of the note, the note itself bears the indorsement, and the testimony in the record establishes such fact. The record in this case supports the findings of the court necessary to support a judgment in favor of the plaintiff, as required by subdivisions 3 and 4 of section 3133 of the Civil Code, to wit, that the plaintiff took it in good faith and for value; that at the time it was negotiated to the plaintiff, the plaintiff had no notice of any infirmity or defect in the title of the person negotiating it. And likewise, under the provisions of section 3140 of the Civil Code which says: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course." This burden, the court found,

was successfully carried by the plaintiff, and as there is testimony sufficient to support such finding, it is binding here.

As further supporting the judgment in this case, we will cite the case of *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 761, 118 P. 92, and the authorities cited on page 769 (118 P. 95).

The findings in this case being supported by the testimony, it follows that the judgment should be and the same is hereby affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

99 Cal. App. 280

PEOPLE v. JORI. (Cr. 1535.)

District Court of Appeal, First District, Division 2, California. June 4, 1929.

1. Criminal law ☞578—Statute relating to setting and continuing cases does not apply to postponements which trial court orders because court is otherwise engaged (Pen. Code, § 1050, as added by St. 1927, p. 1036).

Pen. Code, § 1050, as added by St. 1927, p. 1036, relating to setting criminal cases for trial not later than 30 days after entry of plea and relating to continuances, does not apply to postponements which trial court orders because court is otherwise engaged.

2. Criminal law ☞351(2)—Evidence regarding defendant's answers to officer's questions after defendant had denied story told by prosecuting witness held properly admitted (Pen. Code, § 288).

In prosecution for violation of Pen. Code, § 288, relating to lascivious acts on body of child, testimony of police officer regarding questions asked defendant and defendant's answers after he had stated to officer that story told by prosecuting witness was not true held properly admitted.

3. Criminal law ☞1159(3)—Jury's verdict of guilty, based on conflicting evidence, was binding on reviewing court (Pen. Code, § 288).

In prosecution for violation of Pen. Code, § 288, where facts showed attempt to commit rape or a violation of section 288, depending on defendant's intent, and evidence showing defendant's intention was conflicting, jury's verdict of guilty of violation of section 288 was binding on court of review.

4. Criminal law ☞772(3)—Instruction referring to facts charged in information held sufficient without reciting all facts alleged.

Instruction distinctly referring to facts charged in information held sufficient without reciting all facts alleged in information.

5. Criminal law ☞1038(1)—Defendant cannot for first time on appeal present point that court did not give instruction on alibi.

Defendant cannot for first time on appeal present point that trial court did not give instruction regarding his defense of alibi.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Antone F. Jori was convicted of violating Pen. Code, § 288, and he appeals. Affirmed.

Ezra Cox, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the State.

STURTEVANT, J. The district attorney filed an information against the defendant charging him with having committed a felony. Pen. Code, § 288. The defendant entered a plea of not guilty, and a trial was had before the court sitting with a jury. The jury returned a verdict of guilty, the defendant made a motion for a new trial, the motion was denied, and judgment was entered on the verdict. The defendant has appealed from the order and from the judgment.

[1] The defendant complains that certain continuances were "granted" in violation of the provisions of section 1050 of the Penal Code (as added by St. 1927, p. 1036). The defendant entered his plea on January 21, 1929. On that date the cause was set for trial on February 6th; on that date the trial was put over to February 11th; on the 8th day of February the date of the trial was further put over until the 25th day of February; and on that date it was put over until the next day, the 26th, and at that time the trial commenced. At no time, did the prosecution ask for a continuance, and no continuance was "granted." The record shows facts from which it can be inferred that the trial court was busy in the trial of other criminal cases during all business hours from January 21 to February 25, 1929, both dates inclusive. The record does not show to the contrary but that each postponement was ordered by the court of its own motion. The language of section 1050 of the Penal Code contains nothing applicable to postponements which the trial court orders because the court is otherwise engaged. That section is addressed to continuances asked by one of the parties.

The prosecuting witness was five years of age. The defendant contends that the trial court erred in allowing her to testify. The Attorney General asserts that the trial court did not err, and he cites *People v. Reyes*, 194 Cal. 650, 229 P. 947. It is closely in point. The defendant cites, and relies on, *People v. Delaney*, 52 Cal. App. 765, 199 P. 896. In that case the voir dire examination was conducted by the trial judge. It was very brief and did not develop the facts showing competency or incompetency under Code of Civil Procedure, § 1880, subd. 2. Permission was denied the defendant's counsel to further develop those facts. In the instant case the defendant's counsel was not limited. We have read the voir dire examination and all of the testimony of the witness. We cannot say the

court erred in allowing the prosecuting witness to be heard as a witness.

[2] The witness Thornbury, a police officer, testified that he made the arrest, took the defendant to the interview room, and there stated to the defendant the story told by the prosecuting witness. He further testified that the defendant stated that the story was not true. Over the objection of the defendant the witness was allowed to state certain questions which he thereupon proceeded to ask the defendant and to relate the defendant's answers. The defendant now claims that the objections should have been sustained. The contention is not well founded. A denial of the truth of the child's story in no way precluded an inquiry as to the defendant's remembrance of the facts.

[3] The defendant claims that the evidence showed the commission of the crime of rape or an assault to commit rape, but did not tend to prove an offense under Penal Code, § 288. He makes the attack by claiming the evidence was insufficient and by claiming a variance. It was stipulated that the crime of rape was not committed. The facts showed an attempt to commit rape or a violation of the provisions of section 288, Penal Code, depending on the intent. The evidence showing intent was conflicting. As its verdict was against the defendant, the jury believed those facts showing that the intent was to violate the provisions of section 288 of the Penal Code. Under these circumstances the verdict of the jury is binding in a court of review whether it is contended that the evidence is insufficient or that there was a variance.

[4] The trial court gave an instruction which appears in the transcript, page 125, lines 4 to 13. The defendant asserts that the instruction was erroneous because it did not recite all the facts alleged in the information. It distinctly referred to the facts "charged in the information," and that was sufficient.

The court gave an instruction which appears on page 129 of the transcript, lines 5 to 11. The defendant contends that it was argumentative and should not have been given. The Attorney General replies that the instruction has been approved in this state. *People v. Ramey*, 70 Cal. App. 92, 94, 232 P. 724. The latter case was decided on the authority of *People v. Wolff*, 182 Cal. 728, 739, 190 P. 22. Although not directly in point, the case last cited is determinative.

[5] The defendant complains because the trial court did not give an instruction regarding his defense of alibi. The defendant did not request an instruction on the subject, and he may not now present the point for the first time.

We find no error in the record. The judgment and order are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

PEOPLE v. OSAKI et al. (No. 1079.)★

District Court of Appeal, Third District, California. May 31, 1929.

Rehearing Denied June 15, 1929. Hearing Granted by Supreme Court June 27, 1929.

1. Aliens ⇨17—Proof of leasing of land by Japanese in and of itself establishes no offense (Alien Land Law).

Alienage is an essential element or ingredient of the offense of violating the provisions of the Alien Land Law (St. 1921, p. lxxxiii, as amended), and proof of the leasing of lands by Japanese in and of itself establishes no offense whatever.

2. Aliens ⇨10—Constitutional law ⇨249, 311—Law requiring one to prove citizenship held denial of due process and equal protection (Alien Land Law, §§ 9a, 9b, as added by St. 1927, p. 881; Code Civ. Proc. § 1981, and § 1983, as added by St. 1927, p. 434; Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

Alien Land Law, §§ 9a and 9b, as added by St. 1927, p. 881, and Code Civ. Proc. § 1983, as added by St. 1927, p. 434, placing the burden of proving citizenship on defendant, held in violation of Const. Cal. art. 1, § 13, and Const. U. S. Amend. 14, as a denial of due process and equal protection and contrary to Code Civ. Proc. § 1981, placing burden of proof on party holding affirmative of issue.

3. Criminal law ⇨306—There must be reasonable and rational connection between fact proved and fact presumed.

In order to authorize prima facie presumption, there must be a reasonable and rational connection between the fact proved and the fact presumed.

4. Aliens ⇨10—Law providing that proof of membership in race ineligible to citizenship creates prima facie presumption of ineligibility held void as authorizing arbitrary conclusion (Alien Land Law, § 9b, as added by St. 1927, p. 881).

Alien Land Law, § 9b, as added by St. 1927, p. 881, providing that proof that defendant is a member of race ineligible to citizenship creates a prima facie presumption of ineligibility to citizenship, held void as authorizing arbitrary conclusion without any reasonable or rational connection between the fact proved and the fact presumed.

5. Aliens ⇨17—Evidence held insufficient to prove nationality or ineligibility to citizenship as to one defendant charged with violating land laws (Alien Land Law).

Evidence, in prosecution under the Alien Land Law (St. 1921, p. lxxxiii, as amended), for violating the provisions thereof, held insufficient as to one defendant to prove nationality or that he was ineligible to citizenship.

6. Criminal law ⇨761(2)—Instruction in prosecution for violating land laws did not assume that defendant named therein was alien ineligible to citizenship (Alien Land Law).

Instruction requested by defendants, in prosecution for violating the provisions of the Alien

Land Law (St. 1921, p. lxxxiii, as amended), requiring the showing of conspiracy between defendants, did not assume as a fact and instruct the jury as a fact that defendant named therein was an alien ineligible to citizenship.

7. Criminal law ⇨1186(4)—Constitutional provision providing that reversal will not result from errors in procedure does not apply in case of denial of fundamental right (Const. art. 6, § 4½).

Const. art. 6, § 4½, relating to reversal for errors in matter of procedure, unless resulting in a miscarriage of justice, does not apply, where defendant has been denied a fundamental right.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

K. Osaki and another were convicted of violating the provisions of the Alien Land Law, and they appeal. Reversed and remanded.

Lloyd E. Hewitt, of Yuba City, W. P. Rich, of Marysville, and Brobeck, Phleger & Harrison, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendants were convicted upon an indictment charging them in six separate counts of violating the provisions of the Alien Land Law (Stats. 1921, p. lxxxiii). Convictions were had upon five of the six counts set out in the indictment. Upon this appeal from the judgment in said cause the appellants challenge the constitutionality of sections 9a and 9b of the Alien Land Law as amended by an act of the Legislature, approved May 16, 1927, Statutes of 1927, p. 881, and also section 1983 of the Code of Civil Procedure as added in 1927 (St. 1927, p. 434).

Section 9a of the Alien Land Law, as amended, places the burden of proving citizenship upon a defendant when the information alleges the alienage and ineligibility to citizenship of such defendant, and the proof introduced establishes the acquisition, possession, enjoyment, use, cultivation, etc., of real estate. Section 9b of the act, in addition to placing the burden of proving citizenship upon such a defendant, provides that, when the information, complaint, or indictment alleges alienage and ineligibility to citizenship, and there is proof of the acquisition, possession, use, etc., of real estate, and further proof that the defendant is a member of a race ineligible to citizenship under the naturalization laws of the United States, such proof shall create a prima facie presumption of ineligibility to citizenship of such defendant. Section 1983 of the Code of Civil Procedure, as added in 1927, so far as this case is concerned, is substantially the same as section 9b of the Alien Land Law as amended in 1927. Based upon

the provisions of section 9a of the Alien Land Law above referred to, the trial court gave to the jury, at the request of the plaintiff, instructions numbered 10 and 17. These instructions are as follows:

"Plaintiff's Instruction No. 10.

"It is alleged in the indictment that the defendant Osaki is an alien ineligible to citizenship and that pursuant to the conspiracy alleged in the indictment did acquire, possess, enjoy, use, cultivate and occupy real property described therein and an interest therein, in a manner and to an extent otherwise and for purposes otherwise than prescribed by any treaty existing between the nation and country of which said alien is a citizen and subject.

"I therefore instruct you that if and when the people have established that the defendants did conspire to so acquire, possess, enjoy, use, cultivate and occupy such real property, then the burden is upon the defendants to establish the fact that the defendant Osaki was a citizen of the United States, or a person eligible to become a citizen of the United States."

"Plaintiff's Instruction No. 17.

"The burden of proof is upon the prosecution. In this case, however, under the pleadings, the prosecution is not required to prove that the defendant Osaki is eligible to citizenship in the United States. But on the contrary that burden is upon the defendants. And if the defendants have failed to show that he is a citizen or is eligible to become a citizen, then you will find that he is not a citizen and is ineligible to become one."

The appellants insist that the sections of the Alien Land Law upon which the foregoing instructions were based are violative of sections 10, 13, and 16 of article 1 of the Constitution of the state of California, and also violative of the Fourteenth Amendment of the Constitution of the United States.

[1] In every prosecution of the kind with which we are dealing, there are three elements to be established; i. e., first, the defendant must be an alien; second, the defendant must be an alien ineligible to citizenship under the naturalization laws of the United States; and, third, the acquisition and use of the character of real estate prohibited by the Alien Land Law. That alienage is an essential element or ingredient of the offense, such as is charged in the indictment before us, is established beyond controversy by the decision of the Supreme Court in the case of *People v. Quarez*, 196 Cal. 404, 238 P. 363. The mere occupancy of land by a Japanese, as shown by the reasoning in the *Quarez* Case, constitutes no offense. In that case the charge was that of carrying a concealed weapon by an alien, where the court held, as we have said, the fact of alienage was an essential element of the offense, and, unless

established, no crime was proven. Or, to use the language quoted in the *Quarez* Case: "It follows that it is as necessary to the proof of a violation of the statute that the defendant be shown to belong to the proscribed class as it is that he committed the forbidden act. This fact being one essential element of the crime, it constitutes a part of the corpus delicti and must be proved as such. The corpus delicti consists of the elements of the crime." And, as further said in the same opinion, the rule of convenience which excuses the prosecution from proving a negative does not apply when the fact constituting the negative is a part of the corpus delicti. Or, to use the language found in 8 R. C. L. 172: "As a general rule, when the offense is grounded on a negative, or when that negative is an essential element of the crime, the burden is on the state to prove it, for in criminal cases the law requires that the state shall prove all the essential facts entering into the description of the crime," etc. We think it unnecessary to cite authorities to support the maxim "that the burden of proof never shifts from the prosecution to prove all the facts necessary to establish the crime charged," and, where the necessary facts are not proven, there can be no burden to shift. The sections of the Alien Land Law under consideration bear no resemblance to the cases founded upon exceptions in laws regulating the sale of intoxicating liquors and other like injurious substances. Such laws make it a crime for any one to sell the prohibited substance, and then contain an exception clause permitting one to sell under a prescribed license. In such instances the corpus delicti is established when the proof of sale is introduced. Here, proof of the leasing of land by a Japanese in and of itself establishes no offense whatever.

[2] We have been cited to no authorities supporting the principle sought to be injected into the Alien Land Law by the two sections under consideration, that a charge in an indictment or information takes the place of proof. That such an act is an attempt to deny to a certain class of persons the due process of law accorded by section 13 of article 1 of the State Constitution and the Fourteenth Amendment to the Constitution of the United States seems to us incontrovertible. Section 1981 of the Code of Civil Procedure places the burden of proof upon the party holding the affirmative of an issue, and upon the party who would be defeated, if no evidence were given on either side. Such is the rule as to all other cases. To deny the application of that principle of law in cases such as the one at bar would be to violate the constitutional guaranties as to due process and equal protection.

[3, 4] As to section 9b of the Alien Land Law as enacted in 1927, little need be said in addition to what we have already set forth. The law is well settled that there must be a rational connection between the fact proven

and the fact presumed, and, unless such is the case, that portion of section 9b relative to establishing the presumption of ineligibility to citizenship is void. That there is no such rational connection between proof that one of the defendants in this case is ineligible to citizenship by reason of being a member of the Japanese race is shown by the fact that his codefendant, K. Yoshioka, also a Japanese, is an American citizen. We need only to call attention to what is common knowledge to everyone familiar with everyday facts, that there are hundreds of Japanese in the United States who are now citizens, and this by reason of the constitutional provision that all persons born, etc., in the United States, and subject to the jurisdiction thereof, are citizens. While the respective parties have cited a considerable number of authorities touching upon the questions here considered, we think what we have stated is so obvious that citation of other cases is unnecessary. Attention, however, may be called to the fact that in *Cockrill v. People of California*, 268 U. S. 258, 45 S. Ct. 490, 69 L. Ed. 944; *People v. Cockrill*, 62 Cal. App. 22, 216 P. 78, chiefly relied upon by the respondent to sustain section 9b, supra, alienage was not involved. The *Cockrill* Case turned upon the presumption that one who pays the purchase price for land without anything further appearing may reasonably be held to have a beneficial interest therein. This presumption, as a principle of law, has been adhered to almost from time immemorial. It is founded upon the experience of mankind that ordinarily one does not pay the purchase price for a tract of land, unless he is intending to acquire an interest therein. We may further add that none of the cases cited depart from the rule above stated that there must be a reasonable and rational connection between the fact proved and the fact presumed. There can be no arbitrary application of the principle here involved.

Appellants' brief calls our attention to the fact that there are now over 20,000 Japanese born in the United States, and within the confines of this country. All of these people are spoken of as "Japanese," which again demonstrates that to presume from such a statement that they are ineligible to citizenship is an arbitrary conclusion, and directly contrary to the facts.

[5] Appellants call our attention to the fact that not one word of testimony was introduced by the prosecution to prove the nationality of Osaki, or to prove that he was ineligible to citizenship. We have searched the record from cover to cover, and fail to find any testimony in relation thereto. All that does appear is contained in three isolated references brought out on cross-examination, which do not refer to nationality or citizenship. We set them forth: "Q. You knew, of course, he was a Japanese when you did so?

A. Yes, I knew he was a Japanese. Q. (Cross-examination of another witness): Is Osaki the only Japanese you saw there at that time? A. No, I saw a number of Japanese there, but he is the only one I talked to." And in the cross-examination of another witness, this question and answer appears: "Q. Did you see any other Japanese except Osaki there at the time? A. No." Upon these questions and answers the respondent rests its case so far as the proof is concerned, in supplying the necessary testimony to prove the corpus delicti of the crime charged. Appellants reply that the common expression of "Japanese" proves absolutely nothing as to whether the person referred to is or is not a citizen of the United States or a person eligible to citizenship. And in this particular we are reminded that without exception the average person will speak of the foreign-born and the native-born Japanese in the same manner. They are all denominated "Japanese"; and for a witness to state that he talked to a "Japanese" means absolutely nothing more than that whether foreign-born or native-born, he calls him a "Japanese."

We do not need to cite the cases referred to by appellants wherein native-born Chinese and Japanese are spoken of as "Chinese and Japanese" by our own courts and, as well, by the courts of the United States. It is such a common expression that the statement of the fact is all that is necessary to carry conviction of its truth.

[6] Respondent further relies upon instruction No. 21 given by the trial court to the jury at the request of appellants, and argues that, in the request for such instruction, the appellants admitted all that was necessary to supply the lack of proof as to the corpus delicti in the first instance. If the respondent's construction is correct as to instruction No. 21, then the trial court directly and explicitly violated section 19 of article 6 of the Constitution, which forbids a trial court from charging a jury as to a matter of fact, much less assuming and stating as a fact something which nowhere appears in the testimony. The instruction referred to is as follows:

"Before you can find either of the defendants in this action guilty of a conspiracy to violate the Alien Land Law, under any of the counts named in the indictment, it must appear from the evidence beyond a reasonable doubt, and to a moral certainty, that some agreement was made or some understanding had by and between the defendant Yoshioka, who is admitted to be an American citizen, and the defendant Osaki, who is an alien ineligible to citizenship, under and by which they conspired together to secure leases of agricultural or farming land and property, or an interest therein, to the end that the defendant Osaki might acquire, control, possess and enjoy some interest in the agricultural lands mentioned in the indictment and unless

you find from the evidence that such an agreement was made or such an understanding existed between them, you should find each of the defendants not guilty."

While upon first reading it would seem that the trial court did apparently assume, as a fact, and instruct the jury as a fact, that Osaki was an alien ineligible to citizenship, we think, upon further consideration, that the court did not intend to do so, and that the purpose of the request was not to induce the court so to do. The purpose of the instruction and the intent which we gather from it was to inform the jury that they must be satisfied from the evidence, beyond a reasonable doubt and to a moral certainty, that there was some agreement between Yoshioka and Osaki, an alien ineligible to citizenship, to secure leases, etc.; that it was necessary to be satisfied beyond a reasonable doubt that Osaki was an alien ineligible to citizenship; and that the agreement between them was for the purpose of securing the beneficial use of land to Osaki as an alien ineligible to citizenship. That this construction is correct is borne out by other instructions given by the trial court to the jury. As an illustration, we may cite the concluding words of instruction No. 12. After reciting certain facts necessary to constitute the offense charged, the court said: "Then they are guilty of a conspiracy to violate the Alien Land Law as charged in each and all the counts of the indictment in regard to which you make such finding, provided you find that Osaki is not a citizen."

[7] Finally, respondent insists that, under section 4½ of article 6 of the Constitution, the order and judgment of the trial court should be upheld. No case has been called to our attention where this provision of the Constitution has been held to apply where a defendant has been denied a fundamental right. On the contrary, it has been explicitly held that section 4½ of article 6 of the Constitution does not apply where a defendant has been denied a fundamental right. *People v. Carmichael*, 198 Cal. 534, 246 P. 62; *People v. Wismer*, 58 Cal. App. 679, 209 P. 259; *People v. O'Connor*, 81 Cal. App. 506, 254 P. 630.

It is apparent from what we have said that it is not a question of error on the part of the trial court in the admission of evidence, or as to a matter of pleading, but a case where the jury is told that a defendant can be convicted where the prosecution has failed to prove the corpus delicti of the offense charged, unless the defendant establishes his innocence. Any such construction of section 4½ of article 6 of the Constitution of this state would render it violative of the Fourteenth Amendment of the Constitution of the United States as a denial of due process of law; that is, convicting a defendant upon a mere charge contained in the information or indictment, and thus denying such defend-

ant the due process of law guaranteed to him.

The order and judgment of the trial court are reversed, and the cause remanded for further proceedings.

We concur: FINCH, P. J.; THOMPSON, J.

99 Cal. App. 327

HANSON et al. v. CHOYNSKI et al.*
(Civ. 6471.)

District Court of Appeal, First District, Division 2, California. June 7, 1929.

Rehearing Denied June 28, 1929. Hearing Denied by Supreme Court Aug. 5, 1929.

1. Corporations Ⓒ619—Evidence in suit against alleged trustees of defunct corporation sustained finding that defendant was not director (St. 1907, p. 746, § 10a).

In suit to impress trust upon sum claimed to have been received by defendants as directors of defunct corporation, dissolved for nonpayment of license taxes under St. 1907, p. 746, § 10a, evidence held sufficient to support finding of trial court that defendant acting as dummy director at time of organization of company and in whose place another was elected, was not a director of the corporation at time of its dissolution, and therefore not liable as trustee.

2. Estoppel Ⓒ110—Defendants were not estopped to deny status as directors of defunct corporation, where issue was not pleaded and injury to creditors not claimed.

In suit by creditors to hold defendants as trustees of corporation on ground that they were directors at time corporation's charter was forfeited, no question of estoppel arose, where that issue was not pleaded and no injury to creditors was claimed to have resulted from defendants' conduct.

3. Corporations Ⓒ619—Defendant did not by holding himself out as trustee of defunct corporation become liable as de facto trustee, where there was full quota of de jure directors.

Fact that one who acted as dummy director for corporation at time of its organization held himself out in certain transactions with creditors as director or trustee of defunct corporation did not render him a de facto trustee within statute making directors or managers in office trustees of defunct corporation, where at time of dissolution and at other times in issue full number of directors were actually "directors in office."

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Suit by E. J. Hanson and others against Herbert Choynski and others, as trustees for Olson's Market, Inc., a defunct corporation. Judgment for defendants, and plaintiffs appeal. Affirmed.

Vogelsang & Brown and Bert Schlesinger, all of San Francisco, for appellants.

I. M. Golden and Sidney Rhein, both of San Francisco, for respondents.

NOURSE, J. Plaintiffs sued the defendants to impress a trust upon the sum of \$1,598 alleged to have been received and held by them as trustees under the claim that they were the directors of Olson's Market, Inc., at the time of its dissolution as a corporation for nonpayment of license taxes under the provisions of section 10a of the act of 1907 (Stats. 1907, p. 746). The defendant Olson was not served with process, and no proceedings were had against him. The cause was tried before the court and resulted in a judgment for the two other defendants. The plaintiffs have appealed on typewritten transcripts. It is obvious that no case was made against the defendant Hawkinson, and he does not appear on this appeal.

[1] The gravamen of the case on appeal is whether the respondent Choynski was a director of the corporation at the time of its dissolution by forfeiture of its charter on November 30, 1907. The cause was tried before with this respondent as the sole defendant. It resulted in a judgment in his favor which was reversed on appeal. *Hanson v. Choynski*, 180 Cal. 275, 180 P. 816. The complaint was amended, bringing in the other defendants and alleging that the three were the "duly elected, qualified and acting directors and trustees in office of said corporation" at the time of its dissolution. On the second trial it was found that the respondent Choynski had not been a director of said corporation since 1905.

The evidence had at the second trial is that the respondent merely acted as a "dummy" director at the time of the organization of the company in 1905, but that another had been elected in his stead and the respondent had not served or acted as such at any time thereafter. Appellants now concede that material evidence first introduced at the second trial supports the finding that respondent was not a "de jure" director at the time of dissolution, but they argue that the trial court should have found that he was a "de facto" director because of certain acts which they endeavored to prove. Briefly, the position of appellants is that the original articles of incorporation named respondent as one of the three directors, and that the creditors were

entitled to presume that he continued as such; that respondent was present at one or two meetings of the board; that he held himself out as a director in dealing with some of the creditors; and that, in a certificate to a copy of a resolution of the board, dated September 25, 1907, respondent was noted as one of the three then acting directors. In support of the finding respondent points to positive testimony that he held no share of stock in the corporation, attended the first meeting of directors for organization only, had another elected as a director in his stead, and that the recitation in the certificate erroneously included his name for that of his brother, E. W. Choynski. Under this state of the record it must be clear that the trial court had evidence before it supporting the finding, and this closes the question on appeal.

[2, 3] The argument is made that, notwithstanding this situation, the respondent must be held to be a trustee "de facto" because he permitted himself to be held out as such in certain transactions with the creditors of the corporation. No question of estoppel arises, as that issue was not pleaded, and no injury to the creditors is claimed to have resulted, but assuming the facts relied on by appellants to have been proved, and disregarding the question of conflict in the evidence, we are convinced that appellants can get no comfort from the situation. The statute under which appellants sue declares that the "directors or managers in office" are deemed to be trustees upon dissolution of the corporation. The undisputed evidence here disclosed that three other persons were the "de jure" and acting directors of the corporation at the times in issue. By the terms of the statute these three persons became statutory trustees of the corporation and stockholders and, as such, were the legal owners of the corporate assets. Manifestly, an outsider could not substitute himself as such trustee by any act of his own when the full number of the directors were actually "directors in office" at the time of dissolution. Thus the statute itself expressly precludes the claim that the respondent, by any act of his own, could have become a "statutory trustee."

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

98 Cal. App. 645

SALSBERY v. JULIAN. (Civ. 6216.)

District Court of Appeal, Second District, Division 1, California. May 28, 1929.

Judgment ⇨161—Action for conversion should not be decided on defects in answer averring that defendant never claimed ownership or control except as trustee.

Action for conversion of corporate stock should be decided on merits, rather than on alleged defects in defendant's deposition and answer, insufficiency of which was first raised on appeal, where it averred that defendant never claimed ownership of stock, nor right to control or hold it, except under trust agreement with plaintiff and others.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by John Salsberry against C. C. Julian. From an order setting aside a default judgment, plaintiff appeals. Former opinion (277 P. 518) amended, and order affirmed.

Culbert L. Olson, of Los Angeles, for appellant.

David H. Cannon, of Los Angeles, for respondent.

PER CURIAM. On petition for rehearing.

It is ordered that the opinion filed in this case on May 3, 1929, be amended so as to read as follows:

Appeal from an order setting aside a default judgment rendered and entered in favor of the plaintiff and against the defendant. Substantially the same questions are raised on this appeal as are raised in *Salsberry v. Julian* (2d Civ. No. 6215) 277 P. 516, and for the reasons stated therein and in this opinion, the order setting aside the judgment is affirmed.

In this case appellant further contends that the answer and deposition of defendant do not show a meritorious defense in this respect, that the alleged trust was invalid by reason of uncertainty. This is an action for the conversion of corporate stock. The answer specifically denies that plaintiff made demand for the stock as alleged in the complaint and denies that defendant has wrongfully deprived the plaintiff of any of the stock of plaintiff, and denies that defendant converted any of plaintiff's stock. By way of affirmative defense, the answer alleges that the defendant is holding the said stock belonging to the plaintiff as one of the trustees under the terms of a certain agreement made and entered into between the plaintiff, the defendant, Jacob Berger, and Edward Staunton, wherein it was agreed that said parties would pool their stock with a trustee until such time as it was agreed between said parties that said stock might be released from said pool; that Edward Staunton and the de-

fendant were, with the consent and at the request and suggestion of plaintiff, appointed trustees to hold the said stock until such time as said parties should unanimously agree to release said stock from the custody of the trustees to the respective owners thereof. The answer further avers: "That the defendant has never, nor does he now claim, the ownership of the 205,000 shares of stock so deposited, as aforesaid, by the plaintiff with the defendant; nor has the defendant in the past nor does he now claim the right to control or hold said stock except under and by virtue of the agreement heretofore entered into between the plaintiff, the defendant, Jacob Berger and Edward Staunton." Appellant contends that where the answer and the deposition of defendant establishes the fact that defendant has not a meritorious defense to the action and acknowledges an invalid trust as an excuse for the conversion complained of, and where the amount of the judgment is shown to be correct, even if a satisfactory showing of excusable neglect has been made, this court should reverse the action of the trial court in setting aside the default judgment. The insufficiency of the answer is raised for the first time on appeal. In view of all the circumstances in this case, including the fact that the answer avers that defendant has never claimed the ownership of said stock nor the right to control or hold said stock, except under and by virtue of said agreement, we think the case should be decided upon the merits rather than upon the alleged defects in the answer and the deposition of defendant.

The petition for rehearing is denied.

99 Cal. App. 223

BROWN v. DE WARD & SONS et al.
(Civ. 5394.)

District Court of Appeal, Second District, Division 2, California. May 29, 1929.

1. Appeal and error ⇨1024(4) — Refusal to vacate judgment on conflicting affidavits as to stipulation permitting delay in filing answer held conclusive.

Decision of trial court denying motion to vacate judgment *held* final, where there was a direct conflict in affidavits concerning existence of stipulation permitting postponement of filing of demurrer or answer until after hearing motion for change of venue.

2. Appeal and error ⇨935(1) — On appeal from order refusing to vacate judgment, it must be presumed trial court found stipulation for delay concerning which affidavits were conflicting did not exist.

On appeal from order denying motion to vacate judgment, it must be presumed that trial court found stipulation postponing time for demurrer or answer, which was contested and on

which defendant based claim for relief, never existed.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Action by J. L. Brown against De Ward & Sons and others. From an order denying defendants' motion to vacate a default judgment in plaintiff's favor, defendants appeal. Affirmed.

Crouch & Sanders, of San Diego, for appellants.

Le Roy B. Lorenz, of San Bernardino, for respondent.

CRAIG, J. This appeal is one from an order denying a motion to vacate a default judgment. The motion was supported by affidavits claiming an oral telephonic stipulation between counsel to the effect that no demurrer or answer need be filed pending the hearing of a motion for change of venue to be made by the defendants; that notwithstanding such stipulation and before hearing upon the last-named motion, plaintiff's attorney caused default to be entered. A counter affidavit was filed, in which plaintiff's attorney denied having made any stipulation other than that defendants have two days and until the end of that week in which to serve and file their answer. The affidavits of defendants further recite certain facts concerning the conduct of counsel for the plaintiff, to the effect that on the day after default had been taken and on the day the hearing of the motion for change of venue was to be heard, counsel for both sides appeared in open court and agreed that the hearing upon said motion be continued until the following day, no reference being made by plaintiff's attorney to the fact that he had entered the default. This and another alleged incident of the same character could only be considered as corroborative of the defendants' affidavits to the effect that the stipulation claimed by them was actually made.

[1, 2] We have, then, a direct conflict concerning the stipulation. The situation is such that the decision of the trial court will be upheld, even though if the matter were one presented de novo here we might be inclined to rule otherwise. The action of the superior court, and its decision as to which affidavits contained the truth, are conclusive. *Patterson v. Keeney*, 165 Cal. 465, 132 P. 1043, Ann. Cas. 1914D, 232.

We find nothing in the decisions cited by appellants which is in conflict with this well-recognized principle. In nearly all of the cases to which reference is made in their brief, an oral stipulation was conceded or found by the court to have existed. In none of them where an order denying a motion to set aside a default was refused and the judgment set aside does it appear that there was

any finding against the existence of a stipulation upon which the moving party relied. The only case, in which the language employed might seem at all inharmonious with the general rule that the decision of the trial court on disputed matters of fact is conclusive, is *Savings Bank of Santa Rosa v. Schell*, 142 Cal. 505, 76 P. 250. However, a careful examination of that decision discloses that it was found below that the parties against whom the default was taken had requested a third party, an attorney, to procure an extension of time from the plaintiff's counsel. The go-between attorney reported to defendant's counsel that he had secured the extension of time. Under these circumstances the Supreme Court ruled that the default should have been granted, because it was clear that the defendant's counsel had reason to believe and did believe that the stipulation extending time had been given. In the case at bar it must be presumed from the fact that the lower court denied the motion that it found the nonexistence of a stipulation, and if so there was no ground for the defendants' attorney to have been misled or to have had reason to believe that he was protected thereby.

The order is affirmed.

We concur: **WORKS, P. J.; IRA F. THOMPSON, J.**

99 Cal. App. 224

PEOPLE v. MARSHALL. (Cr. 1779.)

District Court of Appeal, Second District, Division 2, California. May 29, 1929.

1. Criminal law ⇨300—Evidence of insanity is inadmissible on plea of not guilty (Pen. Code, § 1019; § 1016, as amended by St. 1927, p. 1148, § 1; § 1020 as amended by St. 1927, p. 1149, § 3; § 1026, as added by St. 1927, p. 1149, § 4).

Evidence of insanity is not admissible on plea of not guilty, since question of insanity is not then in issue under Pen. Code, § 1019; § 1016, as amended by St. 1927, p. 1148, § 1; § 1020, as amended by St. 1927, p. 1149, § 3; § 1026, as added by St. 1927, p. 1149, § 4.

2. Criminal law ⇨623—Where trial of defendant's sanity is severed from trial on plea of not guilty, court must take evidence of sanity before pronouncing sentence (Pen. Code, § 1019; § 1016, as amended by St. 1927, p. 1148, § 1; § 1020, as amended by St. 1927, p. 1149, § 3; § 1026, as added by St. 1927, p. 1149, § 4).

Where trial on issue of defendant's sanity is severed from that presented by plea of not guilty under Pen. Code, § 1019; § 1016, as amended by St. 1927, p. 1148, § 1; § 1020, as amended by St. 1927, p. 1149, § 3; § 1026, as added by St. 1927, p. 1149, § 4, court may not pronounce sentence without taking evidence on issue of sanity.

3. Criminal law ⚡623—Defendant's failure to refer to separate plea of insanity at trial, or to object to dismissal of jury, or imposition of sentence, did not permit trial court to sentence him without jury trial on insanity (Pen. Code, § 1019; § 1016, as amended by St. 1927, p. 1148, § 1; § 1020 as amended by St. 1927, p. 1149, § 3; § 1026, as added by St. 1927, p. 1149, § 4).

Trial court *held* without jurisdiction to sentence defendant, without jury trial on issue of insanity, as presented by separate plea of insanity, under Pen. Code, § 1019; § 1016, as amended by St. 1927, p. 1148, § 1; § 1020, as amended by St. 1927, p. 1149, § 3; § 1023, as added by St. 1927, p. 1149, § 4, though defendant throughout trial made no reference to remaining plea, and made no objection to dismissal of jury or continuance of date of sentence, and did not object to sentence.

4. Criminal law ⚡48—Insanity is complete defense to criminal charge.

Insanity is complete defense to criminal charge, and act committed by insane person, though otherwise unlawful, is not criminal.

5. Criminal law ⚡599—Correction of typographical error in information by amendment changing date from 1928 to 1927 was not prejudicial error, where no continuance was requested on that ground (Pen. Code, § 1008, as amended by St. 1927, p. 1040).

Where information filed on September 7, 1928, erroneously charged commission of offense as of November 22, 1928, instead of 1927, correction of typographical error by amendment to make date 1927 *held* not prejudicial error, under Pen. Code, § 1008, as amended by St. 1927, p. 1040, permitting information to be amended at any stage of proceedings, unless substantial rights of defendant are prejudiced, where no continuance was requested.

6. Criminal law ⚡713—District attorney's argument accounting for absence of check apparently mentioned in argument for defendant did not involve misconduct.

District attorney's argument accounting for absence of certain check, apparently mentioned in argument for defendant, *held* not to amount to misconduct warranting reversal.

7. Criminal law ⚡855(7)—Bailiff's indication to jurors, when asked, of place where they would be quartered in event of disagreement, and permitting another ballot before retiring, *held* not coercion to obtain conviction.

Where bailiff, when asked, merely indicated to jury place where they would be quartered for the night, in event of disagreement, and later told jury, upon request from juror, they had time for one more ballot before retiring, there was no exercise of coercion to obtain conviction such as would justify reversal.

Appeal from Superior Court, San Diego County; Eugene Daney, Jr., Judge.

J. W. Marshall was convicted of grand theft, and he appeals. Reversed and remanded.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

CRAIG, J. By information of the district attorney of San Diego county, appellant was charged with having committed the crime of grand theft, in that he unlawfully and feloniously took from one U. L. Voris personal property consisting of \$550, lawful money of the United States, and it was therein further charged that he had twice previously been convicted of a felony. He pleaded not guilty of grand theft, and not guilty thereof by reason of insanity, and denied the two prior convictions, though the latter were thereafter admitted, and, after a trial by jury, he was found guilty of grand theft as charged. Thereupon the jury were discharged, and three days later, and on January 17, 1929, the date fixed by the court for pronouncing sentence, a motion for a new trial was presented, which, on motion of the defendant, was set for hearing on January 19th. On the date last mentioned the hearing upon said motion was again continued until January 26th, at which time it was denied, and the defendant was sentenced to the state prison for the term prescribed by law, and remanded to the custody of the sheriff. The principal grounds of appeal are errors alleged to have occurred during the trial, and that he was not duly convicted of the crime charged against him.

It is first urged as a ground for reversal that the trial court had no authority to sentence the defendant without a jury trial upon the issue of sanity, as presented by his separate plea, under the provisions of section 1016 et seq. of the Penal Code. It is contended on the part of the people that appellant is not in a position to advance objection, because throughout the trial he made no reference to the remaining plea, and made no objection to the dismissal of the jury, or the continuance of the date of sentence, and that he did not attempt to show any cause why judgment should not be pronounced, other than to present a motion for new trial, and that, when sentenced, he made no objection thereto. The Penal Code provides five kinds of pleas to an indictment or information, including "not guilty," and "not guilty by reason of insanity." If the defendant does not plead guilty, he may enter these two simultaneously or either separately. The plea of not guilty puts in issue every material allegation of the people's pleading, and upon such plea matters pertaining to a defense other than a former judgment of guilt or acquittal, once in jeopardy, and insanity, may be given in evidence. Pen. Code, §§ 1016 (as amended by St. 1927, p. 1148, § 1), 1019, 1020 (as amended by St. 1927, p. 1149, § 3). Section 1026 (as added by St. 1927, p. 1149, § 4) further provides:

"When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, * * * then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried. * * * In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law. If the verdict * * * be that the defendant was insane at the time the offense was committed, the court unless it shall appear to the court that the defendant has fully recovered his sanity shall direct that the defendant be confined in the state hospital for the criminal insane; * * * if, however, it shall appear to the court that the defendant has fully recovered his sanity such defendant shall be remanded to the custody of the sheriff until his sanity shall have been finally determined in the manner prescribed by law. * * *"

Hence, in the event of dual pleas, followed by a conviction, the nature of the judgment is wholly dependent upon the verdict or finding of the jury as to the sanity of the accused. If found to have been sane when the offense was committed, sentence shall be pronounced as though no plea of insanity had been interposed. If the verdict or finding be that he was insane when he committed the offense, the court shall direct that he be confined in a state hospital, or remand him to the custody of the sheriff for further appropriate proceedings, accordingly as it shall judicially determine from his present condition at the time of trial.

[1, 2] Upon the plea of not guilty, no evidence of insanity is admissible. The question of insanity is not then in issue. *People v. Leong Fook* (Cal. Sup.) 273 P. 779. Where a trial upon the issue of sanity is severed from that presented upon a plea of not guilty, to pronounce sentence without taking evidence upon the former would be as clearly without the jurisdiction of the court as if, before any evidence had been introduced at the time of hearing upon the latter, the proceeding were to be abruptly halted and sentence imposed.

[3, 4] The fact that the defendant did not object to such a proceeding would no more confer jurisdiction in one instance than in the other. Besides, it must be borne in mind that it is the policy of the law to safeguard the interests of the insane, and to that end to require the ascertainment of the fact that a person charged with crime was sane at the

time of its commission. Where that issue is raised, before any penalty which might be imposed for a violation of the law can be so imposed, it is inconsistent with such a policy and with such principle that one whose sanity is in question can be held to have waived the right to have that issue tried and determined by failure to object to any action or proceeding until his sanity shall have been determined, and while that issue is still pending. It must be borne in mind that insanity is a complete defense to a criminal charge; that an act committed by an insane person, though otherwise unlawful, is not criminal; and that the law regards such a person as innocent even though he may otherwise have transgressed in a most serious manner. If insane, even though he be convicted, he may by proof of insanity thus establish his innocence. We think it is clearly the intent of the Legislature in enacting section 1026 of the Penal Code to require a trial upon the issue of insanity either jointly with that upon the plea of not guilty, where both are interposed, or by separate hearings upon each issue, but which jointly constitute but one trial. Where a plea of insanity is interposed as well as one of not guilty, notwithstanding a verdict of guilty upon the issue presented by the latter plea, until it shall have been determined that at the time of the commission of the offense the defendant was sane, the verdict is not complete, nor is he found guilty for all purposes, but only upon condition that it be further decided that he was sane.

The ruling in *People v. Strickler*, 167 Cal. 627, 140 P. 270, argued in both briefs, is easily distinguishable from this one. It appeared that the defendant pleaded guilty after a former plea of not guilty, previous acquittal, and once in jeopardy, and asked for probation. It was not there denied that the defendant was possessed of his normal faculties, and it was expressly held that by petitioning for a conditional liberty he waived the special pleas.

[5] It is next contended that the court erred in permitting the correction of a typographical error in the information by amendment. Although the information was filed on September 7, 1928, it erroneously charged the commission of the offense as of "the 22nd day of November, A. D., nineteen hundred and twenty-eight." The "eight" was stricken out, and the word "seven" substituted therefor, after the jury were sworn, and before any evidence had been offered. Section 1008 of the Penal Code (as amended by St. 1927, p. 1040) provides that an information may be amended at any stage of the proceedings, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable continuance may be granted. No continuance was requested by appellant upon that ground, nor do we think the slight alteration under the circumstances in any manner prejudiced the rights of the defendant.

[6, 7] The only remaining points presented consist of argument that the information insufficiently stated the offense attempted to be charged; that the district attorney was guilty of misconduct; and that the deputy sheriff in charge of the jury used coercion to obtain a conviction. There is no merit in either of these assertions. The sufficiency of the pleading was not questioned by demurrer, and in that regard the argument presented only goes to its certainty. The district attorney merely accounted for the absence of a certain check apparently mentioned in argument for the defendant, and the bailiff did no more than indicate to the jury, when asked, the place where they would be quartered for the night, in the event of a disagreement, and later, upon request of an unknown member of the jury that they be permitted to do so, told them that they had time for one more ballot before retiring. In this latter respect, it is stated that the jury stood eleven to one until the ballot last mentioned, whereupon a unanimous verdict of guilty was voted. The bailiff testified however, that he "merely sanctioned whatever they wanted to do," and that there was no other conversation.

The judgment is reversed, and the case remanded for trial upon the issue presented by the special plea.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

HAMMOND LUMBER CO. v. RICHARDSON BUILDING & ENGINEERING CO., Inc., et al. (Civ. 3782.)★

District Court of Appeal, Third District, California. May 23, 1929.

Rehearing Granted June 26, 1929.

1. Mechanics' liens §317—Finding that note extending time of payment was delivered to plaintiff held sustained in action on contractor's bond.

In action on contractor's bond in which defense of sureties was that time of payment had been extended by giving of note and securities therefor, finding of trial court that note and securities were delivered held sustained by evidence, where plaintiff was unable to explain what became of note and securities, and witness testified that they had not been returned.

2. Principal and surety §104(1)—Surety is released, where creditor grants extension of time to debtor without surety's consent.

Where creditor grants debtor extension of time without surety's consent, surety is released.

3. Mechanics' liens §315—Sureties on contractor's bond held released by materialman's extension of time to contractor by acceptance of note and securities without consent of sureties (Code Civ. Proc. § 1183).

Materialman's extension of time to contractor for payment of book account for materials by taking note payable in 90 days with list of securities held to release sureties on contractor's bond given for payment of labor and materials under Code Civ. Proc. § 1183, where sureties did not consent to change in terms of contract.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by the Hammond Lumber Company against the Richardson Building & Engineering Company, Incorporated, and others. From a judgment denying plaintiff relief against the sureties, plaintiff appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant. Stephens & Stephens and G. C. DeGarmo, all of Los Angeles, for respondents.

FINCH, P. J. This action was brought to recover on a contractor's bond, given pursuant to the provisions of section 1183 of the Code of Civil Procedure, for materials furnished by the plaintiff to the defendant Richardson Building & Engineering Company, the contractor. The plaintiff was given judgment against the contractor, but was denied any relief against the sureties on the bond. The plaintiff has appealed from the judgment. The only defense of the sureties which need be considered is stated in the findings of the court, as follows:

"That on the 26th day of December, 1923, said defendant Richardson Building and Engineering Co. Inc., as contractor, was indebted to said plaintiff for and on account of building materials furnished by said plaintiff to said Richardson Building and Engineering Co. Inc., for use in various buildings theretofore constructed by said contractor, including the materials furnished by said plaintiff for use in the building described in plaintiff's complaint; that to evidence said entire indebtedness said Richardson Building and Engineering Co. Inc., did on the 26th day of December, 1923, execute to said plaintiff and said plaintiff did accept and receive from said Richardson Building and Engineering Co. Inc., a promissory note for the sum of \$23,192.82 payable on or before 90 days after date thereof, with interest at the rate of seven per cent per annum; and said note by its terms provided that the execution and acceptance of said note constituted evidence of said debt as a stated account.

"That said note was secured by the assignment to said plaintiff of certain securities belonging to said contractor; and since said time said note and securities have been and

are now retained by and are in the possession of said plaintiff.

"That prior to the 26th day of December, 1923, the indebtedness referred to in plaintiff's complaint and sued on in this action was an ordinary book account and the same was and had been payable on or before the 28th day of September, 1923; that subsequent to the execution of said note there was a novation of indebtedness sued on herein and said book account was closed, discharged and liquidated and the same was, subsequent to the 26th day of December, 1923, merged into and became and was an account stated, which account stated included debts other than the one herein sued on.

"That at the time of the execution of said note, it was agreed between said plaintiff and said contractor that five per cent should be added to said book account of \$4,756.03, making a total of \$5,003.40, as alleged in plaintiff's complaint, and said sum of \$5,003.40 became and was made a part of said promissory note hereinbefore referred to and described.

"That the extension of time given by said plaintiff to said contractor for the payment of said original debt, under and by virtue of the execution of said note, and the substitution of said new account for said original book account, as aforesaid, were given and made by the parties thereto, without the knowledge or consent of the defendant sureties, or either of them; that said defendant sureties did not at any time assume, promise or agree to pay said account stated or said note or any part thereof."

Appellant contends that neither the promissory note nor the securities referred to in the findings were ever delivered or accepted. The evidence shows that the promissory note was duly signed and given into the possession of the plaintiff. The note recites: "This note is secured by the collateral listed below." Below the signatures to the note is enumerated a list of securities, consisting of the capital stocks of two corporations, with the statement that they were pledged to the plaintiff as collateral security for the payment of the note, and authorizing the sale thereof upon default in payment of the note. This statement is also signed by the defendant corporation. Certificates of the pledged capital stock of one corporation were delivered with the note. The stock in the other corporation had not been issued. Burt Richardson, who is the owner of the defendant corporation, had entered into an agreement to purchase such stock in the other corporation and had been given a receipt for the amount paid therefor, stating that the stock would be delivered to him when issued under authority of the corporation commissioner. He indorsed on the receipt and signed an agreement to deliver the stock to the plaintiff "when, and only when, permission has been

received from the corporation commissioner." He then delivered the receipt to the plaintiff as a part of the pledge to secure payment of the note.

[1] Witnesses for the plaintiff testified that the note and pledge were taken subject to the approval of the plaintiff. One of these witnesses testified: "I told him (Richardson) that it (the note) was not accepted, and that we would merely hold it pending such time as the security could be put in proper shape." This testimony, however, was denied by witnesses for the defendant, who testified that the note and the securities were delivered and accepted unconditionally. The note was given December 26, 1923, and the complaint herein was not filed until May 6, 1925. At the trial the plaintiff was unable to give any satisfactory explanation of what had become of the note and the securities, and Richardson testified that they had never been returned to him. The finding of the court that the note and the securities were delivered, therefore, is fully supported by the evidence. Whether or not the attempted pledge of the capital stock which had not been issued was of any validity appears to be immaterial as between the plaintiff and the sureties. The promissory note recites: "This note is not given or accepted as payment of said amount due said payee, but as evidence of said debt as a stated account only, and neither the giving or accepting of this note, with or without security, shall be held to waive payee's right to enforce any mechanic's lien or other lien, to which it would otherwise be entitled."

[2, 3] Whatever may be the effect of this provision, it in no manner affects the other provision of the note which fixed the time of payment of the indebtedness then due at 90 days after the date of the note. Appellant seems to concede that it is the general rule that where the creditor grants the debtor an extension of time without the consent of the surety, the latter is released; but it contends that this rule "has no application to a bond that is given for the payment of labor and materials," citing *Los Angeles Stone Co. v. National Surety Co.*, 178 Cal. 247, 173 P. 79, and other cases. Those cases are not in point. They merely hold that a surety's obligation in such a case to persons furnishing labor and materials is not released by an extension of time by the owner to the contractor or by a change in the terms of the contract to which such persons are not parties. In such a case the laborer or the materialman is the creditor, and it is not he, but the owner, who has extended the time or agreed to the change. But in this case the creditor, the one furnishing the materials, extended the time, and no reason appears for not applying the general rule. The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

HAMMOND LUMBER COMPANY (a Corporation), Plaintiff and Appellant, v. **RICHARDSON BUILDING & ENGINEERING COMPANY, Incorporated** (a Corporation), et al., Defendants and Respondents. (Civ. 3783.)★

District Court of Appeal, Third District, California. May 28, 1929.

Rehearing Granted June 26, 1929.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

R. L. Horton, of Los Angeles, for appellant.
Stephens & Stephens and G. C. DeGarmo, all of Los Angeles, for respondents.

PER CURIAM. The questions involved in this case are in all respects the same as those in *Hammond Lumber Co. v. Richardson Building & Engineering Co., Inc.*, et al. (Civil No. 3782) 203 Cal. 408, 278 P. 261, this day decided in this court.

On the authority of that case the judgment is affirmed.

STEPHENSON v. NORTHWESTERN PAC. R. CO. (Civ. 6659.)†

District Court of Appeal, First District, Division 2, California. June 1, 1929.

As Modified on Denial of Rehearing June 29, 1929. Hearing Granted by Supreme Court July 29, 1929.

1. Railroads ⇨327(8)—Driver of automobile approaching crossing without having looked for trains after reaching point opposite last obstruction held contributorily negligent.

Driver of automobile, looking for approach of train from point opposite last obstruction and failing to look thereafter, though view was increased and sun had not yet set and whistle was blown, held guilty of contributory negligence as matter of law as regards injury sustained in crossing collision.

2. Railroads ⇨347(1)—Evidence of railroad's maintenance of warning devices at other crossings held immaterial in action for injuries in crossing collision.

In action against railroad for injuries in crossing accident, admission of evidence that at several other street crossings in particular town warning devices were maintained by railroad held error because immaterial.

3. Trial ⇨252(9)—Absence of evidence of plaintiff's discovery of his peril rendered instruction as to care required of one finding himself in perilous position inappropriate.

In action for injuries sustained in crossing collision, instruction on amount of care required by one who finds himself suddenly in great peril through no fault of his own should not have been given, where there was no evidence that plaintiff discovered his peril until after the collision.

Appeal from Superior Court, Sonoma County; M. S. Sayre, Judge.

Action by John Stephenson against the Northwestern Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Eells & Orrick, Orrick, Palmer & Dahlquist, and R. W. Palmer, all of San Francisco, and Geary & Geary, of Santa Rosa, for appellant.

F. de Journal, Philip Conley, and Conley, Conley & Conley, all of Fresno, and W. F. Cowan, of Santa Rosa, for respondent.

KOFORD, P. J. [1] Respondent recovered a verdict and judgment against appellant for \$25,000 for personal injuries inflicted upon him by appellant's locomotive and train when it collided with his automobile at the Matheson street crossing in the city of Healdsburg. Appellant claims upon this appeal that the conduct of the respondent was negligent, barring his recovery, despite negligence of the appellant.

The crossing is about one-fourth mile north of the depot. The train left the depot at 4:50 p. m. February 4, 1925, and proceeded north towards the said crossing, where the collision occurred a few minutes later. The railroad track crosses Matheson street curving on a large radius, the inside of the curve being to the east. About 28 feet east of the track and south of Matheson street is a large packing house extending over 200 feet along the railroad right of way and about 125 feet along Matheson street. Respondent had parked his automobile on Matheson street at the north end of this packing house near the railroad track, but where the building blocked his view of the track south towards the depot. He went inside the building upon business for about 5 or 10 minutes. Then he came out and entered his automobile alone. He said, in substance: I could see the railroad track. I looked up and down it. I did not hear any train or see anything, so I started the automobile slowly, and I looked again and there was a little grade, a little dip there (in the street), and I started slowly across the track in low gear at not over five or six miles per hour and just all of a sudden there was a flash; that's all I saw. After looking from a point opposite the corner of the packing house I did not look any more because I had already looked. Respondent was never aware of the presence of the train until it struck him. He testified that he heard no bell, whistle, or noise. The positive testimony of witnesses that the locomotive gave several short warning blasts of the whistle immediately following the regular crossing whistle of two long and two short blasts and that the bell was constantly ringing is deserving of mention, although the

plaintiff and other witnesses testified negatively, having heard no bell or whistle. The point from which respondent last looked for a train prior to the collision was about opposite the corner of the packing house, which corner was the last obstruction to a clear view down the track in the direction from which the train came. At this point his vision down the track would be greatly increased or diminished by advancing towards the track or retreating from it a few feet. He estimated that when he last looked he could see down the track about 100 feet. The permanent objects on the ground there show that, after passing the corner of the packing house, one could see down the track in excess of 400 feet. During the time the last 20 or 25 feet was traversed by respondent just prior to the collision, the engine must have been plainly visible to him if he had looked. Had he seen the danger he could have stopped in safety because traveling in low gear at a slow rate of speed in an automobile in good condition. A train at 40 miles an hour would travel not over 200 feet, while a motorist travels 25 feet at 5 miles per hour.

Counsel points to the curving track as an excuse for respondent's failure to see, but the curve was not sharp enough to conceal the train behind the packing house if the train was close enough to reach the automobile at the most favorable speeds found in the testimony. The engine was visible, therefore, despite the curve in the track, even assuming the train was coming at the speed of forty miles an hour. A 14-year-old boy was the only witness who testified to such high speed. He estimated it at 30 to 40 miles per hour. None of the numerous other witnesses on this point estimated the speed of the train in excess of 14 miles per hour.

Counsel for respondent also assigns poor visibility as an excuse for failure to see the train, but the evidence does not show this. The collision occurred between 4:50 and 5 p. m. February 4, 1925, which was about one-half hour before sunset. It was a cloudy and stormy day but not raining at the time. No witness testified that it was dark. The plaintiff himself testified the light conditions were pretty good, and that by "pretty good" he meant "not dark or anything." The rough condition of the street surface where it approaches and crosses the railroad tracks is also assigned as an excuse. The respondent did not testify that his attention was diverted by the surface of the street, nor does the testimony indicate that the condition of the street was such as to require marked or more than ordinary attention.

While there are conflicts in the evidence regarding other facts, such conflicts are not upon subjects which could alter the foundation upon which appellant lays its plea of contributory negligence. There seems to be no escape from the conclusion that respondent was negligent in failing to observe the approach of the train under the circumstances. The facts are not distinguishable in principle from the cases relied upon by appellant holding such conduct to be contributory negligence as a matter of law. *Griffin v. San Pedro, I. & S. L. R. R. Co.*, 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842; *Murray v. Southern Pacific Co.*, 177 Cal. 1, 169 P. 675; *Eddlemon v. Southern Pacific Co.*, 41 Cal. App. 340, 182 P. 811; *Thompson v. Southern Pacific Co.*, 31 Cal. App. 567, 161 P. 21; *Baltimore & Ohio Ry. Co. v. Goodman*, 275 U. S. 66, 48 S. Ct. 24, 72 L. Ed. 167, 56 A. L. R. 645.

The authorities relied upon by respondent in which contributory negligence was held to be a question for the jury show much greater precautions taken by the one injured than in the instant case. They are: *Levings v. Pacific Electric Ry. Co.*, 178 Cal. 231, 173 P. 87; *Walker v. Southern Pacific Co.*, 38 Cal. App. 377, 176 P. 175; *McDonald v. Southern Pacific Co.*, 71 Cal. App. 656, 236 P. 172; *Badostain v. Pac. Electric Ry. Co.*, 83 Cal. App. 290, 256 P. 576.

For the foregoing reasons the judgment appealed from should be reversed. Two other points should be mentioned.

[2] By the complaint the appellant was charged with negligence in failing to maintain a warning device at the crossing, and that issue went to the jury. Over objection of appellant evidence was admitted that at several other street crossings in Healdsburg such devices were maintained by the appellant. The evidence should have been excluded. What was done by the appellant at other crossings which may or may not have resembled this one was immaterial. *Bailey v. New Haven & Northampton Co.*, 107 Mass. 496; *Lake Erie & W. R. Co. v. Johnson*, 191 Ind. 479, 133 N. E. 732.

[3] The court's instructions upon the amount of care required of one who finds himself suddenly in great peril through no fault of his own should not have been given. There was no evidence that respondent discovered his great peril until after the collision.

The judgment is reversed.

We concur: STURTEVANT, J.;
NOURSE, J.

2. Justices of the peace ⇨2—Township justice court is not abolished by establishment of police court in city whose boundaries are same as those of township (Const. art. 11, §§ 8, 8½).

Under Const. art. 11, §§ 8, 8½, the establishment by charter of city police court does not abolish justice of peace court of township coterminous with city boundaries, nor affect jurisdiction of such court; the provisions of section 8½ that, where municipal court has been established in any city, there shall be no other court inferior to the superior court in said city, not being intended to apply to justice's court of township in which city was located.

In Bank.

In the matter of the application of Manuel Romero for writ of habeas corpus, directed to the Sheriff of the County of Contra Costa. Writ denied.

Thomas M. Carlson and Robert Collins, both of Richmond, for petitioner.

T. H. De Lap, of Richmond, for respondent.

CURTIS, J. Petitioner seeks his release from imprisonment by means of a writ of habeas corpus. He alleges that he is unlawfully imprisoned and illegally restrained of his liberty by the sheriff of the county of Contra Costa. The return of the sheriff shows that he holds and retains in his custody the body of the petitioner under and by virtue of an order of commitment of the justice's court of the fifteenth judicial township of said county of Contra Costa issued in the case of the People of the State of California v. Manuel Romero, and that said order of commitment was issued upon a judgment of said court, adjudging said petitioner to be guilty of a misdemeanor, to wit, disturbing the peace.

The ground upon which the petitioner bases his claim that his imprisonment is illegal is set forth by proper and sufficient allegations in said petition. This ground as thus stated is that said justice's court is not, and at the times the proceedings against petitioner were pending therein, which resulted in his conviction and imprisonment, was not, a legally constituted court, and therefore that all such proceedings, including the issuance of the commitment under which he is now held by said sheriff, are illegal and void.

The facts upon which this claim is made as they appear from the record before us are that the Fifteenth judicial township of the county of Contra Costa is situated in the city of Richmond, and that the boundaries of said township and of said city are identical and coterminous; that said city of Richmond in the year 1909 under the powers granted it by the Constitution of the state adopted a charter for the government of its municipal offices; that by the terms of said charter

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Ex parte ROMERO. (Cr. 3221.)

Supreme Court of California. June 5, 1929.

1. Justices of the peace ⇨32—Township justice court is different and distinct from justice court of city having same boundaries as township (Code Civ. Proc. § 103; Pol. Code, § 4015).

Under Code Civ. Proc. § 103, and Pol. Code, § 4015, the township justice of the peace court is entirely different and distinct from city justice of the peace court, notwithstanding the boundaries of the city and township are identical.

there was established in said city a police court known as the "Police Court of the City of Richmond," and that by the terms of said charter "within the city limits said court shall have concurrent and coordinate jurisdiction with township justices' courts in all matters and things in which said justices' courts now or may hereafter have jurisdiction; and the judge of said police court shall have as aforesaid like authority, power and jurisdiction as the justices of said justices' courts." This power to frame their own charters was given to cities of the state by sections 8 and 8½ of article 11 of the Constitution. Section 8½ authorized a city to establish a police court by means of a charter, and, at the time said city of Richmond adopted its charter, merely authorized cities to provide in their charters "for the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attaches." In 1914 said section 8½ was amended so as to authorize cities by their charters to establish police courts and also municipal courts, and in its amended form this section further provided that "in any city or any city and county, when such municipal court has been established, there shall be no other court inferior to the superior court."

The petitioner now contends that by this provision of the constitution the justice's court existing and acting in said Fifteenth judicial township of said county of Contra Costa at the date of the adoption of said constitutional amendment has been abolished, and that at the time the proceedings were pending against petitioner, in which said commitment was purported to have been issued, there was no such court as the justice's court of the Fifteenth township of said county.

This contention is based entirely upon the decision in the case of *Robertson v. Langford* (Cal. App.) 273 P. 150, rendered December 13, 1928. That case arose in the city of San Jose, which city had adopted a charter which provided for a police court with "all of the powers, authority and jurisdiction, both civil and criminal, that are now or may hereafter be conferred by law upon justices of the peace. * * *". The charter of the city of San Jose was adopted under the power granted to cities of this state having a population of more than 3,500 by sections 8 and 8½ of article 11 of the Constitution of the state to frame charters for their own government. At the time of the adoption of its charter by the city of San Jose, said section 8½ of article 11 contained the foregoing provision providing that: "In any city or any

city and county, when such municipal court has been established, there shall be no other court inferior to the superior court. * * *"

It was the view of the court rendering the decision in *Robertson v. Langford*, supra, that the so-called police court provided for in the charter of said city of San Jose was in legal effect a municipal court in the sense in which said term "municipal court" was used in the above-quoted provision of said section 8½ of article 11 of the Constitution, and that, as there had thus been established by said charter a municipal court in said city of San Jose, there could not be in said city any other court inferior to the superior court. Accordingly, it was held that by the adoption of said charter, which in effect provided for a municipal court in said city, the justice's court, which prior thereto had existed in said city, ceased to exist and was by the express declaration of the Constitution, as contained in section 8½ of article 11 thereof, abolished and superseded by said municipal court.

The question presented in the present proceeding differs from that decided in the case of *Robertson v. Langford*, supra, in at least one most material respect. In that case, as we have seen, it was decided that a city justice's court had been abolished by the establishment of a municipal court in said city in pursuance of the power granted by said constitutional provision. In the present proceeding petitioner contends not that a city justice's court but that a township justice's court has been abolished by the enactment of said constitutional provision.

[1] Justices' courts for both townships and cities are provided for in section 103 of the Code of Civil Procedure. By the first paragraph of said section it is provided that: "There shall be at least one justice's court in each of the townships of the state, for which one justice of the peace must be elected." By the second paragraph of said section it is further provided: "In every city [of certain designated classes to one of which the city of Richmond belongs] there must be one justice of the peace, to be elected in like manner, by the electors of such cities." By section 4015 of the Political Code the board of supervisors of each county are authorized and directed to divide their respective counties into townships for the purpose of electing justices of the peace and constables. It will thus be seen from the scheme of government adopted by the legislature that justices' courts in townships are entirely different and distinct from justices' courts in cities, and that in all cities of the state where this general law applies, and which belong to one of the classes enumerated in section 103 of the Code of Civil Procedure, these courts exist side by side with justices' courts of the township of which said city is a part. The city

justice's court is an office of the city, and the justice thereof is elected by the electors of said city. The township justice's court is a township office, and the incumbent of said office is elected by the electors of said township. The fact that the city is a part of the township or constitutes the whole of the township does not make the justice's court of the township a justice's court of the city. In such a case they each retain their separate and distinct entity. This was held in the recent case of *Platnauer v. Board of Supervisors*, 65 Cal. App. 666, 668, 225 P. 12, 14, where the court had under review the question of the status of the justice's court of the city of Sacramento, and, in determining that question, said: "From the foregoing it clearly appears that the offices of township justice of the peace and city justice of the peace are distinct entities, though having certain jurisdiction in common. The fact that Sacramento township and the city of Sacramento embrace the same territory is a mere incident. In other counties a city of the same class may constitute a part only of a judicial township."

[2] In the light of the foregoing well-established principles we will now consider the provision of the Constitution which the petitioner contends abolishes the justice's court of the Fifteenth judicial township of said county. It reads, as we have already seen, as follows: "In any city or any city and county, when such municipal court has been established, there shall be no other court inferior to the superior court." Paraphrasing this provision of the Constitution, it would read: "Where such municipal court has been established in any city or in any city and county, there shall be no other court inferior to the superior court in said city or in said city and county." Manifestly this reference in the Constitution is to inferior courts in the city, or city and county in which the municipal courts have been established, and was not intended to apply to the justice's court of the township in which said city may be situated, or of which said city may be a part. As we have seen, these two courts are two entirely different and distinct entities, and a reference to one cannot by any reasonable construction of the language used be held to have been intended to include or refer to the other. We therefore conclude that the justice's court of said township 15 was not abolished by the provision of the Constitution above quoted, even assuming that the police court theretofore established in the city of Richmond was vested with all the powers and jurisdiction of a municipal court.

These views render it unnecessary for us to decide whether the provision of the Constitution herein considered is retroactive and therefore applies to a city which had

at the date of the adoption of said constitutional amendment provided in its charter for courts vested with the jurisdiction of municipal courts. In this case it makes no difference in so far as the charter of the city of Richmond is concerned whether it was enacted prior or subsequent to the adoption of said constitutional amendment. Even if adopted after the enactment of said amendment and while it was in full force and effect, neither said amendment nor said charter provision, providing for a police court, would in any way affect or impair the validity of the justice's court of said township.

The writ is denied, and the prisoner is remanded to the custody of the sheriff of said county of Contra Costa.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

I concur in order: SHENK, J.

207 Cal. 323

STATE BAR OF CALIFORNIA v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. (L.A. 11141.)★

Supreme Court of California. May 31, 1929.

Rehearing Denied June 27, 1929.

1. Statutes $\S$ 80(4)—Constitutional provision forbidding creation of corporations by special act applies only to private corporations (Const. art. 12, $\S$ 1).

Provision of Const. art. 12, $\S$ 1, to effect that corporations may be formed under general laws, but shall not be created by special act, applies only to private corporations.

2. Municipal corporations $\S$ 3—Law providing that all corporations other than those formed or organized for government were private did not limit later legislation creating public corporation (Civ. Code, $\S$ 284).

Civ. Code, $\S$ 284, providing that all corporations other than those formed or organized for government of a portion of the state constitute private corporations, being purely of statutory origin, does not constitute a limitation on later legislation to create public corporations for other purposes.

3. Statutes $\S$ 80(1)—Statute regulating practice of law was not unconstitutional as attempt to create private corporation by special act (State Bar Act; Const. art. 12, $\S$ 1).

Regulation of the practice of law as contemplated by the State Bar Act (St. 1927, p. 38) is not such a matter of purely private concern as to constitute an attempt to provide for the formation of a private corporation, in violation of Const. art. 12, $\S$ 1, relating to the creation of corporations by special act.

4. Statutes ☞81—Statute regulating practice of law was not "local or special law" within constitutional provision relating thereto (State Bar Act; Const. art. 4, § 25, subd. 19).

State Bar Act (St. 1927, p. 38), regulating the practice of law, *held* not to constitute a local or special law within the meaning of Const. art. 4, § 25, subd. 19, forbidding the Legislature to pass local or special laws granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Local Law.]

5. Attorney and client ☞31—Judge of court of record was not, during continuance in office, subject to jurisdiction, control, and processes conferred on state bar association (State Bar Act; Const. art. 6, § 22; art. 4, §§ 17, 18).

Under Const. art. 6, § 22, providing that no judge of the court of record shall practice law during his continuance in office, such judicial officers were not during continuance in office subject to jurisdiction, control, and processes conferred on the state bar association and their governing body or other officers by virtue of the State Bar Act (St. 1927, p. 38), which is limited to those members of the legal profession who were engaged in, and were or are entitled to be engaged in, the practice of law, particularly in view of remedy provided by Const. art. 4, §§ 17, 18, in case of judge's misconduct in office.

6. Witnesses ☞21—Witness cannot be required to give testimony in matter over which court has no jurisdiction or in which appearance and testimony are neither pertinent nor material.

Witness before court or any other inquisitorial tribunal or committee cannot be required to be sworn or to give his testimony either in any matter for which court or other body has not jurisdiction or in any matter to the inquiry in which the appearance and testimony of the witness are neither pertinent nor material.

In Bank.

Original application for writ of mandate by the State Bar of California prayed to be directed to the Superior Court of Los Angeles County, Hon. Marshall F. McComb, Judge thereof. Writ denied.

Eustace Cullinan and Maurice E. Harrison, both of San Francisco, and Victor E. Shaw and Kenyon F. Lee, both of Los Angeles, for petitioner.

Oscar Lawler, of Los Angeles, John Francis Neylan, of San Francisco, and John M. Hall and Alexander T. Sokolow, both of Los Angeles (Oscar Lawler and John M. Hall, both of Los Angeles, of counsel), for respondent.

Rex B. Goodcell, W. Joseph Ford, Paul W. Schenck and Rex Hardy, all of Los Angeles, amici curiæ.

RICHARDS, J. The application herein was for a writ of mandate directing the superior court in and for the county of Los

Angeles and honorable Marshall F. McComb, a judge thereof, to require Carlos S. Hardy, then and still also a judge of said superior court, to be sworn and testify before a certain body designated in said application as "a special committee" pursuant to the provisions of section 26 of the "State Bar Act" (St. 1927, p. 38), appointed by that certain organization known as "The State Bar of California," and directed by the terms of its appointment "to take evidence and make findings on behalf of the Board in the matter of the conduct of Carlos S. Hardy, a judge of the superior court in and for the county of Los Angeles, in connection with the payment to said Carlos S. Hardy * * * of the sum of twenty-five hundred dollars (\$2,500.00) or thereabouts on or about August 12, 1926 and all matters relating thereto." The application presented and filed herein does not set forth, other than as above stated, the particular conduct of the respondent Carlos S. Hardy which was being made the subject of investigation by the aforesaid committee, but it sufficiently appears from the record herein that the matter relative to which the investigation undertaken by said committee was being conducted was that of the alleged acceptance by said respondent Hardy of the aforesaid money for legal services rendered to the persons named in said application while a judge of said superior court. It is set forth in the application herein that said special committee fixed a time and place of meeting for the purpose of conducting its hearings in the course of its said investigation, and that the respondent Carlos S. Hardy, being notified thereof, was present at said time and place, and was thereupon asked to be sworn and testify in said matter, but, upon the advice of his counsel, refused to be sworn or to give his testimony before the committee; and that thereupon, and acting under and in accordance with section 34 of said "State Bar Act," the committee reported to the respondent superior court of said county the refusal of said Carlos S. Hardy to be sworn or to testify before said committee as above set forth, and asked that said respondent court issue an attachment in the usual form, and having for its purpose the bringing of said Carlos S. Hardy before said court in order that he might be punished for contempt conformably to the aforesaid section of said act; that said respondent court accordingly made and issued its order requiring the said Carlos S. Hardy to appear before Hon. Marshall F. McComb, a judge of said court, at a certain time and place, then and there to show cause, if any he had, why he should not be adjudged guilty of contempt of said special committee of the state bar of California by refusing to be sworn and testify before it at the time and place and in the matter aforesaid; that said

Carlos S. Hardy appeared before said court and the judge thereof responsive to said order, and presented a demurrer to the petition of the committee, based upon the ground that "said petition does not set forth sufficient facts to vest this Honorable Court with jurisdiction of the subject matter in said petition stated"; that, upon the hearing had upon said demurrer, the respondent court and the said judge thereof sustained the same, and in so doing adjudged that upon July 29, 1927, the effective date of said State Bar Act, said Carlos S. Hardy was and still is a duly elected, qualified, and acting judge of the superior court of the state of California in and for the county of Los Angeles, and therefore and for that reason was and is not a member of the "State Bar of California"; and that therefore said petitioner and its said special committee did not have jurisdiction over the person of said Carlos S. Hardy or of the subject-matter aforesaid, and that respondent by reason thereof was without jurisdiction to punish said Carlos S. Hardy for contempt under the provisions of the State Bar Act. Thereupon the application for an alternative writ of mandate was filed herein, and, such writ having been issued and a return having been made thereto and a hearing had thereon, the matter as to whether such writ be made permanent is now before this court for decision.

[1, 2] The so-called "State Bar Act" was adopted by the Legislature and approved by the Governor of California on March 31, 1927, and became effective on July 29, 1927. Stats. 1927, p. 38. In the title of the act it is stated to be "An act to create a public corporation to be known as 'The State Bar of California.'" It is insisted by certain counsel for said Carlos S. Hardy, who have appeared as amici curiæ and have presented briefs herein in opposition to this application, that the writ of mandate should not be made permanent herein, for the reason that the State Bar Act is unconstitutional upon the several grounds set forth in the briefs of counsel so appearing. The question thus presented stands upon the threshold of this discussion. It is contended by counsel thus appearing in opposition to the issuance of such writ that the State Bar Act is unconstitutional, as in violation of article 12, § 1, of the state Constitution, which provides that "Corporations may be formed under general laws, but shall not be created by special act." If, however, "The State Bar of California" is, as it was stated in the title and also in the body of the State Bar Act to be, "a public corporation," it would seem that the foregoing provision of the Constitution would not have application, for the reason that said provision thereof has been held by this court to refer only to *private* corporations. *Napa State Hospital v. Dasso*, 153 Cal. 698, 703, 96 P. 355, 18 L. R. A. (N. S.) 643, 15 Ann. Cas. 910.

It is however, insisted by said counsel that, notwithstanding the designation of "The State Bar of California" as a public corporation to be formed under the provisions of said act, it is not and cannot be, or be formed as, such public corporation, for the reason that it is not brought by the terms of said act within the definition of a public corporation as set forth in section 284 of the Civil Code as follows: "Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the state; all other corporations are private." It is to be noted in considering this contention that the Constitution does not attempt to define the several sorts of corporations which may be formed by or in accordance with legislative action, but that the foregoing definition of what shall constitute public, as distinguished from private, corporations is purely of statutory origin. This being so, it must be clear that the provisions of the Civil Code above quoted could not be held to constitute a limitation upon later legislation to create public corporations for other purposes than those relating to "the government of a portion of the state." It is a fact within general knowledge that the state Legislature has, upon not a few occasions since the adoption both of our present Constitution and of the foregoing section of the Civil Code, provided for the creation of various kinds of public corporations or associations which did not have for their function or purpose the "government of a portion of the state." Such, for example, was Reclamation District No. 551, which was organized under certain laws enacted by the Legislature for the expressed purpose of the reclamation of certain swamp and overflowed lands. In upholding these laws relating to its creation, this court held that the districts to be formed thereunder, while public corporations, were neither municipal corporations, nor were they to be held to belong to either of the classes of corporations defined by section 284 of the Civil Code. *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 P. 1016. The same ruling was made in the case of *People v. Levee Dist. No. 6*, 131 Cal. 30, 63 P. 676, and in the case of *In re Madera Irr. Dist.*, 92 Cal. 296, 28 P. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106, wherein this court, in sustaining the validity of the Wright Act (Stats. 1887, p. 29) declared: "That the legislature is vested with the whole of the legislative power of the state, and that it has authority to deal with any subject within the scope of civil government, except in so far as it is restrained by the provisions of the Constitution, and that it is the sole tribunal to determine as well the expediency as the details of all legislation within its power, are principles so familiar as hardly to need mention. The declaration in article IV, section 1, of the Constitution: 'The legislative

power of this state shall be vested in a senate and assembly, which shall be designated the legislature of the state of California,"—comprehends the exercise of all the sovereign authority of the state in matters which are properly the subject of legislation; and it is incumbent upon anyone who will challenge an act of the legislature as being invalid to show, either that such act is without the province of legislation, or that the particular subject-matter of that act has been by the Constitution, either by express provision or by necessary implication, withdrawn by the people from the consideration of the legislature. The presumption which attends every act of the legislature is, that it is within its power; and he who would except it from the power must point out the particular provision of the Constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body." See, also, *Melvin v. State*, 121 Cal. 16, 53 P. 416; *People v. San Joaquin Valley Assn.*, 151 Cal. 797, 91 P. 740.

[3,4] It is further, however, urged by said counsel that, notwithstanding the express declaration embodied in the title and also in the body of the State Bar Act that the corporation to be formed and to function thereunder is to be a public corporation, it cannot be held to be other than a private corporation, in view of its membership, its functions, the purposes of its creation, and, finally, its independence of public regulation and control. Dealing with these objections in the order of their statement, it is a matter of public history and general knowledge that the profession and practice of the law embraces in its membership probably the largest, and certainly the most influential, body of individuals, having a definite and common objective, of any similar professional association of citizens of this or of any other of the commonwealths of our common country. This body of our citizenry known to the laws of this state as "attorneys and counselors at law" form an integral and indispensable unit in our system of administering justice which has come down to us under the name of Anglo-Saxon jurisprudence, and without the constant presence and contacts of which courts could not function nor the orderly administration of justice go on. Attorneys and counselors at law have long been known as "officers of the court," and as such they have for centuries been required to undergo certain courses of preparation and to assume certain solemn obligations relative to their training, character, and conduct as such; and these not only with respect to their relation to the courts, but also with regard to their relation to the public at large. Thus it is that the profession and practice of the law, while in a limited sense a matter of private choice and concern in so far as it relates to its emoluments, is essentially and

more largely a matter of public interest and concern, not only from the viewpoint of its relation to the administration of civil and criminal law, but also from that of the contacts of its membership with the constituent membership of society at large, whose interest it is to be safeguarded against the ignorances or evil dispositions of those who may be masquerading beneath the cloak of the legal and supposedly learned and upright profession. It is to be noted also that from the body of the legal profession it is required, by both the Constitution and statutory law of this and most other states, the justices and judges of all courts of record and of certain other subordinate tribunals must be chosen. It is for each and all of these reasons that the membership, character and conduct of those entering and engaging in the legal profession have long been regarded as the proper subject of legislative regulation and control; and it has never heretofore been considered, so far as we have been made aware, that, at least in this commonwealth, the exercise of a reasonable degree of regulation and control over the profession and practice of the law, constituted an intrusion into the domain of our state organization constitutionally assigned to the judicial department thereof. From almost the inception of our state government statutory provision has been made for the admission, disbarment, suspension, or disciplining of members of the legal profession. *Stats. 1851*, p. 48. It is not necessary herein to review the changes which have occurred in the course of our statutory regulations in this regard, nor even to consider in detail the various tribunals and administrative bodies to which from time to time these regulatory functions have been assigned, since the purpose of this branch of our inquiry has been attained when we arrive at the conclusion, as we do, from the foregoing considerations that the profession and practice of the law is not such a matter of purely private concern that the effort on the part of the Legislature to put the regulation thereof into the organized form contemplated by the State Bar Act is to be regarded and held as an attempt to provide for the formation of a private corporation.

It is, however, further insisted by counsel appearing as amici curiæ herein that the State Bar Act is violative of article 4, § 25, subd. 19 of the state Constitution, which forbids the Legislature to pass local or special laws "granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity." The answer to this objection is contained within the very terms of the foregoing constitutional inhibition when applied to the act in question, since it would seem to be apparent that the act cannot be regarded as a local or special law. It is true that in the title or body of

the act it is not expressly stated in so many words to be a general law, but it is not necessary so to be, if from the content of the act itself it appears that it applies to all of the class of persons with respect to which it purports to legislate, and that as to such classification it is apparently based upon a reasonable distinction. It requires but a cursory glance at the provisions of the State Bar Act to determine that it has inclusive application to each and every member of the legal profession within the state of California who is actively engaged and entitled to engage in the practice of the law, and that it purports to regulate the admission, conduct, and continuance in the practice of the law of this certain and well-recognized professional class of the body politic coming within the precise limitations of said act, as these will presently be more particularly set forth and defined. In support of their foregoing contention, we are cited by said counsel to certain decisions of the Supreme Court of the state of Idaho, holding a certain State Bar Act adopted a number of years ago, and later sought to be amended by the Legislature of that state, to be for certain reasons therein stated a private corporation created by special laws. It will suffice here to say that we do not approve of either the reasoning or conclusions of these Idaho cases, and decline to adopt or follow them.

[5] As to the final contention of said counsel that the State Bar Act here in question is as to certain of its provisions in violation of article 1, § 21, of the state Constitution, which, among the "Declarations of Rights" in said article enumerated, states: "Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens," we do not deem a discussion of this phase of the State Bar Act to be germane to the issues involved in this special proceeding for reasons which clearly appear when, having determined, as we now do, that said act is otherwise constitutional, we turn to a consideration of the particular provisions of the act with respect to their applicability to the precise issue before us in the instant case. The title of said State Bar Act purports to set forth that the purpose of the act in making provision for the creation of the state bar of California is "to provide for its organization, government, membership and powers, to regulate the practice of law, and to provide penalties for violations of said act." In the body of the act it is provided in section 3 thereof that "the first members of the State Bar shall be all persons *now entitled to practice law in this state.*" By the terms of section 7 thereof it is provided that "after the organization of The State Bar, as herein provided, all persons who are admitted to practice in accordance with the provisions of this act shall become by that fact members of The State Bar."

By the provisions of sections 4, 5, 6, and 8 thereof members of the state bar are classified as "active" and "inactive" members thereof, but with the classification as to inactive members we have no present concern.

That it was the "active" members of the legal profession in California which it was the manifest purpose of said act to organize into a "State Bar" sufficiently appears, not only in the title of the act, which expressly states its purpose to be "to regulate the practice of law," but also from the body of the act itself, as will appear from the following further extracts from its numerous subdivisions: Section 3 thereof provides that the first members of the state bar shall be "all persons now entitled to practice law in this state." Section 12 thereof provides that the first members of the governing board of said state bar to be appointed immediately upon the act becoming effective shall be selected "from among those qualified for active membership in The State Bar." Section 15 of the act provides that in the subsequent election or elections of members of the board of governors "only active members of The State Bar * * * shall be entitled to vote" for the governor or governors from their respective districts. Section 30 of the act provides for the appointment by the board of governors of such administrative committees as it may deem advisable. "Such committees shall be composed of active members of The State Bar." And, finally, by the provisions of section 47 of the act, "No person shall practice law in this state subsequent to the first meeting of The State Bar unless he shall be an active member thereof as hereinbefore defined."

When we turn to those sections of the State Bar Act which purport to invest the board of governors, or its administrative committees, with governmental functions and disciplinary powers, we find that these uniformly and expressly have relation to the *practice* of the law. Section 24 thereof contains the grant of power to said board to determine the qualifications "for admission to *practice law* in this state," with frequent iteration of the foregoing phrase; while section 26 of the act embraces those disciplinary powers which are to be exercised through the disbarment, suspension, removal, or reinstatement of those persons who, while actively engaged in the practice of the law, have brought themselves within the terms of said section of the act; while section 49 thereof provides that "any person who, not being an *active member* of The State Bar, or who after he has been disbarred or while suspended from membership in The State Bar, as by this act provided, *shall practice law*, shall be guilty of a misdemeanor."

From a consideration of the foregoing terms and intendments of the State Bar Act it would seem to be fairly deducible that the act, as to its scope, purposes, and conferred pow-

ers was intended by the framers thereof to be limited to those members of the legal profession who were engaged, and were and are entitled to be engaged, in the practice of law. The term "practice of law" has been defined in occasional cases, but perhaps as concrete and inclusive a definition as any is that contained in the case of *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836, wherein the court says: "As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter pending therein throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court." With the foregoing statement, and with this definition in mind, we arrive at the consideration of the immediate issue before us. The record herein discloses that both at the time of the taking effect of the State Bar Act and at the dates which the particular investigation out of the sequences of which the instant application arose was initiated by the board of bar governors of the state bar of California Carlos S. Hardy was, and for some years prior thereof had been, a duly admitted and qualified attorney and counselor at law within the state of California. It further, however, appeared that during said time he was also one of the number of superior judges, duly elected, qualified, and functioning as such in and as a part of the superior court of Los Angeles county. Being such, he was subject to each and all of the constitutional provisions which have application to that particular constitutional court of record and to the judges thereof. Among these provisions is that to be found in article 6, § 22, of the Constitution, which provides as follows: "No judge of a court of record shall practice law in any court of this state during his continuance in office."

Under the foregoing definition of the phrase "Practice law," it must be held to have been intended by the framers of this provision of the Constitution that its inhibition should be inclusive enough to embrace each and all of those professional activities which are included within said definition, since otherwise the obvious purpose of imposing this particular inhibition upon those occupying judicial positions would, or at least could, be subverted. The foregoing provision of the Constitution is to be considered in connection with the immediately following provision thereof, which reads: "No person shall be eligible to the office of a justice of the supreme court, or of a district court of appeal, or of a judge of a superior court, or of a municipal court, unless he shall have been admitted to practice before the Supreme Court of the state for a period of at least five years immediately preceding his election or appointment to such office."

When so read in connection with the phraseology of the State Bar Act, to which we have above directed attention, it would seem to be sufficiently clear that the term "eligible" and the term "entitled," as used in these several provisions of the law, have each a distinctive meaning; and that as to each of these terms they should be given such application to the first of the foregoing provisions of the Constitution as to import the meaning that no person, however eligible to practice law in this state, shall be entitled so to do while he occupies the office of a justice or judge of a court of record and during the period of his continuance in such office. The effect of such an interpretation of said constitutional provision would logically be that whatever right an attorney and counselor at law might have been invested with by virtue of his admission to practice, and whatever might be his eligibility so to do, was to be so far held in suspension during his incumbency in any such judicial office that he would not be entitled to the exercise of such right during such time.

Such interpretation, aside from the soundness of its reason, has authority for its support in the case of *In re Silkman*, 88 App. Div. 102, 84 N. Y. S. 1025, as to whether a surrogate in the state of New York and in counties thereof having a population in excess of 120,000 was entitled to practice law, in the face of a constitutional provision which declared that no surrogate in any such county should practice as an attorney or counselor in any court of record in said state. The court held that the petitioner, Silkman, was upon taking such office "suspended from practice as effectively as he could possibly be by any order of this court." In the later case of *In re Strahl*, 201 App. Div. 729, 195 N. Y. S. 385, it was held by the same court with reference to a justice of the municipal court that "Under the laws of this state the right to practice law by one holding such a judicial office as the respondent is suspended during his incumbency." It was similarly so decided by the Supreme Court of Florida in the case of *Perry v. Bush*, 46 Fla. 242, 35 So. 225. We are cited to no authority conflicting with the views expressed in these decisions.

If, therefore, we are correct in the conclusion that under the provisions of article 6, § 22, of the state Constitution, no person holding judicial office in a court of record in this state is entitled to practice law during his continuance in such office, it would seem to follow irresistibly that the provisions of the State Bar Act relating to those over whom the regulatory jurisdiction and power of the public corporation created thereunder are to be exercised cannot be held to extend to those persons who, however regularly admitted thereto, and however otherwise eligible to engage in the practice of the law, are not entitled to actively engage in such practice during their incumbency in any judicial office

which comes within the inhibition of said article and section of the state Constitution. This conclusion is abundantly supported and strengthened when we come to consider the consequences which would legally follow the violation of the foregoing provision of the state Constitution. An attorney and counselor at law who may be the incumbent of a judicial office, by essaying to practice law, does not by so doing violate any particular principle of legal ethics to which our attention has been directed. This is shown by the fact that the occupants of judicial positions in the courts of this state not of record, who are otherwise eligible so to do, may and in most instances do, practice law without any suggestion that in so doing they are violating either former or existing laws defining and regulating the ethical practices of the legal profession. The offense of a judge of a court of record who violates the foregoing provision of the Constitution is not an offense against his profession, but against his office. It amounts, if proven, to such misconduct in office as would subject him to impeachment or to such other procedure to accomplish his removal from office as the laws provide, but it does not, and should not, put him in peril of proceedings which would destroy his eligibility to practice his profession or remove him from his membership therein, for the obvious reason that so to do would be to permit the accomplishment by indirection of his disqualification to hold, and hence necessarily his removal from his office, for which the Constitution in sections 17 and 18 of article 4 thereof has provided a direct, if not an exclusive, mode of procedure.

An apt and well-reasoned line of authority upon this precise question is that supplied by the case of *Falloon v. Clark*, 61 Kan. 121, 58 P. 990, wherein the Supreme Court of Kansas determined that "wherever the constitution has created an office and fixed its term, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the legislature to remove such officer or suspend him from office for any other reason or in any other mode than the constitution itself has furnished." The said court rests its authority for this conclusion upon *Lowe v. Com.*, 3 Mete. (Ky.) 237, and *Throop, Pub. Off.*, § 341, which latter authority states the foregoing doctrine to be well settled, and cites in support thereof the cases of *State v. Wiltz*, 11 La. Ann. 439; *State v. McNeely*, 24 La. Ann. 19; *Brown v. Grover*, 6 Bush. (Ky.) 1; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; and *Mechem, Pub. Off.*, § 457. There would seem to exist many reasons, rooted in public policy, why this public and, it may well be said, powerful corporation, considering its membership and the relation thereof to the administration of justice through the judicial arm of the state government, should not lightly be held to be invested

with the power and authority over judicial officers which in the instant case it has sought to exercise. Whether or not in any instance the board of governors of said body, or any committee thereof, may be held to be possessed of power to execute such a roving commission as that upon which the committee of said board relied as the basis of its effort to invoke the jurisdiction of the respondent court, or upon which the petitioner in this immediate proceeding seeks to found its claim of right to the issuance of a writ of mandate, we do not need to inquire, for the all-sufficient reason that the record herein discloses that the order of said board of governors creating such committee definitely stated and defined the precise matter with regard to which the committee was invested with power to function. By reference to such order it appears that the committee was appointed "pursuant to the provisions of section 26 of the State Bar Act, to take evidence and make findings on behalf of the board in the matter of the conduct of Carlos S. Hardy, a judge of the superior court in and for the county of Los Angeles." The remaining portion of said order further confines the inquisitorial power of the committee to the particular matter of an alleged receipt of money from certain persons while occupying his aforesaid office. By reference to said section 26 of said act it will be seen that it has relation solely to the disbarment, suspension, discipline, and reinstatement of members of the state bar. Whether or not the aforesaid order would have sufficed to serve as a complaint against a member of the state bar, and whether or not the proceedings of said committee and the findings based thereon would have been a sufficient basis for an order of disbarment, suspension, or reproof under the terms of said section of the act, we do not need to determine, since upon the very face of said order it appears to constitute a direction to said committee to undertake a proceeding against one who, as we have already seen, cannot be brought within the terms of said section or within the inquisitorial powers which said committee is sought by said order to be invested.

[6] It is, however, argued by the petitioner herein that the only capacity in which Carlos S. Hardy was sought to be subjected to the jurisdiction of said committee was in that of a witness before it, and in that capacity he may not be heard to question his duty to be sworn or his obligation to testify. This argument is specious, but is wholly lacking in legal support, since under long and well settled authority a witness before a court or any other inquisitorial tribunal or committee cannot be required to be sworn or to give his testimony, either in any matter over which such court or other body has not jurisdiction or in any matter to the inquiry in which the appearance and testimony of the witness are neither pertinent nor material. When we look

to the proceeding before the superior court in and for the county of Los Angeles, which is the respondent herein, and which was a proceeding having for its purpose the issuance of a citation directing said Carlos S. Hardy to appear and show cause in and before said court why he should not be adjudged guilty of, and be punished for, contempt, we not only fail to find that there was any affirmative showing that the matters concerning which the said Carlos S. Hardy in his capacity of such witness was required to be sworn or to testify were such as would render his testimony material and pertinent; but, on the contrary, it affirmatively appeared upon the face of said proceedings that the precise matter which said committee had been constituted to investigate, and which it was so proceeding to do, was one over which the committee had no jurisdiction. And, when we look further to the application for an alternative writ of mandate presented herein, we discover the same precise infirmities upon the very face and content of said application. These defects affirmatively appearing in the proceedings before both of these tribunals would have sufficed in and of themselves to have justified the said superior court in its order sustaining the respondent's demurrer to said petition and to also justify this court in refusing to make permanent said writ. We have preferred, however, to put our decision of this matter upon the broader grounds covered by the main considerations embraced in this opinion, and we summarize our conclusion thereby reached herein as follows:

First. The State Bar Act, approved on March 31, 1927, and effective on July 29, 1927, is constitutional.

Second. The provisions thereof provide for the formation of a public corporation embracing in its membership such persons as were entitled to practice law in this state at the effective date of said act, and also such persons as should thereafter become entitled to practice law in this state as provided by law.

Third. The duly elected and qualified judges of the courts of record in this state who were such at the time said act became effective, and who have since become and are such judicial officers, were and are not, under the inhibition of section 22 of article 6 of the state Constitution, entitled to practice law in this state during their and each of their continuance in office, and hence under the express provisions of said State Bar Act have not become, and during said period are not, members of the state bar of California, and hence are not subject to the jurisdiction, control, and processes conferred upon said corporation and the governing board or other officers thereof by the scope and provisions of said act.

Fourth. The said Carlos S. Hardy, affirmatively appearing to have been a duly elected,

qualified, and acting judge of the superior court in and for the county of Los Angeles at the date said act became effective, and at all times since said date, and hence not having at any of said times become or been a member of said corporation, was not, by virtue of the acts or conduct attributed to him by the order or action of the board of governors of said corporation or its committee as hereinabove set forth, subject to the jurisdiction or processes of the said board of governors of said corporation, or of any committee thereof, so as to be required to do the acts for his failure or refusal so to do he was sought to be adjudged guilty of contempt and to be punished therefor before the said respondent court; and,

Fifth. And, finally, as a result of the foregoing conclusions, that the petitioner herein is not entitled to the issuance of a permanent writ of mandate herein.

It is therefore ordered that such writ be, and the same is hereby, denied.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; PRESTON, J.; SEAWELL, J.

207 Cal. 361

**PEOPLE v. DISTRICT COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVI-
SION 2 et al. (L. A. 11205.)**

Supreme Court of California. June 17, 1929.

Prohibition ☞13—Prohibition to prevent District Court of Appeal staying conviction judgment was denied, where question became moot by affirmance of judgment.

Where, after submission of application for writ of prohibition or review to prevent District Court of Appeal from staying operation of judgment of conviction, case to which application related was heard and determined in said court, and petition for hearing in Supreme Court was denied, writ was denied as relating to question which had become moot.

In Bank.

Original proceeding for writ of prohibition or review by the People against the District Court of Appeal, Second Appellate District, Division 2, and others, to prevent said court from staying the operation of a judgment. Denied.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for petitioner.

Thos. P. White and A. P. G. Steffes, both of Los Angeles (Vincent C. Hickson, of Los Angeles, of counsel), for respondents.

PER CURIAM. In this matter an application by the Attorney General for a writ of

prohibition or review was presented and submitted to this court at a time when the case of the People of the State of California v. Marco Albori, to which said application related, was still pending and undetermined in the District Court of Appeal in and for the Second Appellate District, Division 2. Since the submission of said application, however, the case of People v. Albori, 275 P. 1017, has been heard and determined in said court, and the judgment of conviction of the defendant therein has been affirmed; the decision of said court having been filed on March 14, 1929. A petition for hearing in this court was filed on April 5, 1929, and denied on April 11, 1929. The decision of the District Court of Appeal having thus become final, it follows that the order of said court staying the operation of the judgment appealed from, which was sought to be made the subject of review in the instant proceeding, having fully subserved its purpose, there is no longer any matter pending in said District Court of Appeal to which the issuance of a writ by this court could be given application. The question presented for our consideration in the instant proceeding has thus become moot, and for that reason only the petition for a writ of prohibition or review herein is denied.

207 Cal. 364

WILSON v. SUPERIOR COURT OF STATE OF CALIFORNIA, IN AND FOR MONTEREY COUNTY, et al.
(Nos. 13453, 13455.)

Supreme Court of California. June 17, 1929.

1. Exceptions, bill of $\S$ 51—Court's action in refusing to settle bill of exceptions and dismissing proceedings held not abuse of discretion in view of plaintiff's delay.

Trial judge held not to have abused discretion in refusing to settle bill of exceptions and dismissing proceedings, where proposed amendments thereto were served on plaintiff on May 29 and she did nothing prior to death of presiding judge on Sept. 30th to bring matter to his attention, and period of inaction continued for an additional period of nearly three months after death of presiding judge.

2. Exceptions, bill of $\S$ 50—Moving party in settling bill of exceptions must proceed with diligence.

Where plaintiff was moving party in settling bill of exceptions, it was incumbent on her to proceed with diligence.

3. Exceptions, bill of $\S$ 51—Determination as to due diligence in causing bill of exceptions to be settled is conclusive, absent abuse of discretion.

Whether a party has exercised due diligence in causing a bill of exceptions to be settled is so largely a matter of discretion with the trial

judge that, when no abuse of such discretion appears, his determination is conclusive.

4. Exceptions, bill of $\S$ 53(3)—Trial judge's discretion properly exercised in refusing to settle bill of exceptions held not controllable by mandamus.

Discretion of trial judge properly exercised in refusing to settle bill of exceptions cannot be controlled by mandamus.

In Bank.

Petition by Helen Cooke Wilson for writ of mandate directed to the Superior Court of the State of California in and for the County of Monterey, and Hon. Henry G. Jorgenson, Judge thereof, to compel respondent judge to settle a bill of exceptions and motion by defendant to dismiss petitioner's appeal for failure to perfect record. Writ denied, and appeal dismissed.

Roger Marchetti, of Los Angeles, for petitioner.

Melvin & Sullivan and Ward Sullivan, all of San Francisco, for respondents.

SHENK, J. Two matters are before us in this cause. The first is an application on the part of the plaintiff for a writ of mandate to compel the respondent judge to settle a bill of exceptions, and the second is a motion by the defendant to dismiss the plaintiff's appeal for failure to perfect a record on appeal.

The action is one for divorce, for an order setting aside a property settlement agreement, and for the custody of minor children. The complaint was filed on February 8, 1927, and the cause was tried and submitted for decision on the 30th day of the following August. On January 26, 1928, the court granted the plaintiff an interlocutory decree of divorce, but by its judgment then rendered refused to set aside the property settlement agreement. On March 8th the plaintiff's motion for a new trial was denied, and on March 19th she filed her notice of appeal. On March 30th the appellant served and on April 2d filed her proposed bill of exceptions. On May 29, 1928, the defendant served on the plaintiff, and on May 31st filed proposed amendments to the proposed bill.

During all of the times hereinbefore mentioned Hon. Fred A. Treat was the judge of the superior court in and for Monterey county who tried said cause and rendered judgment therein. On September 30, 1928, Judge Treat suffered injuries in an automobile accident resulting in his death. On October 29, 1928, the respondent judge was appointed as Judge Treat's successor in office. On December 22, 1928, the appellant served and later filed a notice of motion to have the bill of exceptions settled. On December 28th the respondents filed a notice of opposition to the settlement of the bill and served and filed

a notice of motion to dismiss the proposed bill. On January 18, 1929, the respondent court entered its order denying the plaintiff's motion to settle the proposed bill and granting the defendant's motion to dismiss the proceeding on the ground that the plaintiff had not proceeded with due diligence. On April 3d the court denied the plaintiff's motion, made under section 473 of the Code of Civil Procedure, that she be relieved "from her default in failing to have properly settled," etc., her proposed bill of exceptions. The plaintiff now seeks to compel the respondent judge to settle said bill.

[1-4] We find no abuse of discretion in the refusal of the respondent judge to settle the bill of exceptions and in dismissing the proceeding. The plaintiff was the moving party, and it was incumbent on her to proceed with diligence. *Galbraith v. Lowe*, 142 Cal. 295, 75 P. 831. After the proposed amendments were served upon her on May 29th she did nothing prior to the death of Judge Treat on September 30th to bring the matter to the attention of the trial judge. This period of inaction of four months is unexcused. In fact, it continued for an additional period of nearly three months when on December 22d the plaintiff first took steps to bring the matter of the settlement of the bill of exceptions to the attention of the respondent judge.

Whether a party has exercised due diligence in causing a bill of exceptions to be settled is so largely a matter of discretion with the trial judge that when no abuse of such discretion appears his determination is conclusive. *Miller v. American Central Insurance Co.*, 2 Cal. App. 271, 274, 83 P. 289. This discretion, properly exercised, cannot be controlled by mandamus. See *Stonesifer v. Armstrong*, 86 Cal. 594, 25 P. 50; 2 Cal. Jur. p. 570; 16 Cal. Jur. p. 812.

The peremptory writ is denied, and the appeal is dismissed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

207 Cal. 362

BOWLES v. STANLEY et al. (L. A. 9931.)

Supreme Court of California. June 17, 1929.

Automobiles ☞244(6)—Verdict against driver whose truck hit curb and struck pedestrian, after driver attempted to avoid collision with another truck, held sustained.

In action for injuries sustained by pedestrian on sidewalk, struck when truck hit curb and overturned, verdict in plaintiff's favor against truck driver and his employer held sustained by evidence showing truck was driven to curb in effort to avoid collision with another truck at intersection.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Emily J. Bowles against Don Stanley and August Kwasigroch and others. Judgment for plaintiff, and defendants named appeal. Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Schweitzer & Hutton, of Los Angeles, for respondent Bowles.

H. T. Morrow and Henry L. Knoop, both of Los Angeles, for other respondents.

SHENK, J. This is an appeal from the judgment on a verdict for \$7,500 in favor of the plaintiff in an action for damages for personal injuries.

On December 4, 1925, at about 4 o'clock p. m., the plaintiff was walking on the sidewalk near the corner of Second and Oxford streets in the city of Los Angeles. At the same time the defendant Don Stanley was driving a grocery delivery truck in the service of his employer, August Kwasigroch, proceeding southerly on Oxford street toward its intersection with Second street. Coincidentally the defendant Ahl was driving a plumber's truck in the service of his employers, Carroll & Barry, proceeding easterly on Second street toward Oxford. At the intersection a collision of the two cars became imminent, and both drivers endeavored to avoid it. In the attempt, the defendant Stanley's car hit the curb, overturned, struck the plaintiff while she was on the sidewalk, and caused the serious injuries for which redress is sought in this action. The plaintiff sued both drivers and their employers as joint tort-feasors. The jury returned a verdict against the appealing defendants, Stanley and Kwasigroch, and in favor of the other defendants.

It is unnecessary to recount further the circumstances of the accident. It is not contended that the plaintiff was not entitled to recover. At the trial it was the endeavor of one set of defendants to show that they were not responsible for the accident, which, if proved, would throw the liability on the other set of defendants. It is sufficient to say that the evidence was sufficient to support the verdict against the appealing defendants.

Nor is it required that specific mention be made of the numerous contentions of the appellants. They constitute criticism of instructions given and refused and alleged erroneous rulings of the trial court. Each point has been examined, and in none of them do we find sufficient of substance to require or justify a reversal.

The judgment is therefore affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

99 Cal. App. 264

DAVIS v. RENTON. (Civ. 6820.)★

District Court of Appeal, First District, Division 2. California. May 31, 1929.

Rehearing Denied June 28, 1929. Hearing Denied by Supreme Court July 29, 1929.

1. Automobiles ⇨245(72)—Pedestrian held not contributorily negligent as matter of law in failing to maintain continuous lookout to left for approaching vehicles while crossing street.

Pedestrian crossing street, who looked for approaching traffic before she left curb, held not contributorily negligent as matter of law with respect to injuries sustained in automobile accident because of failure to maintain continuous lookout to left as she entered intersection.

2. Automobiles ⇨217(1)—Pedestrian in crossing street must exercise ordinary care with reference to time, place and circumstances.

Pedestrian crossing street is bound to exercise ordinary care with reference to time, place, and circumstances.

3. Appeal and error ⇨1004(3)—Trial court's ruling on excessiveness of damage is conclusive if supported by substantial evidence, unless facts suggest at first blush passion or prejudice of jury (Code Civ. Proc. § 657, subds. 1, 5).

Ruling of trial court on question whether damages are excessive at time question is presented on motion for new trial under Code Civ. Proc. § 657, subds. 1, 5, may not be disturbed by an appellate court if there is any substantial evidence to support the finding of the trial court, unless the facts suggest at first blush passion or prejudice on the part of the jury.

4. Damages ⇨130(3)—\$5,000 for fracture of thumb and concussion of brain in automobile accident, not shown to have caused dizziness of which plaintiff complained, held excessive.

\$5,000 damages to woman suffering concussion of brain in automobile accident with recurrent dizziness and loss of memory and fracture of outer joint of left thumb and bruises held excessive as suggesting passion or prejudice of jury, where it did not appear that the dizziness was a result of the brain concussion.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Action by Minnie Davis against Helen Renton. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

J. Hampton Hoge, of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco, Jesse E. Nichols, of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover a judgment for damages arising out of a collision with an automobile. The defendant answered and a trial was had in the trial court

before the court sitting with a jury. The jury returned a verdict in favor of the plaintiff for the sum of \$5,000; the defendant made a motion for a new trial; the motion was denied; and she has appealed from the judgment based on the verdict under section 953a of the Code of Civil Procedure.

[1, 2] The accident occurred in Oakland on the 29th day of September, 1927. The plaintiff was in the act of walking from the southwest corner of Fifty-First street and Telegraph avenue easterly across Telegraph avenue. The defendant approached from Berkeley driving south on the west side of Telegraph avenue. The collision occurred near the westerly rail of the double street railroad track. Just before she left the curb the plaintiff looked north on Telegraph avenue for approaching traffic. She saw two cars and she waited until they passed. She testified that she then stepped into the street, and when she was midway between the curb and the rail she looked again and saw two automobiles approaching from the north. She estimated the distance at 150 feet. She continued forward to the rail and at that time looked again and saw the defendant's car about 15 feet to the plaintiff's left. She saw the car swerve as though it were going to pass behind her and she was then in the act of advancing when she was hit. Neither on direct examination or cross-examination did she claim to have looked north from the time she stood on the sidewalk until the accident happened. The defendant calls this evidence to our attention and asserts that the plaintiff was guilty of contributory negligence. In this behalf she argues that it was the duty of the plaintiff to be continually looking in the direction from which traffic might be approaching. The plaintiff was bound to exercise ordinary care. Ordinary care has reference to time, place, and circumstances. There is nothing in the record before us showing that this plaintiff should, at the time and place of this particular accident, have been looking continually to the north as she entered Telegraph avenue.

[3] The defendant makes the further contention that the verdict of the jury fixing the damages in the sum of \$5,000 was excessive. If a jury is corrupt, its verdict may be attacked before the trial court by a motion for a new trial. That attack is provided for by the statute. Code Civ. Proc. § 657, subd. 1. If the jury acts through passion, or prejudice, its verdict may be attacked at the same time in the same manner. Code Civ. Proc. § 657, subd. 5. The ruling of the trial court on those questions, like the ruling of the trial court on any other question of fact, may not be disturbed by an appellate court if there is any substantial evidence to support the ruling of the trial court; or, as it has been expressed, unless "the facts are such as to

suggest, at first blush, passion, prejudice, or corruption on the part of the jury." *Morris v. Standard Oil Co.*, 188 Cal. 468, 473, 205 P. 1073, 1075.

[4] Before we can say what appears at first blush in the instant case the facts must be stated. As it is possible that the jury believed one witness and did not believe another, it is necessary to state the facts as claimed by the plaintiff. The facts testified to by her and some of her witnesses were as follows: When she collided with the defendant's automobile the plaintiff fell and in falling struck the left side of her head and face with such force as to cause a lump on the left side of her forehead. She scratched her nose on the outside and furthermore her nose bled from the inside at the time of the accident, some during that evening, and some the next morning. She suffered a concussion of the brain which caused a momentary unconsciousness. The plaintiff has suffered from dizziness and loss of memory. The dizziness has recurred from time to time since the accident. It was not so pronounced at the date of the trial, about seven months after the date of the accident. The record discloses some loss of memory, but that element of plaintiff's claim is very slightly developed. The plaintiff suffered a fracture of the outer joint of the left thumb. The fracture responded to treatment, but as the fracture extended into the joint there is a loss of motion of about 50 per cent. There was testimony to the effect that the injury to the thumb might become permanent and might become more fixed. As the plaintiff fell to the street she hit on her left side. The skin was not broken, but she suffered external bruises on her shoulder, arm, hip, thigh, knee, and below the knee. The bruises on the knee were somewhat extensive. In falling there was such a wrenching of the left leg that some of the ligaments were strained and some of the blood vessels fractured. The plaintiff was taken at once to the Emergency Hospital. There her thumb was set and bandaged and some of the bruises on the left leg were bandaged. Later in the day she was taken home and the next day her physician called. On another day he called again. In four or five days the plaintiff left her home and called at her physician's office. On another day she called again. In about three weeks the bandages about the thumb were removed. The dizziness above mentioned was quite continuous for about three months. Since that time occasionally it returns when the plaintiff goes to get up and causes her to stand still for a short time until it passes away. At first the injury to the thumb was very painful. At the time of the trial the thumb did not pain the plaintiff, but the plaintiff could not do the things that she could do before. In this regard she said that

she could not wash and wring out clothes. The evidence developed in the trial court did not disclose that the plaintiff makes her living by washing, or that she is a housewife and does the family washing. The plaintiff's evidence did not disclose that the dizziness mentioned was the result of the concussion above mentioned, but the evidence of the defendant was directly to the point that it was not. Under all of these circumstances we have no hesitancy in saying that the verdict suggests "at first blush passion, prejudice or corruption on the part of the jury."

There is no necessity for again trying any of the issues except the issue of damages. The evidence does not indicate any necessity for further investigation of the other issues in the court below.

The judgment is reversed, and the cause is remanded to the lower court for a new trial solely upon the issue of the amount of the damages, with directions to that court, upon the settlement of that issue, to render judgment in favor of the plaintiff for the amount so found. The defendant will recover her costs on this appeal.

We concur: KOFORD, P. J.; NOURSE, J.

99 Cal. App. 310

BARNETT v. ATCHISON, T. & S. F. RY. CO.
et al., and three other cases. (Civ. 6573.)★

District Court of Appeal, First District, Division 2, California. June 6, 1929.

Rehearing Denied July 3, 1929. Hearing Denied by Supreme Court Aug. 5, 1929.

1. Railroads ⇨327(2)—Persons in automobile deliberately backing into known danger, without stopping, looking, or listening, held contributorily negligent.

In action for damages resulting from collision between automobile and train at crossing, undisputed evidence that persons riding in automobile deliberately backed into place of known danger, utterly heedless of bells and whistles sounded by train, and without slightest effort to stop, look, or listen for approaching trains, together with evidence that persons in automobile stopping when they approached tracks could have seen train and heard signals, demanded holding that persons in automobile were guilty of contributory negligence as matter of law.

2. Railroads ⇨327(1)—Doctrine that persons must stop, look, and listen for approaching trains applies to motorist.

Doctrine that railroad track is in itself signal of danger, and that any one attempting to cross track must stop, look, and listen for approaching trains, applies to driver of motor vehicle as well as to driver of horse-drawn vehicle or to foot passenger.

3. Railroads $\S$ 327(7)—Motorist is not excused from stopping to determine whether railroad tracks may be safely crossed because noise of motor vehicle prevents hearing of warning signals.

That noise of motor vehicle approaching railroad tracks may often prevent hearing of warning bells or whistles does not excuse motorist from stopping, if necessary, to ascertain if tracks may be safely crossed.

4. Evidence $\S$ 553(4)—Question to engineer as to distance within which he could stop train not incorporating facts held objectionable as assuming facts not in evidence (Code Civ. Proc. $\S$ 2055).

In action to recover damages from collision between automobile and train at crossing, hypothetical question to engineer called as witness under Code Civ. Proc. $\S$ 2055, as to distance within which he could stop train he was driving, was objectionable as assuming facts not in evidence, where there was no attempt to prove that engineer was expert on facts concerning which he was questioned, and there was no attempt to incorporate question, facts, and circumstances on which witness was asked to express opinion.

5. Evidence $\S$ 568(5)—Statement by engineer not expert nor questioned as to facts that he could stop train within 120 feet held not basis for claiming engineer had last clear chance.

Where engineer of train colliding with automobile at crossing was not shown to be expert on facts concerning which he was questioned, and there was no attempt to incorporate, in question as to distance within which he could stop train, facts and circumstances on which engineer was asked to express opinion, answer of engineer that he could stop train within 120 feet could form no basis for claim that engineer had last clear chance to prevent accident.

6. Evidence $\S$ 553(4)—Opinion of witness on assumed facts, differing from facts proved, has no probative force.

Opinion of witness on assumed facts, differing from those shown by evidence, cannot be given any probative force, and, when such opinion is given in answer to question which does not take facts proved into consideration, it is without value as evidence.

7. Railroads $\S$ 338—Engineer having right to assume automobile would cross safely or stop, attempting to stop train within distance insufficient to avoid collision held not negligent under doctrine of last clear chance.

Where engineer of train colliding with automobile at crossing did not realize that occupants of automobile failed to heed his warning signals, and were in danger until train was 75 feet from point of collision, and engineer then did everything possible to stop train, and there was no negligence in engineer's not trying to stop train earlier, when he had right to assume that automobile would cross safely or stop before reaching point of danger, and engineer testified that he could stop train within distance of 120 feet, doctrine of last clear chance was not applicable to charge engineer with negligence in not attempting to stop train earlier, since evidence showed occupants of automobile, and not engineer, had last clear chance to avoid injury.

Appeals from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Separate actions by Willis Orton Barnett, a minor, by Lela Barnett, his guardian ad litem, and another, against the Atchison, Topeka & Santa Fe Railway Company and others, and by Smith Casner, Laverne Hallmark, a minor, by Zula Hallmark, her guardian ad litem, and another, and by Hollace Taylor, a minor, by Joseph Taylor, his guardian ad litem, against same defendants, consolidated for trial. From judgments for plaintiffs in each case, defendants appeal. Reversed.

Hearing denied by Supreme Court; CURTIS and LANGDON, JJ., voting for a hearing.

E. W. Camp, Robert Brennan, Platt Kent, and Leo E. Sievert, all of Los Angeles, for appellants.

Philip M. Carey, of Oakland, and J. E. Rodgers, A. F. Bray, and Mortimer B. Veale, all of Martinez, for respondents.

NOURSE, J. These four actions were consolidated by stipulation and tried together at the same time. The plaintiffs sued for damages resulting from a collision with an overland train operated by the defendant and an automobile driven by Raymond Hallmark near the town of Antioch. The verdicts were returned in favor of Lela Barnett and her infant child in the sum of \$10,000; in favor of Smith Casner in the sum of \$5,000; in favor of Zula Hallmark and her two minor children in the sum of \$15,000; and in favor of Hollace Taylor in the sum of \$6,000. The defendant has appealed from each of the judgments upon typewritten transcripts.

The accident occurred at about 6 o'clock a. m. on June 28, 1925, at a crossing over the main transcontinental line of the defendant corporation approaching the city of Antioch along the southern bank of the San Joaquin river. This crossing was along an unimproved extension of B street, through the private property of the Antioch Lumber Yard, which was used as an approach to an old wharf belonging to the company, but abandoned some time prior to the accident. Five young men, Taylor, Casner, Barnett, Hallmark, and Parks, had crossed over the railroad tracks and on to this wharf a short time prior to the accident riding in a Star touring automobile which was driven by Hallmark. Parks was seated on the driver's right in the front seat; Casner, Taylor, and Barnett were seated in the rear seat. When they reached the wharf, Parks alighted and secured a sack of minnows which he placed in the tonneau of the automobile, and Hallmark thereupon backed the automobile off the wharf over the same course they had just followed. While they were thus approaching the railroad track, Hallmark was looking to the left and rear of the automobile while the three men in

the back seat had their heads down and were examining the minnows in the sack placed on the floor of the machine. At that time an overland train operated by the defendant corporation approached from the east, or to the right of the backing automobile. It was seen by Parks, who called to his companions to jump. He jumped free from the machine, and was uninjured. Hallmark, Casner, and Barnett were all killed as a result of the impact, while Taylor suffered serious injury.

The uncontradicted evidence was that the automobile was backing across the track at the rate of about five miles per hour; that the train was approaching at the rate of between 25 and 35 miles per hour; that the engineer had blown what is called the station whistle at a point some six or seven hundred feet from the crossing as he approached it; that the automatic bell on the engine was sounding continuously, and that, when the engineer noticed the automobile backing towards the track, he sounded four sharp warning whistles; that the automobile was then approximately 15 feet from the north rail of the track; and that when the engine was approximately 75 feet from the crossing, the engineer, seeing that the driver of the machine failed to stop, applied the emergency and air brakes, and released sand upon the rails for the purpose of bringing the train to a stop.

The uncontradicted evidence is that all five of those riding in the automobile were familiar with the conditions surrounding the crossing; had passed over it at other times; that they knew the frequency of trains upon that track; and that they backed on to the crossing on this occasion without a single precaution for their safety. A small shed had been erected close to the wharf which obstructed the vision of those in the automobile so that until they reached a point about 18 feet from the north rail of the track they were unable to see a train approaching from the east. Notwithstanding this fact, they did not stop, look, or listen for approaching trains at any period of their journey from the wharf to the railroad track. Hollace Taylor, the only member of the party who gave testimony on the subject, testified that from the point where they left the wharf to the point of collision they were backing approximately 100 feet; that they did not stop at any time until they reached the track; that there were no side curtains on the machine to obstruct their view; that he and his two companions on the back seat were examining the minnows during this whole time, and that, until Parks called from the front seat to jump, he had not noticed the train approaching; that at that time the train was about 150 or 175 feet from the crossing.

When this witness had fixed the train at that point, one of his counsel volunteered the statement that he saw it before that, and, after the court had taken a noon recess, the witness was again called to the stand. This

witness then testified that he first saw the train about 500 or 600 feet from the crossing. Another witness testified that he was standing at a point about 45 feet from the point of collision; that he heard the whistle of the train some 2 miles away; that he saw the automobile on the wharf, and saw it backing towards the railroad crossing as he saw and heard the train coming down the track. He called to the people in the automobile, and noticed Parks, who sat in the front seat on the driver's right, turn and speak to the driver. The automobile was then about 10 feet from the track. The automobile, however, continued to back toward the crossing, and, as the train approached, it "whistled a lot of whistles."

Numerous other witnesses testified to the continuous ringing of the bell, to the sounding of whistles, and to the rumbling of the train, which was heard for some three minutes prior to the collision. The engineer of the train testified that, after he had sounded the long station whistle, and when within 150 or 200 feet of the crossing, he for the first time noticed the automobile backing towards the track; that he then sounded four sharp warning whistles, and, when he saw that the driver of the machine failed to heed the warning, but continued on to the track, he applied all his brakes, and released sand upon the tracks for the purpose of bringing the train to a stop. The train, however, did not stop until the engine had proceeded about 1,000 feet beyond the crossing, and this is explained in the testimony of the engineer and others that, as the automobile was struck, oil and gas were spilled upon the rails; that the wheels of the engines immediately locked and skidded, thus preventing the engineer bringing the train to a stop within a reasonable distance. At this point it is well to note that, when the engineer was called as a witness for the plaintiffs under section 2055, Code of Civil Procedure, he was asked within what distance he could stop a train such as he was driving at the time. He answered within 120 feet. The plaintiffs rely strongly upon this testimony in support of their theory of the last clear chance doctrine, while the defendant quite properly suggests that it is not competent evidence, as the engineer was not qualified as an expert, and was not shown to have had any experience in trying to stop a train of the length such as he was driving at the time of the accident traveling at the speed testified to.

[1-3] The undisputed evidence is that the five men in the automobile deliberately backed into a place of known danger utterly heedless of the warning bells and whistles, and without the slightest effort to stop or to look or to listen for approaching trains. This evidence unmistakably demands a holding that they were all guilty of contributory negligence as a matter of law. It must be conceded that, if they had stopped when they

passed the corner of the shed, a distance of 18 feet from the railroad track, and had looked, they would have seen the approaching train, as from that point they had a clear vision of the track for a distance of approximately one-half a mile. It must also be conceded that, if they had stopped at that point, or even closer to the track while still in a position of safety, they would have heard the whistle or bells or the rumble of the approaching train or the warning cries of the witness who stood near the point of collision. The age-old doctrine that a railroad track is in itself a signal of danger, and that any one attempting to cross the track must stop, look, and listen for approaching trains, applies to the driver of a motor vehicle as well as to the driver of a horse-drawn vehicle or to a foot passenger. The fact that the noise of a motor vehicle may often prevent the hearing of warning bells or whistles does not excuse the motorist from stopping, if this is necessary to ascertain whether the track may be safely crossed.

This duty of the driver who attempts to cross a railroad track is well expressed by Mr. Justice Holmes in *Baltimore & Ohio R. Co. v. Goodman*, 275 U. S. 66, 69, 48 S. Ct. 24, 25 (72 L. Ed. 167, 56 A. L. R. 645), where he says: "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk."

The same principle is announced in *Young v. Southern Pacific Co.*, 189 Cal. 746, 754, 210 P. 259, 262, where the court says: "The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing. Absent-mindedness or forgetfulness will not suffice as an excuse for the neglect of a person about to cross a railroad track to look and listen for a possible approaching train. And a person who attempts, regardless of warnings, to cross in front of a moving train, even though he be apparently in a condition of mental abstraction and consequently indifferent to the peril of his situation, is nevertheless negligent." The foregoing passage is quoted with approval in *Billig v. Southern Pacific Co.*, 192 Cal. 357, 363, 219 P. 992, 995, where many other authorities to the same purport are cited.

In *Giannini v. Southern Pacific Co.* (Cal. App.) 276 P. 618, evidence of contributory negligence far less convincing than what we have here was held to constitute contributory

negligence as a matter of law within the rule of *Green v. Southern Cal. R. Co.*, 138 Cal. 1, 70 P. 926; *Griffin v. San Pedro, etc., R. Co.*, 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842; *Murray v. Southern Pacific Co.*, 177 Cal. 1, 169 P. 675; *Billig v. Southern Pacific Co.*, *supra*, and other cases cited.

Relying upon plaintiffs' evidence, the defendant moved for a nonsuit upon the ground, among others, of contributory negligence as a matter of law. The motion was denied. It should have been granted. The evidence thereafter received as a part of defendants' case and in rebuttal on the part of plaintiffs did not aid plaintiff's case in any respect. If anything, it clearly emphasized the contributory negligence of these parties and the lack of negligence on the part of the defendants. The issue of contributory negligence should therefore have been taken from the jury by the trial judge upon an instruction that the evidence disclosed contributory negligence as a matter of law. Because the evidence on this issue was all one way, the judgments must be reversed, but, as the cases must be returned for a new trial, we deem it proper to discuss one other point raised by the appellants, and that is the application of the doctrine of the last clear chance.

[4-6] This issue was raised by the respondents upon the theory that, even though the occupants of the car were guilty of contributory negligence as a matter of law, nevertheless the respondents were entitled to recover because the engineer could have, with the exercise of ordinary care, avoided the collision. The only evidence upon which this claim is based is the unsupported testimony of the engineer, when, in answer to a hypothetical question addressed to him by respondents, he said that he could stop the train within a distance of 120 feet. The question was objected to by the appellants upon the ground that it was incompetent and improper because it assumed facts not in evidence. The objection should have been sustained, but, though the answer was permitted, it does not form any basis for the claim that the appellants had a last clear chance to prevent the accident. There had been no attempt to prove that the engineer was an expert upon the facts concerning which he was interrogated, and there was no attempt to incorporate in the question the facts and circumstances upon which the witness was asked to express an opinion. The opinion of a witness upon assumed facts differing from those shown by the evidence cannot be given any probative force (*Estate of Purcell*, 164 Cal. 300, 308, 128 P. 932), and, when such opinion is given in answer to a question which does not take the facts proved into consideration, it is without value as evidence.

[7] But, assuming that the jury could have considered the conjecture of this witness as to within what distance he could stop a train of this character, this wholly fails to prove

the issue of last clear chance. The undisputed evidence is that, as the train left the trestle some 287 feet east of the collision, the automobile was still backing towards the railroad track; that, when the engine was about 150 feet from the point of collision, the engineer sounded four sharp blasts of the whistle as a warning; that, when the engine had reached a point about 75 feet east of the point of collision, the engineer for the first time realized that those in the automobile had not heeded his warning signals, and for the first time realized that they were in a place of danger. The evidence then is that at that time the engineer applied his brakes and did everything possible under the circumstances to avoid the injury. There is no word of testimony which tends to prove, or from which any fair inference can be drawn, that from the time the engineer realized that those in the automobile were unable to escape from their place of danger he failed to do anything which ordinary care and prudence would dictate to avoid the injury. If we are to believe the corrected testimony of the witness Taylor that, when the rear of the automobile was near the right-hand rail, he looked up and saw the train approaching 650 feet distant, that the motor of the vehicle was still running, and that he did not jump because he assumed that the automobile had ample time to get out of the way of the train, it cannot be said that the engineer failed to exercise ordinary care in not applying his brakes at that point, because he, too, had the right to assume that the automobile would either cross safely over the track or that it would stop before reaching the point of danger.

As said in *Basham v. Southern Pacific Co.*, 176 Cal. 320, 324, 168 P. 359, 360: "When a person is approaching a place of danger, and all the warnings of the danger have been given that reasonable care requires, those in charge of the dangerous engine, seeing him thus acting, are not obliged to presume, and it cannot be said that they act unreasonably in not presuming, that the person will continue his approach until he gets into the very place of danger, when it is obvious that he could at any time, with the least care, stop and avoid it." *Billig v. Southern Pacific Co.*, 192 Cal. 357, 363, 219 P. 992, 995.

It is in the testimony of this same witness Taylor that, after the automobile stopped in the middle of the railroad tracks with its motor still running, he saw its driver, Hallmark, switching the clutch, and that, when the engine was still within 200 feet of the point of collision, he still assumed that Hallmark would get the automobile out of danger. It is also in the evidence that at the speed at which the train was approaching those in the automobile would have had time to jump to safety when the automobile stalled upon the track. From the fact that they did not do so, it is fair to assume that they still believed they had ample time to cross the tracks and

escape from injury. To charge the engineer of the train with negligence in not having applied his brakes before that time would, therefore, be carrying the doctrine of last clear chance beyond the limits of the decisions. This view is well expressed in *Bagwill v. Pac. Elec. R. R. Co.* (Cal. App.) 265 P. 517, and quoted with approval in *Giannini v. Southern Pacific Co.* (Cal. App.) 276 P. 618, as follows: "There seems still to be some misconception of this doctrine of last clear chance. It was not devised as a last resort to fasten liability on defendants. Like the body of the law of negligence, to which the doctrine is appended, the test remains as that of ordinary care under all of the circumstances. The law in many of its workings indicates great charity and solicitude for individual rights. It says to a negligent plaintiff that in spite of his lack of caution he will be protected against wanton, wilful or avoidable harm. But, on the other hand, it penalizes no innocent person. We are not to tear down the facts of a case and rebuild the same so that, by a trimming-down and tight-fitting operation, something can be constructed upon which may fasten the claim of last clear chance. The words mean exactly as they indicate, namely, last clear chance, not possible chance. The Supreme Court has not left us to speculate on the application of the doctrine (*Palmer v. Tschudy*, 191 Cal. 696 [218 P. 36]; *Young v. Southern Pacific Co.*, 182 Cal. 369 [190 P. 36]; *Wallis v. Southern Pacific Co.*, 184 Cal. 662 [195 P. 408, 15 A. L. R. 117]; *Gainer v. United Railroads of San Francisco*, 58 Cal. App. 459 [208 P. 1013])."

The facts in evidence in *Basham v. Southern Pacific Co.*, supra, are almost identical with the situation in this case, except that a horse-drawn vehicle rather than a motor vehicle was involved in the collision. We might paraphrase the language of that decision appearing on page 329 of 176 Cal. (168 P. 362) as follows: "The bell of the engine was continuously ringing. The moving train itself must have made considerable noise. The automobile was proceeding at a slow speed under the control of Hallmark. He could have come to a standstill in a second. Under all these circumstances it would be extremely unreasonable for any one to suppose he was unaware of the approaching train, and did not intend to stop before reaching the track, as he could easily have done, and as is the frequent custom. When the engineer began to entertain a fear that those in the automobile were inattentive he at once used every effort to stop the train. It cannot be said that either he did realize the danger sooner, or that, in reason, with his knowledge he had cause to realize it sooner. Hence the last clear chance doctrine never came into operation."

Upon the reasoning in the *Basham Case*, and upon the authority of *Wallis v. Southern Pacific Co.*, 184 Cal. 662, 673, 195 P. 408, 15 A. L. R. 117, we are satisfied that the trial judge

erroneously instructed the jury that the doctrine of last clear chance applied in this case; in fact, the evidence clearly demonstrates that the last clear chance to avoid the injury was with those whom the respondents represent and not with the appellants. The error in submitting this issue to the jury requires a reversal of the judgments, notwithstanding any other errors claimed.

For the reasons given, the judgments and each of them are reversed.⁴

We concur: KOFORD, P. J.; STURTEVANT, J.

99 Cal. App. 303

KILBRIDE v. SWAFFORD et al. (Civ. 6815.)

District Court of Appeal, First District, Division 2, California. June 5, 1929.

1. Damages $\S$ 141—Complaint alleging that plaintiff sustained great physical shock, damages to automobile, and physical injuries as result of defendant's negligent operation of automobile held sufficient.

Complaint alleging that as result of defendant's negligent operation of automobile causing defendant's car and plaintiff's car to come into violent contact, plaintiff sustaining great physical shock and damage to his automobile, in addition to physical injuries, *held* sufficient.

2. Automobiles $\S$ 238(8)—Complaint alleging that defendant operated automobile in such a negligent manner as to cause violent contact with plaintiff's automobile injuring plaintiff, held sufficient.

Complaint alleging that defendant was operating his automobile "in such a careless and negligent manner as to cause same to come into violent contact with the automobile that plaintiff was driving, damaging his automobile and injuring plaintiff," and that as result of defendant's carelessness plaintiff sustained injuries, *held* sufficient to present issue of negligence and proximate cause as against claim that insufficient facts were alleged.

3. Negligence $\S$ 119(2)—Proximate cause is properly in issue where complaint alleges injury was suffered because of defendant's negligent act.

When it is pleaded that plaintiff suffered injury because of negligent act of defendant, element of proximate cause is properly put in issue in action for injuries.

4. Appeal and error $\S$ 1039(4)—Defendant was not prejudiced if complaint for injuries was insufficient, where court found collision was caused simply by defendant's careless operation of car and awarded \$500 damages.

If complaint in action for injuries sustained in collision of automobiles was insufficient, such insufficiency was not prejudicial and did not warrant reversal where case was fairly tried and court sitting without jury found that collision was caused simply by defendant's negligent

operation of car, and where trial court awarded only \$500 damages for shock, fractured rib, and contusions of hip; there being no surprise.

5. Appeal and error $\S$ 1039(2)—Sufficiency of complaint becomes less important where defendant is not taken by surprise by issues raised at trial.

Where defendant is not taken by surprise because of any issue not raised in the complaint, matter of the sufficiency of the pleading becomes less important.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Robert Kilbride against Charles Swafford and others. Judgment for plaintiff, and defendant Swafford appeals. Affirmed.

Frank V. Cornish and Cornish & Cornish, all of Berkeley, for appellant.

William T. O'Reilly, of Honolulu, Hawaii, and James H. Eva and George W. Lupton, Jr., both of Oakland, for respondents.

NOURSE, J. Plaintiff sued for damages for injuries resulting from an automobile collision. The cause was tried before the court sitting without a jury. The trial court awarded plaintiff judgment in the sum of \$500, and the defendant Swafford appeals upon the judgment roll alone.

The complaint alleged that "while plaintiff was driving a Ford roadster in a northerly direction over and along the east side of Shattuck avenue at or near the point where the said Shattuck avenue intersects Alcatraz avenue * * * at the same time and place the defendants * * * were operating a certain other automobile in an easterly direction on Alcatraz avenue in such a careless and negligent manner as to cause same to come into violent contact with the automobile that plaintiff was driving, damaging his automobile and injuring plaintiff." It was further alleged that "as a result of the defendants' carelessness * * * plaintiff sustained a great physical shock, fracture of two ribs on the left side, contusions, and wrenching of the right hip and a sprain of the back." Special damages were also alleged, and the complaint closed with a prayer for both general and special damages in the sum of \$10,215.

[1] On this appeal the judgment is attacked upon the sole ground that the complaint failed to state a cause of action. The argument is that the pleading is insufficient because it does not state facts showing how the respondent suffered physical injuries merely by the contact of the two cars. But the complaint alleged that as a result of the negligent operation of the car by the appellant which caused the two cars to come into violent contact the respondent sustained "a

great physical shock" and damages to his automobile in addition to the physical injuries complained of. This was sufficient to support the cause for some damages at least, because it cannot be said that personal contact with appellants' machine was necessary to cause a shock to respondent.

[2, 3] It is also argued that the complaint is insufficient because it does not state facts which show the damage to have been proximately caused by the negligent acts of the defendants. *Smith v. Buttner*, 90 Cal. 95, 27 P. 29, and similar cases are cited to the point. It would serve no purpose to discuss the cases cited, each one of which rests on the peculiar wording of the pleading involved. The complaint under attack is almost identical in wording to that considered in *Wiley v. Cole*, 52 Cal. App. 617, 199 P. 550, where the court said: "It clearly appears from the allegation that defendants were operating their automobile in a negligent manner, and that by reason of such negligence their automobile collided with that of plaintiff and thereby caused the injury." Here the complaint alleged that the appellant was operating his automobile "in such a careless and negligent manner, as to cause same to come into violent contact with the automobile that plaintiff was driving, damaging his automobile and injuring plaintiff as hereinafter set forth." The "acts" which were alleged to have been negligently done were the careless operation of the automobile which caused the contact with respondent's machine. It is conceivable that in these automobile cases the act of carelessly driving a car into another is the only act of negligence that can be truthfully alleged. If the plaintiff relies upon the fact that the defendant was driving at an excessive speed, or on the wrong side of the road, or in violation of some traffic regulation these are facts constituting negligence which may be pleaded, but where a collision is caused merely by one carelessly driving a car into another that is the act of negligence to be alleged. When it is pleaded that the plaintiff suffered injury because of such negligent act the element of proximate cause is properly put in issue.

[4, 5] But if the pleading here has been too liberally construed we are satisfied that the appellant has suffered no prejudice. There is no complaint that the cause was not fairly tried. The court, sitting without a jury, found that the collision was caused simply by appellants' careless and negligent operation of his car by which he caused his car to come into contact with respondent's car, and that such negligence was the direct and proximate cause of the injury. Thus, the appellant was not taken by surprise because of any issue not raised in the complaint. In such a case the matter of pleading becomes less important. *Stein v. United R. of S. F.*, 159 Cal. 368, 370,

113 P. 663; *Tietke v. Forrest*, 64 Cal. App. 364, 367, 221 P. 681.

The rule is particularly applicable here where the trial court awarded the respondent but \$500 in damages on a finding that he had suffered a great physical and mental shock, a fracture of a rib, and contusions of the hip. The judgment appears to be a fair and reasonable one under the circumstances.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

99 Cal. App. 297

PEOPLE v. FALLAI. (Cr. 1528.)

District Court of Appeal, First District, Division 1, California. June 5, 1929.

1. Robbery ☞17(1)—Information charging that defendant robbed another was sufficient, regardless of amendment (Pen. Code, § 1008, and §§ 951, 952, as amended by St. 1927, p. 1043).

Information for robbery charging that defendant committed a felony, in that on certain date at named place he robbed another, was legally sufficient within Pen. Code, §§ 951, 952, as amended by St. 1927, p. 1043, so that question of right to amendment under section 1008 was immaterial; the word "robbed" having a fixed and defined meaning as used in the administration of criminal laws.

2. Robbery ☞24(1)—Evidence held to sustain conviction for second degree robbery.

Evidence in prosecution for robbery held sufficient to sustain conviction for robbery in the second degree.

3. Criminal law ☞358—Testimony defendant was in state on date prior to robbery held not erroneous, in view of his testimony on alibi.

Where defendant testified in his own behalf that he was outside of state at time of robbery and for a considerable period prior thereto, the admission of testimony in rebuttal to effect that defendant was within state at a time shortly before robbery was not erroneous.

4. Criminal law ☞351(2)—Admitting testimony as to defendant's conduct and conversations had with him and in his presence at time of arrest held not erroneous.

In prosecution for robbery, admission of testimony by detective relative to defendant's conduct and conversations had with him and in his presence at time of his arrest held not erroneous.

5. Criminal law ☞1144(16)—Jury will be presumed to have followed court's instruction to disregard remarks of district attorney assigned as misconduct.

Jury will be presumed to have followed court's instructions to disregard remarks of district attorney in commenting on testimony which were assigned as misconduct.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Humbert Fallai was convicted of robbery in the second degree, and he appeals. Affirmed.

William F. Herron, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

KNIGHT, J. Appellant, having been convicted of robbery in the second degree, has appealed from the judgment of conviction and the order denying his motion for a new trial. One of the several grounds urged for reversal is that the trial court erred in allowing the information to be amended at the commencement of the trial.

Before amendment the information read as follows: " * * * Humbert Fallai is accused by the District Attorney of the said County of Alameda * * * of the crime of felony, to wit, robbery, in that on or about the 4th day of March, A. D. 1928, at the said County of Alameda, State of California, he *robbed* John J. Fitzgerald of one gold watch and chain, one revolver, one pair of handcuffs and \$14 more or less, lawful money of the United States, and the said Humbert Fallai was then and there armed with a deadly weapon." (Italics ours.) Appellant did not demur to the information, but at the commencement of the trial, and after the district attorney had finished his opening statement to the jury, objected to any evidence being received, and asked that the action be dismissed upon the ground that the information did not charge a public offense. The particular objection made was that, because of the use of the word "robbed" in the place of the technical language of the code defining the crime of robbery, the information entirely failed to state a public offense. In ruling upon the objection the trial court indicated that in the absence of a demurrer the information was probably legally sufficient, but stated that the word "robbed" was merely the expression of an opinion and that therefore the information should be amended. Whereupon, pursuant to the authority granted by section 1008 of the Penal Code, the information was amended by striking out the word "robbed" and inserting in lieu thereof the following: "Willfully, unlawfully and feloniously and by means of force and fear, and against the will of one John J. Fitzgerald, did take, steal and carry away from the person and immediate presence of the said John J. Fitzgerald," the personal property hereinabove described, etc.

[1] Appellant now contends that the amendment was one of substance and not of form, and therefore was violative of appellant's constitutional rights; and that, if said section 1008 be construed as permitting such an amendment it is, to that extent, un-

constitutional. Respondent takes the position that prior to the amendment the information was legally sufficient to meet the requirements of the present statute, and that consequently the questions as to the form of the amendment and the constitutionality of the code section permitting the same are immaterial. We are of the opinion that respondent's position must be sustained. The short form of information authorized by the 1927 amendment to section 951 of the Penal Code is as follows: "[Title of the Court]. The district attorney of the County of — hereby accuses A. B. of a felony (or misdemeanor), to-wit: (giving the name of the crime, as murder, burglary, etc.), in that on or about" a certain date (stating it) "in the county of —, State of California, he (here insert statement of act or omission, as for example, 'murdered C. D.')" (St. 1927, p. 1043); and in connection therewith section 952, as amended by St. 1927, p. 1043, of the said Code provides that in charging an offense the information shall be sufficient if it contains in substance a statement that the accused has committed some public offense therein specified, that such statement may be made in ordinary and concise language without any technical averments, and may be in the words of the enactment describing the offense or in any words sufficient to give the accused notice of the offense of which he is charged. The code (Pen. Code, § 211) defines robbery to be "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear;" and in its relation to the law the word "robbed" is defined by Webster to mean: "To take personal property in the possession of another from his person or his presence feloniously and against his will by violence or by putting him in fear." It would appear, therefore, in view of the foregoing definitions, that the word "robbed" as it is used in the administration of the criminal laws has a fixed and well-defined meaning, and, that being so, it would be wholly unreasonable to hold, we think, that appellant did not know what was intended when he was charged with having "robbed John J. Fitzgerald of one gold watch" and the other personal property above mentioned. As said in *People v. Campbell* (Cal. App.) 265 P. 364: "Much of the time of the courts has been consumed in the consideration of technical objections to pleadings in criminal cases; yet it is probable that few judges are able to recall a single case in which the defendant was actually in the slightest doubt as to the crime with which he was charged. Modern legislation is endeavoring to cut the inextricable Gordian knot by which the trial of criminal cases has been so long fettered, and the courts ought not to thwart that laudable effort by an adherence to mere technical

precedents which regard form rather than substance." In the case of *People v. Lopez*, 90 Cal. 569, 27 P. 427, the meaning of the word "steal" as used in the charging part of an information was called into question, and the court said: "The word 'steal,' as here used, has, as will be hereafter shown, a fixed and well-defined meaning, and is, perhaps, in its common, every-day use and general acceptance, as well understood as any word in the English language. * * * To therefore contend that the defendant, who must be presumed to be a person of common understanding, did not know what was intended when he was charged by the information with stealing another man's horse, is simply preposterous." It would seem that the language just quoted applies with equal force to the word "robbed" as here used. Appellant points out that aside from the criminal law, for instance in the Scriptures and in the works of certain famous authors from which he quotes, the word "robbed" is used without criminal signification; but the answer to the argument appellant makes in that behalf is that we are here dealing with its meaning only in the legal sense.

[2] The sufficiency of the evidence is also challenged. The main facts established by the prosecution which support the verdict were as follows: Fitzgerald, a police officer, while walking home from a theatre about 9:30 o'clock at night, being at the time off duty and dressed in civilian clothes, was "held up" and robbed by two men on Thirty-Sixth street, Oakland. According to Fitzgerald's testimony, the men approached in an automobile (which afterwards proved to be stolen) and when close to him they turned suddenly toward the curb and stopped. One of them alighted and pointing a pistol at him commanded him to throw up his hands. The robber then placed the muzzle of the pistol against Fitzgerald's body and called to his companion to relieve Fitzgerald of his valuables. The second robber then got out of the automobile and while emptying Fitzgerald's pockets was recognized by Fitzgerald as being a frequenter of a dance hall located in the district patrolled by Fitzgerald, and whom he afterwards identified as appellant. After relieving Fitzgerald of his valuables he was told to "beat it up the street," but instead he followed the robbers to the automobile, asking for the return of his spectacles; and in doing so was able to observe them further and to obtain the number of the license plate on their automobile. A few days later Fitzgerald was shown pictures of two men, one of whom was appellant, and he immediately identified him as being the robber who had rifled his pockets. The pictures were left with Fitzgerald and kept in his possession for several months thereafter. The robbery occurred on March 4, 1928, and the following June appellant was arrested in San Francisco. Within a day or two there-

after, and while no one else was present except police officers, Fitzgerald identified appellant as being one of the robbers, and positive identification was again made at the trial.

Appellant's defense was an alibi. He claimed that on the day of the robbery he was in Northern Mexico, en route to El Paso, Tex., and that on the day following he registered at a hotel in El Paso under the name of Rupert De Morcerf, a name assumed by him in the theatrical business. In corroboration of his testimony appellant produced a page from the hotel register showing that some person had registered under that name at that hotel on the day following the robbery. The hotel was conducted by a Mrs. Bandy, whose deposition was taken and read in evidence. She identified a picture of appellant as being the person she had known as Rupert De Morcerf and as the person who registered at her hotel on the day mentioned under that name. Appellant further testified that he was accompanied on the trip to El Paso by a man named Hernandez, that the latter registered at the same hotel on the same day, and at appellant's request had written a letter to appellant's mother, who lived in San Francisco. Appellant testified that he had seen Hernandez mail the letter, and such a letter was produced at the trial, the San Francisco post-mark thereon being dated March 7, 1928. In rebuttal, the prosecution introduced the testimony of a handwriting expert to the effect that the signature on the hotel register was not in the handwriting of appellant.

It is apparent from the foregoing that there is a sharp conflict in the evidence as to appellant's participation in the robbery; therefore the question of whether Fitzgerald was correct in his identification of appellant as being one of the robbers, or whether the evidence adduced in support of appellant's asserted alibi should be believed, was clearly one of fact for the determination of the jury, and it having accepted and acted upon the former, which is not inherently improbable, we are not permitted, under the well-established rule, to interfere with its conclusion.

[3] Subject to appellant's objections the prosecution was allowed to offer in rebuttal the testimony of a Mr. Beacher and his wife to the effect that appellant was at their home in Oakland about 8 o'clock at night on February 24, 1928. We find no error in the rulings relating to the admission of this testimony for the reason that appellant claimed while testifying in his own behalf that he was outside of the state of California, not only at the time of the robbery, but for a considerable period prior thereto. In this regard he testified on direct examination that he left El Paso, Tex., for San Luis Potosi, Mexico, on February 25th, and on cross-examination he testified, without objection, that he had been in El Paso, Tex., two or three

days before going to San Luis Potosi. This, of course, would have been a physical impossibility, if, as the Beachers testified, he was in Oakland on the night of February 24, 1928.

[4] Nor do we find any error in allowing Detective Van Matre to testify as to appellant's conduct and the conversations had with him and in his presence at the time of his arrest in San Francisco. *People v. Sprague*, 52 Cal. App. 363, 198 P. 820; *People v. Sampo*, 17 Cal. App. 135, 118 P. 957. It was for the jury to say whether or not at that time appellant knew that the crime had been committed and that he was accused of having committed it. *People v. Shelest*, 62 Cal. App. 213, 216 P. 389; *People v. Piscitella* (Cal. App.) 266 P. 349.

[5] During his closing argument to the jury, in commenting upon the testimony of Mrs. Bandy, the district attorney stated in substance that, since her testimony was given in the form of a deposition, it did "not carry the sanctity that it would if she were here testifying in person." The remarks of the district attorney were assigned as misconduct, and the jury was promptly instructed to disregard them, which was the equivalent, we think, of stating to the jury that the assertion of the district attorney was not the law; and it is to be presumed that the jury followed the court's instructions.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

99 Cal. App. 337

MEYER v. STATE LAND SETTLEMENT BOARD. (Civ. 3813.)★

District Court of Appeal, Third District, California. June 7, 1929.

Rehearing Denied July 6, 1929. Hearing Denied by Supreme Court Aug. 5, 1929.

States 191(2)—Venue 13—Action for diverting water against state land settlement board held maintainable where subject was situated; board not being department of state government (Deering's Gen. Laws 1923, Acts 7923, 8008; St. 1927, p. 942; Code Civ. Proc. § 392, subd. 1).

State land settlement board, created by St. 1917, p. 1566 (Deering's Gen. Laws 1923, Act 8008), to establish and maintain industry and encourage agriculture and reward patriotism of soldiers and sailors, affairs of which are managed by department of agriculture, with certain reservations, under authority of St. 1927, p. 942, held not a department of state government under St. 1893, p. 57 (Deering's Gen. Laws 1923, Act 7928), authorizing suits against state and regulating procedure therein, and section 4, providing for change of venue to county of Sacramento in all such cases, and therefore ac-

tion against the board for diverting water necessary for irrigation purposes could be maintained in county in which subject of action was situated under Code Civ. Proc. § 392, subd. 1.

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Action by A. H. Meyer against the State Land Settlement Board. From an order denying motion for change of venue, defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., Frank English and Charles A. Wetmore, Jr., Deputy Attys. Gen., and Bond & Deirup, of Chico, for appellant. Ware & Ware, of Chico, for respondent.

THOMPSON, J. This is an appeal from an order denying defendant's motion for a change of place of trial.

The complaint alleges that the plaintiff purchase from the defendant corporation a small tract of land in Butte county, together with the water rights appurtenant thereto, consisting of a quantity of water conveyed upon the land of plaintiff from Butte creek by means of ditches; that the plaintiff relied upon this water supply to irrigate the nursery stock and crops which he produced on the premises; that subsequently the defendant changed the location of the main ditch adjacent to plaintiff's northerly property line, and closed the outlets therefrom with a single exception, with the result that the plaintiff was thereafter unable to secure an adequate supply of water. The complaint then prayed for damages and the issuance of a mandatory injunction requiring the defendant to restore the former system of ditches and outlets. The defendant is a body corporate, which was created by an act of the Legislature "to provide employment and rural homes for soldiers, sailors, and marines * * * who have served with the armed forces of the United States in * * * wars; * * * and * * * to demonstrate the value of adequate capital and organized direction in subdividing and preparing agricultural land for settlement." A board of managers was created, and large appropriations of money were made from time to time to carry out the purposes of the act. Stats. of Cal. 1917, p. 1566, Act 8008, 2 Deering's Gen. Laws 1923. Subsequently the department of agriculture of the state of California was given the management of the affairs of the state land settlement board, with certain limited reservations. Stats. of Cal. 1927, p. 942.

A demurrer and motion for change of place of trial to Sacramento county were filed by the defendant. The motion was denied, and the defendant appealed.

The Attorney General maintains that the state land settlement board, a corporation, is virtually a department of the state govern-

ment, and that it has a right to a transfer of the place of trial to the county of Sacramento, under the provisions of an act "to authorize suits against the state, and regulating the procedure therein." Stats. of Cal. 1893, p. 57, Act 7928, 2 Deering's Gen. Laws 1923. This act provides in part: "All persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the state board of examiners, are hereby authorized, * * * to bring suit thereon against the state in any of the courts of this state. * * * Sec. 4. * * * It shall be the duty of the attorney-general to defend all such suits; and upon his written demand, made at or before the time of answering, the place of trial of any such suit must be changed to the county of Sacramento."

Unless this statute authorizes a transfer to Sacramento county of any case based upon contract or negligence against any auxiliary department of the state government, whether such department exercises necessary governmental functions or not, then section 392 of the Code of Civil Procedure will govern in determining the county in which the present case is entitled to be tried. This section provides in part: "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code: 1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property."

It must be conceded that the diverting of water necessary for irrigation purposes, which is appurtenant to real property, is an injury thereto.

It seems quite evident that the purposes for which the Legislature enacted the state land settlement board, laudable as they may have been, were not to maintain a necessary function of state government, but, rather, to establish and maintain an industry to encourage agriculture and reward the patriotism and service of soldiers and sailors. This is a departure from necessary governmental functions, in the operation of which the sovereign power of the state may not claim the application of the ordinary rules of law governing her liability or procedure with respect to the usual governmental institutions. It is well said in *Carmichael v. Riley*, 56 Cal. App. at page 412, 205 P. 479: "The state in all its contracts and dealings with individuals must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign, and another for the subject. But when the sovereign engages in business and the conduct of business enterprises and contracts with individuals, whenever the con-

tract in any form comes before the courts the rights and obligations of the contracting parties must be adjusted upon the same principle as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor, and suitor.' * * *

It will be noted that the foregoing act under which the appellant claims the right to a transfer of the present case to Sacramento county authorizes the Attorney General to appear and defend the interest of the state, and to procure the transfer of the case to Sacramento county, only in litigation upon "claims on contract or for negligence * * * not allowed by the state board of examiners." It seems quite apparent that the Legislature intended to distinguish between such "claims (based) on contracts or negligence" which are proper for the state board of examiners to pass upon, and such as come within the jurisdiction of auxiliary corporate or quasi corporate boards, such as those which represent school districts, reclamation districts, and similar bodies politic created, not for governmental purposes, but for the welfare of the people in matters which are individual in their application rather than governmental. The mere fact that such corporate or quasi corporate political institutions are adjuncts or agencies of the state does not authorize the Attorney General to represent them or demand the transfer to Sacramento county of cases pending against them. This might result in great inconvenience and hardship to the remote individual litigant. It would be granting unwarranted privileges to the sovereign state.

If the state land settlement board is entitled to this transfer, and to demand the abrogation of the application of section 392 of the Code of Civil Procedure in the present case, we are unable to see why the same claim may not be reasonably made in similar litigation against a school district, a reclamation district, or any one of the many similar auxiliary municipal or political agencies of the state. It is argued that there is a distinction between these organizations, in that such agencies as school and reclamation districts are local and limited in their territory, while the jurisdiction of the state land settlement board extends to the remote limits of the state. But the mere territorial size of a district furnishes no logical or reasonable cause for distinction. It is the character of the institution and the enterprise involved which must determine its status and legal rights. If this corporate agency were a necessary governmental institution of the state, then we are of the opinion that the act above referred to, which authorizes certain suits against the state, and provides for the procedure of trial, would control the determination as to the proper place of trial. In the present action, however, the purposes and functions of the state land settlement board

are clearly not governmental in their nature, and therefore the usual provisions of the Code with respect to venue must control in determining the proper place of trial.

The order is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 321

PEOPLE v. LICALSI. (Cr. 1788.)

District Court of Appeal, Second District, Division 1, California. June 6, 1929.

Larceny $\hookrightarrow$ 59—Evidence relative to value of stolen property held insufficient to sustain conviction for grand theft (Pen. Code, § 487).

In prosecution, under Pen. Code, § 487, for grand theft, evidence relative to value of stolen property held insufficient to sustain conviction.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Joseph Licalsi was convicted of grand theft, and he appeals. Reversed.

Joseph M. Wapner, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, of San Francisco, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of grand theft and from an order denying his motion for a new trial.

By the information it was charged that defendant stole a diamond ring, of the value of \$500. Appellant presents the point that, before defendant could be convicted of grand theft, the burden devolved on the prosecution to prove that the value of the ring exceeded the sum of \$200. Section 487, Pen. Code. With reference thereto, in substance, the evidence showed that the ring was set in platinum and weighed 1.35 carats. The only evidence as to the value of the ring was introduced over the objection of defendant, and was that a "white *solitary* diamond ring in the parlance of a jeweler almost perfect, by weight 1.35 carats," was of the value of "approximately \$500," but there was no evidence either that the diamond in question was "white" or that it was "almost perfect." On the other hand, before answering the question as to the value of the ring, the witness on value gave the following testimony:

"Q. Mr. Murray, do you think that you could determine the value of a ring without seeing it? A. Well, if I am given the facts of the stone, I would know about what the value would be.

"Q. Yes; but those facts would have to coincide with the jeweler's terms, the character of the stone, the way it was cut, and

whether or not it was perfect or imperfect. All those things enter into consideration in your determination of the value, don't they? A. Certainly.

"Q. And without that you could not be in a position to make any positive statement, or even give an opinion as to the value; isn't that correct? A. I could not give the value of the stone, unless I could see it. Of course not."

As hereinbefore stated, the only evidence relating to the description of the ring was as to its setting and its weight; not a word as to the color of the diamond, its character as a stone, its cutting, or any of its possible imperfections. Nor was the ring exhibited to the witness. In such circumstances, manifestly it would be impossible for any one to fix its value. For aught that appears in the evidence, the ring may have been practically worthless. By the provisions of section 487 of the Penal Code, before a defendant may be convicted of grand theft, it becomes necessary to establish the fact that "the property taken is of a value exceeding two hundred dollars." Although the evidence may have been sufficient to sustain a verdict of petty theft (section 488, Pen. Code), "this court has neither the constitutional nor statutory authority to modify or interfere with the verdict of the jury in any respect (People v. Nagy, 199 Cal. 235, 239, 248 P. 906, 908).

The judgment and the order denying the motion for a new trial are reversed.

We concur: CONREY, P. J.; YORK, J.

99 Cal. App. 293

McWHORTER v. McWHORTER. (Civ. 3786.)

District Court of Appeal, Third District, California. June 4, 1929.

1. Deeds $\hookrightarrow$ 31—Deed to grantees as to husband and wife as joint tenants held valid, though female grantee was not wife of male grantee and assumed his name without warrant.

Deed running to "Michael McWho. and Hattie McWhorter, his wife, as joint tenants," held good and valid conveyance, where identity of female grantee was not questioned, though her name was assumed without warrant and she was not in fact the wife of the male grantee.

2. Deeds $\hookrightarrow$ 31—Grant to actual person under fictitious or assumed name is valid.

Grant to an actual person by a fictitious or assumed name, by which he is known and passes or which he has assumed for the occasion, is valid.

3. Joint tenancy $\hookrightarrow$ 8—Where parties acquired and used property as joint tenants, their mutual rights were not affected by question of existence of common-law marriage between them (Civ. Code, § 683).

Where man and woman living together acquired, held, and used real and personal prop-

erty as joint tenants under Civ. Code, § 683, on account of parties having contributed equal share to purchase of goods, question whether there was a common-law marriage was immaterial as regards the character of property or relative rights of ownership.

4. Joint tenancy ☞8—One of joint tenants in sole possession held not liable to other joint tenant in partition suit for other's share of rental value.

Where one of joint tenants living together as husband and wife retained exclusive possession of dwelling house after separation and premises were not leased or rented, it was error, in action for partition, to award the other joint tenant judgment for her share of rental value of premises.

5. Tenancy in common ☞28(1)—Tenant in common may not recover from cotenant rent for cotenant's occupancy or share of profits derived by cotenant's labor.

One tenant in common may not maintain action against his cotenant, who is in sole possession of property, to recover rent for cotenant's occupancy or for profits derived from property by means of cotenant's labor, though action in which recovery is sought is one for accounting or partition.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Hattie McWhorter against Michael McWhorter. From the decree, defendant appeals. Modified and affirmed.

Samuel J. Crawford, of Ocean Park, for appellant.

Fogel & Beman, of Los Angeles, and R. S. Harrington, of Sawtelle, for respondent.

THOMPSON, J. This is an appeal from a decree partitioning real and personal property between joint tenants.

While the plaintiff and defendant were living together as husband and wife without the consummation of a marriage, they acquired by their joint efforts the real and personal property involved in this suit. March 16, 1921, for a valuable consideration two lots in Los Angeles, Cal., were conveyed to the parties to this action "as joint tenants." A dwelling house was afterwards constructed on these lots, and the cost of the house and lots was paid for out of the joint earnings of the grantees. The ordinary articles of household furniture and equipment were also acquired and jointly used by them in the same manner, a list of which is enumerated in the decree. Dissensions arose between them, and they separated November 1, 1925. Upon the trial a judgment of partition was rendered and entered decreeing that each of the parties was entitled to an undivided one-half interest in both the real and the personal property, which was ordered to be sold and the proceeds to be distributed accordingly.

The chief contention of the appellant is that

the evidence fails to support the findings of the court to the effect that the plaintiff lived and cohabited with the defendant "in good faith" believing that their relationship was equivalent to what has been termed a common-law marriage. There is a conflict of evidence in that regard, and much of the trial was devoted to this issue.

[1-3] We are of the opinion that it is entirely immaterial, so far as the determination of this appeal is concerned, whether they lived together in good faith as husband and wife, or otherwise. The evidence is ample to support the finding that they acquired and held the property as joint tenants. The deed to the real property expressly conveyed it to them as joint tenants. It is true that the deed did run to "Michael McWhorter and Hattie McWhorter, his wife, as joint tenants," and that plaintiff was not in fact the lawful wife of the defendant, nor was her name really McWhorter. The term "his wife," which was used in the deed, was merely descriptive and surplusage. The identity of the grantee Hattie McWhorter not being questioned, although the name was assumed without warrant, it was nevertheless a good and valid conveyance. In 9 Cal. Jur. 127, § 30, it is said: "A grant to an actual person, by a fictitious or assumed name by which he is known and passes, or which he has assumed for the occasion, is valid." *Emery v. Kipp*, 154 Cal. 83, 97 P. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792; *Knaugh v. Baender*, 84 Cal. App. 142, 148, 257 P. 606. Both the real and the personal property which is involved in the present action were acquired, held, and used by the respective parties as joint tenants. "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy. * * *" Section 683, Civ. Code. The plaintiff was in possession of the household goods as completely as was the defendant, and the evidence amply shows that she contributed an equal share to the purchase of the goods. The question of the validity of the marriage in no way affects the character of the property or the relative rights of ownership.

[4, 5] After a separation of the parties, the defendant retained the exclusive possession of the dwelling house for a brief period of time. Subject to the objection on the part of the defendant that the evidence was incompetent, it was stipulated that the rental value of the premises was \$35 a month. The court also awarded plaintiff judgment for \$245 as her share of the rental value of the premises while defendant occupied the property exclusively. This allowance was erroneous. It is a recognized rule that one tenant may not maintain an action against his cotenant who is in sole possession of the property to recover

rent for the cotenant's occupancy of the property, or for profits derived from the property by means of the occupant's own labor. 7 Cal. Jur. 350, §§ 18, 19; 2 Tiffany on Landlord and Tenant, 1879, § 312; 27 A. L. R. 199; Plass v. Plass, 122 Cal. 3, 11, 54 P. 372; Pico v. Columbet, 12 Cal. 414, 419, 73 Am. Dec. 550. Not even in an equitable action for accounting may one tenant maintain an action against his cotenant in the exclusive possession of the property for rents or the profits of his own labor. Howard v. Throckmorton, 59 Cal. 79, 89. The same rule will prevail in an action for partition between cotenants. There is an exception to the general rule, however. One tenant may maintain an action requiring his cotenant to account for rents collected from their property from third persons to whom the property is leased. There is no reason why the foregoing rule applicable to cotenants should not also govern the relationship of joint tenancy. In the cases of Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540, and Ballerino v. Ballerino, 147 Cal. 544, 82 P. 199, relied upon by respondent, the only question involved was the right of one tenant to compel his cotenant who was in possession of the property to account for the rent which was collected from third persons to whom the property was leased. In the present case the premises were not leased or rented, but, upon the contrary, were occupied by the defendant alone as his domicile. He was therefore not liable to the plaintiff for its rental value while he used it for his benefit alone.

The judgment is modified by striking therefrom the award to plaintiff of \$245 as rental value of the property. As so modified the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 198

BUSCH v. BUSCH. (Civ. 6708.)

District Court of Appeal, First District, Division 1, California. May 29, 1929.

1. Divorce ⇨213, 225—Orders for temporary alimony, suit money, and attorneys' fees held not erroneous because wife possessed independent means not substantially productive of income.

Orders for payment of temporary alimony, suit money, and attorneys' fees held not erroneous because of wife's possession of independent means, where her property was not substantially income producing.

2. Divorce ⇨215—Allowance of \$1,000 per month temporary alimony held not excessive.

Allowance of \$1,000 per month temporary alimony held not excessive, in view of circumstances of parties and standard of living.

3. Divorce ⇨214(4)—Evidence that husband's income for particular year would be materially reduced held not to preclude court in fixing temporary alimony from considering previous year's income.

In fixing temporary alimony, evidence that husband's income for particular year had been materially reduced held not to preclude court's consideration of income for previous year.

4. Divorce ⇨227(2)—\$7,500 attorneys' fees in divorce action held not excessive allowance.

Allowance of \$7,500 attorneys' fees in divorce action held not excessive.

5. Divorce ⇨286—Error in permitting hypothetical questions to be answered in ascertaining reasonable attorneys' fees to be allowed plaintiff in divorce action held not prejudicial.

Error in permitting hypothetical questions to be asked and answered in ascertaining reasonable value of attorneys' fees to be allowed plaintiff in divorce action held not prejudicial; technical rules of evidence being inapplicable to determination of issue.

6. Divorce ⇨209—Where allowance of substantial monthly sum pendente lite is made, additional lump sum allowance as future alimony is not warranted.

Purpose of allowance to wife pendente lite is to enable her to live properly and prosecute or defend divorce action from time order is made, and lump sum allowance as additional future alimony is not justified, where substantial monthly allowance is made.

7. Divorce ⇨214(3)—Lump sum allowance in addition to substantial temporary alimony held not justified by evidence.

Where wife was awarded substantial monthly temporary alimony pendente lite, additional lump sum allowance for purpose not stated held not warranted by evidence that wife had incurred indebtedness, in absence of showing that payment of such debt was necessary to enable wife to prosecute action.

8. Divorce ⇨209—Allowance to wife of sum to pay debts pendente lite held not warranted unless necessary to prosecute action or defense (Civ. Code, § 137).

That wife has incurred debts is not sufficient to authorize pendente lite award of amount of such debts as for necessary expenses under Civ. Code, § 137, unless payment of such debts is necessary to enable wife to prosecute action or defense.

9. Divorce ⇨222—Allowance of \$1,000 suit money held unwarranted, where trial was only five days off and no showing of necessity was made.

Allowance of \$1,000 suit money held unwarranted, where trial of divorce action was only five days away when order was made; there being no showing of necessity.

10. Divorce ⇨182—Allowance to wife of \$1,500 counsel fees and \$200 costs in resisting appeal held not unreasonable.

Allowance of \$1,500 counsel fees and \$200 costs to wife to resist appeal of husband, in

which voluminous briefs were filed, *held* not unreasonable.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Divorce action by Ruth Gordon Busch against A. Hays Busch. From orders requiring payment of alimony, attorney's fees, and suit money, defendant appeals. Orders modified, and, as modified, affirmed.

Young & Young and Dockweiler, Dockweiler & Finch, all of Los Angeles, for appellant.

Flint & MacKay, Frank P. Flint, and William R. Flint, all of Los Angeles (Franklin W. Peck, of Los Angeles, of counsel), for respondent.

DOOLING, Justice pro tem. In an action for divorce, plaintiff and respondent procured an order on March 11, 1927, that defendant and appellant pay her \$1,000 per month temporary alimony, \$1,000 suit money, \$7,500 attorneys' fees, and \$3,600; the purpose of this \$3,600 payment not being stated in the order. Notice of appeal from this order was filed March 17, 1927. Thereafter on April 21, 1927, respondent secured a further order that appellant pay her \$1,500 counsel fees and \$200 suit money to enable her to resist the appeal from the prior order. From this second order appellant also appeals. The two appeals have been presented together.

[1] Appellant's claim that these orders were erroneous because it appeared that respondent had sufficient means of her own to enable her to support herself and prosecute the action may be briefly disposed of. Respondent's property consisted of the home in which she was living with its furnishings, an automobile, personal jewelry, and a few shares of stock. The income from the stock was shown to be about \$8 per year and none of the other property was income producing. "Where the wife is the owner of nonincome-producing property, the law does not require her to have recourse to her own resources first, or to impair the capital of her separate estate." *Farrar v. Farrar*, 45 Cal. App. 584, 586, 188 P. 289, 290.

[2] It is argued that the allowance of \$1,000 per month was excessive, first, because it was not necessary to sustain the wife and child in the manner in which they had been accustomed to live; and, secondly, because it was in excess of appellant's reasonable ability to pay. It was shown that while the parties were living together appellant allowed respondent an aggregate of \$850 per month for household expenses, clothes, and the support of the minor child. In addition appellant paid many expenses of the household himself. We are satisfied that the evidence justified the trial court in its informal finding that these additional expenditures averaged from \$450 to \$600 per month. This showing

was ample to support the implied finding that \$1,000 per month would be necessary to support wife and child in their accustomed manner. While appellant testified that their living on this scale had been against his repeated protests, there was no showing that during the several years they lived together their scale of living had been at any time reduced.

[3] On the second ground it was admitted by appellant that his separate property had a minimum value of \$278,000 and respondent's counsel offered to prove that its value was at least \$700,000. This offer was objected to by counsel for appellant on the ground that it was in the interest of time to exclude such proof and the proof was not permitted to be made. Appellant produced evidence to show that his income for the particular year would be materially reduced from the income that he had received in the previous year, and that by reason thereof \$400 per month would be the maximum amount that he could pay for the support of his wife and child. The court, however, was entitled to take into consideration the previous year's income and was not bound by appellant's estimate, necessarily speculative and possibly colored, of his future income; and appellant admitted receiving a salary of \$1,000 per month in addition to his income from investments. It is also to be noted that the order was made on March 11th and the divorce suit was set for trial and tried on March 16th, five days later. Under these circumstances and upon the showing made the court was justified in allowing the wife temporary alimony to enable her to maintain her accustomed standard of living for the very short period which would intervene before the matter could be fully examined into and determined at the formal trial.

[4] While the allowance of \$7,500 for counsel fees is perhaps more than we would have allowed under the same circumstances, in view of the very wide discretion vested in the trial court, we are not prepared to disturb it. The complaint charged many acts of cruelty and a number of acts of adultery. The answer not only put in issue the voluminous complaint, but set up an affirmative defense of conspiracy between respondent and her father to entrap appellant into actual or apparent adulteries. The amount to be allowed respondent as permanent alimony was seriously disputed, as were the value of appellant's property and his earnings and ability to pay. "The amount to be allowed by the court is as much within its discretion as is the power to make the allowance, and in neither case will the appellate court set aside its action unless this discretion has been abused; and we do not think abuse of discretion has been shown in the present case." *Yoree v. Yoree*, 1 Cal. App. 152, 156, 81 P. 1023, 1025. The evidence was uncontradicted that respondent had neither paid nor agreed to pay her attorneys nor received credit from them

for their services to be rendered in the trial of the action.

[5] Appellant complains of a hypothetical question asked two expert witnesses as to the value of the services thereafter to be performed by respondent's attorneys on the ground that the question assumed facts not in evidence. In the main the facts assumed were correct and the error, if any, was in our opinion not prejudicial. "In taking the evidence for the purpose of finding the amount of the allowance the court is not trying an issue in the case, but is seeking for information as the basis of its order, and is not bound by the technical rules of evidence applicable to controversies between contesting litigants." *Yoree v. Yoree*, supra; *Rose v. Rose*, 109 Cal. 544, 42 P. 452. "And no testimony was necessary to determine what the amount of the fee should be. The court could determine from its own experience, and from the facts and circumstances of the case, as they appeared to it from the pleadings and other papers and proceedings, what was a reasonable fee." *Peyre v. Peyre*, 79 Cal. 336, 339, 340, 21 P. 838, 839.

[6, 7] The allowance of \$3,600 was recited in the order prepared by respondent's counsel to be "back alimony from and including the month of July, 1926, to and including the month of February, 1927." The words in quotation marks were stricken out before the order was signed, so that we are left to speculation to determine on what theory this sum was allowed. It is elementary that the purpose of an allowance to a wife pendente lite is to enable her to properly live and prosecute or defend the action from the time the order is made. As additional future alimony this lump sum allowance would be unreasonable and unjustified in view of the allowance of \$1,000 per month for that purpose. It is sought to be justified as an allowance to permit the wife to repay advances made to her by her father. It is true that in *Reed v. Reed*, 40 Cal. App. 102, 106, 107, 180 P. 43, 45, the court said: "If the application for alimony is not made until some months after the commencement of the action, and if, in the meantime, the wife has managed to exist only by borrowing money * * * it is manifest that, to place her in such a situation that in the future she may be enabled to live upon the allowance provided to be paid for her future support * * * provision ought likewise to be made for her past expenses * * * otherwise she would be compelled to pay out of the allowance for her future support the money she had previously borrowed." We do not think that the evidence in this case brings it within the rule just quoted. Respondent testified that her father had advanced her \$800 per month for her support from the date of her separation; that she had no agreement with him to repay this sum, but intended to do so. The father likewise

testified that there was no agreement to repay him, but that he "considered" these amounts as a loan and so marked them on his check stub. During the same period it appears that the father gave respondent \$800 to take one trip and \$2,000 to take another. These latter amounts were admitted to be gifts and not loans.

Specifically as to the \$800 per month advance by him to respondent for living expenses the father testified:

"Q. Then, if your daughter doesn't get any allowance or any more property from Mr. Busch, you intend she shall reimburse you for the money you advanced her? A. I haven't made any arrangement whatsoever for the repayment of it, simply marked it on the stub."

And respondent testified: "Q. Well, does that intention (to repay the father) vest by virtue of an understanding, or is that a voluntary idea of your own? A. A voluntary idea of my own."

It is plain that this so-called loan did not constitute such a debt, if it was in fact a debt at all in legal contemplation, as was required to be paid in order to enable the wife to properly live pendente lite or prosecute her action. We have no doubt that the rule announced in *Tremper v. Tremper*, 39 Cal. App. 62, 67, 177 P. 868, 870, is applicable here: "An award of temporary alimony should be made to cover the current needs of the wife and should not be allowed to take the place of a final decree disposing of the property rights."

[8] "The fact that the wife has incurred debts is not sufficient to authorize an award for necessary expenses (*Loveren v. Loveren*, 100 Cal. 493, 35 P. 87); but the further fact must appear that the payment of such debts is necessary to enable the wife to further prosecute her action or defense."

The order does not show that the allowance of \$3,600 was made for that or any purpose, but, even if we are entitled to assume that it was made to enable respondent to repay her father in part for his advances, we do not think that it was "money necessary to enable the wife to support herself and her children" within the meaning of section 137 of the Civil Code.

[9] As to the \$1,000 allowed for suit money there was no showing whatever to support its allowance. The trial was only five days off when the order was made. Respondent points to no evidence of any particular contemplated expenses. In the absence of a showing of its necessity this allowance was an abuse of discretion.

[10] The order allowing \$1,500 counsel fees and \$200 for costs to resist the first appeal cannot be held unreasonable. Appellant filed an opening brief of 72 pages and an appendix of 128. Respondent's brief was 63 pages long and the appendix thereto 131. Ex post facto,

therefore, it appears that the trial court did not overestimate the value of the labor and the cost involved in opposing the appeal.

The order of March 11, 1927, is modified by striking therefrom the allowance of \$3,600 and of \$1,000 suit money. The order of April 21, 1927, is affirmed. Each party to pay his own costs of appeal.

We concur: TYLER, P. J.; KNIGHT, J.

99 Cal. App. 230

LETTEAU v. DUMAS et ux. (Civ. 3775.)★

District Court of Appeal, Third District, California. May 29, 1929.

As Modified on Denial of Rehearing June 28, 1929. Hearing Denied by Supreme Court July 25, 1929.

1. Vendor and purchaser ⇨39—Contract to sell lots described according to unrecorded map is void (Deering's Gen. Laws 1923, Act 4574, § 8).

Contract to sell lots described only by reference to an unrecorded map, contrary to provisions of St. 1907, p. 290 (Deering's Gen. Laws 1923, Act 4574, § 8), is void.

2. Vendor and purchaser ⇨334(1) — Where purchasers paid money under void land contract, but vendor applied payment on subsequent valid contracts and purchasers defaulted, they could not recover payment (Deering's Gen. Laws 1923, Act 4574, § 8).

Where purchasers paid money to vendor under unilateral instrument offering to purchase lots described by reference to unrecorded map so that contract was void under St. 1907, p. 290 (Deering's Gen. Laws 1923, Act 4574, § 8), but vendor and purchaser later executed eight separate valid contracts for sale of such lots after map had been recorded and vendor applied sum paid on such contracts and purchasers defaulted under latter contracts, they could not recover sum paid, since they could not complain if vendor credited money belonging to them on valid contract.

3. Vendor and purchaser ⇨337—If void land contract was coupled with later contracts so as to taint them, they were all void and could furnish no means of attaching lien for amount purchasers paid (Deering's Gen. Laws 1923, Act 4574, § 8).

If first land contract describing lots by reference to unrecorded map, contrary to provision of St. 1907, p. 290 (Deering's Gen. Laws 1923, Act 4574, § 8), was inseparably coupled with later contracts so as to taint them with its infirmity, they would all be void and would furnish no means of attaching lien upon vendor's land, in suit to quiet title, for amount purchasers paid.

Appeal from Superior Court, Los Angeles County; James F. Chambers, Judge.

Action to quiet title by George H. Letteau against Vern Dumas and wife. From the

judgment, plaintiff appeals. Reversed, with directions.

Hearing denied by Supreme Court; LANGDON, J., voting for a hearing.

Parker, Moote & Longcroft, by Noren Eaton, all of Los Angeles, for appellants.

James S. Roche, Frank Rouse, and Jerome H. Kann, all of Los Angeles, for respondents.

THOMPSON, J. This is an appeal from a judgment in a suit to quiet title.

The plaintiff is the owner of the eight lots described in the complaint, which are a part of tract 7603 of the city of Los Angeles. November 5, 1923, the defendants prepared and sent to the plaintiff a written communication in the form of a tentative agreement or offer to buy these eight lots upon specified terms for the sum of \$28,500. This agreement was accompanied by \$7,050 as part payment. The document described them with reference to an unrecorded map. So far as the record shows, the plaintiff had nothing to do with the preparation of this instrument, which appears to have been voluntarily prepared and signed by the defendants alone, and was addressed to the plaintiff, who received and retained the money. This written offer to purchase the lots was, however, indorsed by one H. R. Cowan, as follows: "The undersigned hereby accepts the deposit above mentioned, subject to all the conditions contained in the foregoing application. H. R. Cowan, By R. A. Scott." This was not a contract binding the plaintiff to sell these lots. It was a mere conditional offer on the part of the defendants to buy the lots. Subsequently, on December 27, 1923, the map of said tract was duly recorded. Thereafter, on January 14, 1924, eight independent contracts for the sale of the lots were executed by the respective parties. The purchase prices of these lots ranged from \$3,500 to \$3,750 each, aggregating the sum of \$28,500, which was the same amount specified in the former agreement. The payments credited on the purchase prices of the lots in the last-mentioned contracts ranged from \$700 to \$1,200 each, and aggregated some \$7,600, a sum slightly in excess of the amount remaining in the hands of plaintiff. Each contract specified the times and amounts of subsequent payments. The first installments due and payable under these agreements were sums of \$700 to \$850 on each contract, some of which were due May 5, 1924, and others were due October 5, 1924. None of these subsequent installments were paid. The only money which was paid by the defendants on any of these contracts after their execution was a total sum amounting to less than \$500 which was paid for taxes and interest. The defendants were in default. It was stipulated that no further payments were made upon these contracts. Except for the fact that the aggregate final selling price of these eight lots was the same figure mentioned in the original agreement, and that the

total sum credited on account of the purchase price was approximately the amount of defendants' money which was in the hands of plaintiff, the two transactions were separate and distinct. The record does not show that the plaintiff even acquiesced in the first proposal. None of these latter contracts made reference to the former document. Each of them described the lot to which it applied by reference to the recorded map of the tract. Each contract specified the terms of sale in detail, setting out the sale price, the amount credited on account, and the amounts and dates of the deferred payments, together with the rate of interest thereon. Each contract provided for a termination of the agreement and a forfeiture of all money paid thereunder in the event of a breach of any covenant or failure to meet payments as stipulated. Time was made the essence of these contracts. That provision read: "It is expressly understood and agreed that time is of the essence of this agreement, and in the event of the failure of the buyer to comply with any or all of the terms or conditions hereof in the manner and within the time herein specified, the same shall become null and void as fully as if it had never been made, and the seller shall be released from all obligations in law or equity to convey said premises, and the buyer shall forfeit all right thereto and to all moneys theretofore paid under this agreement."

It was stipulated that on December 10, 1924, the defendants consulted an attorney, who advised them that the original offer to purchase lots dated November 5, 1923, and also the contracts for the purchase of the lots dated January 14, 1924, were executed in violation of law and void, and that the defendants, therefore, refused to and made no further payments thereon.

This suit to quiet title was filed September 1, 1926. Answering the complaint, the defendants admitted that plaintiff held the legal title to the lots, but set up the facts of the transaction, alleging that the first agreement to buy the lots was made describing the lots with reference to an unrecorded map, which was, therefore, void, and that the subsequent contracts were coupled with and an inseparable part of the first document and are, therefore, tainted by the same infirmity and were also void.

This was the view taken by the trial court, which adopted findings accordingly but refusing to quiet title in the plaintiff upon any terms, in spite of the fact that it was specifically found that the plaintiff was the owner of the property. The court further rendered judgment in favor of the defendants creating a lien upon the property for the repayment of the money advanced by the defendants upon the purchase price of the lots, together with interest and taxes amounting to \$7,505.71. The plaintiff appealed.

[1] It is settled law that a contract to sell

lots described only by reference to an unrecorded map, contrary to the provisions of the statutes of California of 1907, p. 290 (Act 4574 of Deering's Gen. Laws 1923, § 8), is void. *Smith v. Bach*, 183 Cal. 259, 191 P. 14; *Smith v. Bach*, 54 Cal. App. 236, 201 P. 611; *White v. Jacobs* (Cal. Sup.) 267 P. 1087; *Hartzell v. Doolittle* (Cal. Sup.) 269 P. 527; *Krause v. Marine T. & S. Bank* (Cal. App.) 270 P. 246. While the contract to sell land described only by reference to an unrecorded map is void and may, therefore, not be specifically enforced, the last-cited authorities hold that one who has paid money under such a void contract may maintain an action to recover it.

[2] In the present case, however, while it must be conceded that the first document was void and unenforceable, and that the defendants might have then maintained an action to recover this money, it was the defendants themselves who drew and executed this first document and now seek to take advantage of their own violation of the law. As the situation then existed, because the first instrument was void, the result was that the plaintiff held in his possession \$7,050 belonging to the defendants, which was subject to recovery in a proper proceeding. A map of the tract was subsequently duly filed pursuant to law, and the parties then formally entered into eight separate valid contracts for the sale of the lots, each of which was unambiguous and full and complete in itself. No reference was made in any of these contracts to a former agreement. The first was void and could not be relied upon to procure the making or enforcement of the latter. There is no legal or essential connection between the first agreement and the second group of contracts. If the plaintiff saw fit to credit the money belonging to the defendants which was in his possession, upon valid contracts to purchase lots subsequently executed by them, the defendants may not complain. The defendants will not be permitted to voluntarily tender to the plaintiff a unilateral instrument offering to purchase lots, which violates the statute by reference to an unrecorded map, and then use their own weapon to defeat subsequent valid contracts to buy the property which were executed in good faith and which contracts they have breached. This would be converting a wholesome statutory rule of law into an engine of fraud.

[3] Moreover, if it could be said that the first illegal document is inseparably coupled with the latter contracts so as to taint them with its infirmity, they would all become void and would then furnish no means of attaching a lien upon the land of plaintiff in a suit to quiet title. This is true, even though the defendants would be afforded a remedy under such circumstances for the recovery of money belonging to them, which was wrongfully withheld by the plaintiff.

It follows that the findings are not support-

ed by the evidence so far as the judgment and lien for defendants are concerned.

The judgment is reversed, and the trial court is directed to enter judgment for the plaintiff as prayed for in the complaint.

We concur: FINCH, P. J.; PLUMMER, J.

ue, being merely general classifications of right of action for injuries to person and property.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Injury.]

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Leonora Mason against Walter E. Buck and others. From an order denying his motion for a change of venue, defendant named appeals. Reversed.

N. A. Eisner, of San Francisco, for appellant.

L. C. Pistolesi, of San Francisco, for respondent.

99 Cal. App. 793

George H. LETTEAU, Plaintiff and Appellant,
v. H. H. LEWIN, Defendant and Respondent. (Civ. 3776.)★

District Court of Appeal, Third District, California. May 29, 1929.

As Modified on Denial of Rehearing June 28, 1929.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, James F. Chambers, Judge, in an action to quiet title. Reversed.

Parker, Moote & Longcroft, by Noren Eaton, all of Los Angeles, for appellant.

James S. Roche, Frank Rouse, and Jerome H. Kann, all of Los Angeles, for respondent.

PER CURIAM. This is an appeal from a judgment in a suit to quiet title.

This appeal presents the identical questions involved in the case of Letteau v. Dumas, Civil No. 3775, 278 P. 459, in which an opinion of this court was this day rendered and filed. These cases were consolidated for the purpose of trial, and the evidence of both cases is presented in the same transcript.

Upon the authority of Letteau v. Dumas, supra, the judgment is reversed, and the trial court is directed to enter judgment for the plaintiff as prayed in the complaint.

NOURSE, J. Plaintiff sued in Contra Costa county for the conversion of personal property. The defendant Buck moved for a change of venue upon the ground that he was a resident of the city and county of San Francisco. The motion was denied, and this defendant has appealed on a typewritten transcript.

It is conceded that no one of the defendants was a resident of Contra Costa county and that the motion of defendant Buck should have been granted unless it is held that the cause of action is one for damages to personal property within the meaning of section 395, Code of Civil Procedure. Sections 392, 393, and 394 of this Code prescribe where certain classes of actions are to be tried. Section 395 provides: "In all other cases, the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action, or if it be an action for injury to person, or property, or for death from wrongful act, or negligence, in the county where the injury occurs, or the injury causing death occurs, or in the county in which the defendants or some of them reside at the commencement of the action." The portion of the section quoted reading "or if it be an action for injury to person," etc., was added by amendment of 1911 (St. 1911, p. 847). Section 28 of the same Code reads, "An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it," and section 29 reads: "Every other injury is an injury to the person."

The respondent defends the order appealed from on the ground that a conversion of personal property is a "depriving its owner of the benefit of it" within the meaning of section 28, and that such an injury was contemplated by section 395. The appellant argues that the latter section relates solely to corporeal or physical injuries to person or property.

In Monk v. Ehret, 192 Cal. 186, 219 P. 452, the Supreme Court had occasion to interpret

99 Cal. App. 219

MASON v. BUCK et al. (Civ. 6446.)

District Court of Appeal, First District, Division 2, California. May 29, 1929.

Venue ~~6~~—Conversion of personal property was not "injury" within law authorizing action in county wherein injury occurred (Code Civ. Proc. §§ 28, 29, 395).

Conversion of personal property was not an "injury" to property within the meaning of Code Civ. Proc. § 395, authorizing action in county wherein injury occurs, regardless of the definitions of injury under sections 28 and 29, which do not control interpretation of section on ven-

the amendment to section 395. The action was one for false imprisonment in which it was contended that the forcible seizure, accusation, and arrest of plaintiff was an "injury to the person." But the Supreme Court held that the term was limited to "the wrongful or negligent act of another," and that "the specific terms indicate that the injuries to person within the contemplation of the legislature were those which cause physical injury or incapacity." Page 192 of 192 Cal. (219 P. 454). In the same case it was pointed out that the increasing number of bodily injuries and injuries to property caused by the use of motor vehicles was the suggestion for the amendment of 1911, and that there was nothing to indicate an intention of the Legislature to make such a radical change as that contended for. In *Graham v. Mixon*, 177 Cal. 88, 169 P. 1003, L. R. A. 1918F, 1023, an action for libel, the Supreme Court held that the definitions of injuries found in sections 28 and 29 did not control the interpretation of the section on venue, and that the expression "injury to person" should not be interpreted to mean every "invasion of personal rights."

The reasoning of these cases is equally applicable to actions relating to property. Sections 28 and 29 are merely general classifications of the right of action for injuries to person and property. Sections 392-395 relate to the place of trial of all civil actions. The specific intent is manifested in section 395 to make all these actions triable in the county where the defendant resides except as otherwise specified in these four sections. A conversion of personal property is not necessarily a taking or withholding it from another (*Horton v. Jack*, 126 Cal. 521, 526, 58 P. 1051); it includes any act of ownership or exercise of dominion in defiance of the rights of another (24 Cal. Jur. 1022). To hold that all such acts are an "injury" to property within the meaning of section 395 would nullify the provisions of that section which aim to grant a defendant the right of trial in the county of his residence. Generally speaking, an amendment to a statute is designed to add something to it or to limit its force, rather than to nullify its purpose, and judicial interpretation of an amendment should be made with that end in view, unless the intention to nullify is evident.

From our consideration of the purposes of the Code amendment as outlined in the decisions cited we are satisfied that the Legislature intended to except from the general provisions of section 395 only such actions for injury to person or property, caused by the wrongful act or negligence of another, where the cause of action arose from a "corporeal or physical" injury to the person or property, and that it was not intended to include every invasion of personal and property rights. As an action for conversion is not a corporeal

injury to property within this meaning, it would follow that it should be tried in the county where the defendant resides within the general provisions of section 395.

The order is reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

99 Cal. App. 283

JACKSON et al. v. MEINHARDT et al.
(Civ. 3772.)

District Court of Appeal, Third District,
California. June 4, 1929.

1. Fraud ☞23—Purchaser may rely on vendor's statements respecting location and boundaries of lot, inspection of which will not refute them nor put reasonable person on inquiry.

Purchaser of lot may rely on owner's positive statements as to its location and relation of adjoining streets or other material objects, when inspection of premises will not refute false representations nor furnish evidence which would place reasonable person on inquiry, even if examination of recorded map would disclose true situation of lot and falsity of statements.

2. Fraud ☞31—Vendor and purchaser ☞37 (2)—One purchasing lot in unimproved tract, whereon streets are not laid out, in reliance on fraudulent statements that it is corner lot, may sue for damages or rescission without searching records.

When owner, with intent to deceive purchaser, falsely states that portion of unimproved tract, on which streets are not laid out nor designated, is corner lot bounded on two sides by public streets, and inspection of lot furnishes no evidence to contrary, purchaser relying on such representations to his damage may maintain action, based on fraud, for damages or rescission, without having searched records to ascertain true location and boundaries of lot.

3. Fraud ☞38—Vendee's assignees, suing for damages within seven months after discovering fraudulent representations as to location and boundaries of lot, held not guilty of laches.

Vendee's assignees, fulfilling exact terms of all covenants of contract and commencing action for damages for fraudulent representations as to location and boundaries of lot purchased within about seven months after discovering fraud, held not guilty of laches.

4. Fraud ☞38—Laches is ordinarily no defense to action for fraud, unless delayed beyond statutory limitation period.

Laches is not ordinarily a defense to an action for fraud, unless proceeding is delayed beyond the period prescribed by statute of limitations.

5. Contracts ☞270(2)—Fraud ☞38—Action to rescind contract for fraud must be promptly pursued, but action for damages may ordinarily be commenced any time within statutory limitation period after discovering fraud.

Cause of action to rescind contract for fraud must be promptly and diligently pursued, but

action to recover damages therefor may ordinarily be commenced at any time within statutory period of limitations after discovery of fraud.

6. Fraud ☞9—Single material misrepresentation, knowingly made to induce purchase of land, authorizes recovery of damages.

A single material misrepresentation, knowingly made to induce one to purchase land, such as false statement that it is corner lot bounded by public streets, will afford ground for recovery of damages, though complaint contains defective allegations respecting some of alleged false representations.

7. Fraud ☞29—Vendees' assignees may sue for damages for vendors' fraudulent representations (Civ. Code, § 954).

Under Civ. Code, § 954, assignees of vendees' interest in contract of sale and lot therein described may sue for damages for vendors' fraudulent representations concerning location and boundaries of lot.

8. Fraud ☞46—Complaint alleging reliance of plaintiffs' assignors on defendant's fraudulent representations as to location and boundaries of lot purchased and damages to plaintiffs stated cause of action.

Complaint, alleging that plaintiffs' assignors were induced to purchase lot in reliance on defendant's false representations that it was a corner lot of stated length, abutting on two public streets, and that plaintiffs were damaged in amount of difference between actual and represented value of lot, *held* sufficient to state cause of action for damages.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by George Jackson, C. W. Jackson, and others against George Meinhardt and another. Judgment for defendants, and plaintiffs C. W. Jackson and another appeal. Reversed, with directions.

Lon A. Brooks, of Los Angeles, for appellants.

John M. Fulton and R. M. Fulton, both of Los Angeles, for respondents.

THOMPSON, J. This is an appeal from a judgment against plaintiffs for failure to amend a pleading after a general demurrer had been sustained to a third amended complaint. The suit was for fraud exercised in procuring a contract for the sale of a lot in Los Angeles, Cal.

The amended complaint, to which a general demurrer was sustained with leave to amend, set up an action for damages based upon fraudulent representations regarding the location and boundaries of a lot which the assignors of plaintiffs were thereby induced to purchase.

The complaint alleged in substance that on November 14, 1924, the defendants who owned the land involved in this action, together with the tract surrounding it, executed a contract

to sell the lot to George and Clara Jackson for \$1,200, payable in installments of \$25 a month until the purchase price was fully paid, with 7 per cent. interest per annum on all deferred payments. The property was described as the "East 40 feet of the West 120 feet of the South 101 feet of lot One, Tract 1750, as per map recorded in Book 20, page 157 of Maps," in the county of Los Angeles, Cal.; that on February 7, 1925, for a valuable consideration, the above-named vendees sold and assigned to plaintiffs all their interest in said contract, together with the lot therein described; that upon the purchase of said contract the assignors informed plaintiffs that at the time of the original execution of the contract the defendants represented to them that (1) said land was a corner lot, (2) that a 20-foot public street adjoined the lot on the east, (3) that the lot abutted on a 50-foot street on the south, and (4) that defendants measured the lot in the presence of said assignors and pointed out the northern boundary thereof, stating that the lot extended 101 feet southerly from said point of commencement. The complaint further alleged that the defendants also personally made the foregoing representations to the plaintiffs while actually upon said premises, on February 7, 1925, and acquiesced in their purchase of the contract; that both the original vendees and plaintiffs were strangers in the vicinity and were ignorant as to the actual location of the lot or its dimensions or adjoining streets; that the streets did not appear laid out upon the tract; that neither the original purchasers nor the plaintiffs "had any means of investigation" and made no independent inquiry or examination as to the truth of said representations, and that they each believed them to be true, and relying upon them were thereby induced to purchase the lot when they would not have otherwise done so; that each of said representations was false, as the defendants well knew, and was made to deceive and defraud the purchasers; that in truth the lot was not a corner lot and it did not abut upon a street on either side, or at all, but was entirely surrounded on all sides by other lots, and that it did not commence at the point designated on the ground by the defendants, but did begin 25 feet southerly therefrom; that the plaintiffs did not discover these facts or that the defendants' representations were false until May, 1926; that at the time of such discovery plaintiffs had paid the total sum of \$450 on the purchase price, \$348.50 of which was credited to the principal and the balance was applied to the account of interest; that subsequently the plaintiffs continued to make the payments due upon the contract and fulfilled upon their part all the covenants thereof; that the actual value of said lot situated as it was represented to be, by the defendants, was \$2,500, but that

it was worth not more than \$100 located as in fact it was, adjacent to no street at all; and that plaintiffs were thereby damaged in the sum of \$2,400, for which amount they prayed judgment. The suit was commenced December 14, 1926.

It is claimed that the complaint fails to state facts sufficient upon which to maintain an action for fraud for the reasons that the recorded map of the tract of land involved was constructive notice of the position of the lot conveyed and of the true location of the streets in that vicinity, and that the purchasers forfeited their remedy by their negligence in failing to examine the public records; that they were guilty of laches; that the assignees of a chose in action could not maintain a suit for fraud; that reliance upon the alleged false statements was defectively pleaded; and that no sufficient allegation of damages appears.

[1, 2] A prospective purchaser of land may rely upon the owner's positive statements with respect to its location and the relation of adjoining streets or other material objects, when an inspection of the premises will not refute the false representations nor furnish evidence which would place a reasonable person upon inquiry, even if the examination of a recorded map would disclose the true situation of the lot and the falsity of the statements. When the owner of land with intent to deceive a purchaser falsely states that a portion of an unimproved tract, upon which the streets are not laid out or designated upon the ground, is a corner lot and that it is bounded on two sides by public streets, and an inspection of the property furnishes no evidence to the contrary, and the purchaser relying upon such representations buys the lot and is damaged thereby, he may maintain an action based upon fraud, either for damages or rescission. Under such circumstances the purchaser is not required to search the records to ascertain the true location and boundaries of the lot. In 46 C. J. 545, §§ 29 and 30, it is said: "He who practices bad faith ought not to be permitted to invoke the doctrine of constructive or imputed notice to aid his wrongdoing." 12 R. C. L. 347, § 101. In the case of *Lynch v. Palmer*, 237 Mass. 150, 129 N. E. 374, 33 A. L. R. 842, wherein the facts were quite similar to the case at bar, the defendant falsely informed the plaintiff that he owned lot 89 on Grove street in Medford, Mass., and that it would always remain open as a street, and that lot 88, which was the subject of the proposed sale, was a corner lot. An inspection of the map or plat of Medford would have disclosed the falsity of these statements. No inspection appears to have been made. Many authorities were cited in support of the proposition, and the court said: "If the defendant represented that he was the owner of lot 89, that he was reserving it for a street, and that lot 88 was to be a corner lot, the jury could find that such representations

were false and fraudulent and related to material facts; and if the plaintiff relied upon them and thereby was induced to purchase lot 88, as she testified, the defendant would be liable for the fraud and deceit practiced upon her." The entire trend of authorities appears to uphold the foregoing principle. 33 A. L. R. 917, note, § 24. In 26 C. J. 1197, § 101, it is said: "Although they were matters of record, redress could be had for misrepresentations or concealment with respect to boundaries or location."

To the same effect it is said in 12 R. C. L. 383, § 134: "Some courts (hold) * * * that where the vendee has no knowledge of the facts he has an absolute right to rely on representations as to location made by the vendor, and that he is not bound to make inquiry as to the truth of the facts so stated even though the vendor does not by any artifice prevent him from making inquiry in reference to the true location, which he has present means of ascertaining."

In *Peardon v. Markley*, 50 Cal. App. 257, 195 P. 70, where the vendor falsely represented to the purchaser of land that it included a designated spring, a judgment for rescission and damages was sustained. The court said: "His [the purchaser's] attention was not directed to any fact or circumstance inconsistent with the representations of the vendor. It is no excuse that the vendee by an independent investigation might have ascertained that the spring did not belong to the vendor and that it was not included in the deed of conveyance." 12 Cal. Jur. 758, § 34; *Faull v. Johnson* (Cal. App.) 270 P. 993.

[3-6] Under the circumstances of the present case the defendants may not urge the doctrine of laches as a defense to the alleged fraud, which was not discovered until May, 1926; the action having been commenced within about seven months thereafter. Laches is not ordinarily a defense to an action for fraud unless the proceeding is delayed beyond the period prescribed by the statute of limitations. 12 Cal. Jur. 797, § 59; *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 P. 243; *Montgomery v. McLaury*, 143 Cal. 83, 76 P. 964; *Estudillo v. Security Loan & Trust Co.*, 149 Cal. 556, 565, 87 P. 19; *Simmons v. Briggs*, 69 Cal. App. 447, 231 P. 604. Conduct on the part of the complainant subsequent to the discovery of the fraud, such as the renewal or extension of a mortgage, the execution of which is the basis of the fraud, the renewal of a lease, or the extension of the date of maturity of a note, which acts amount to a ratification or waiver of the wrong complained of, may bar an action for rescission or fraud. *Tucker v. Beneke*, 180 Cal. 588, 182 P. 299; *Schmidt v. Mesmer*, 116 Cal. 267, 48 P. 54; *Monahan v. Watson*, 61 Cal. App. 417, 214 P. 1001. No such change in the contractual relations of the parties occurred in the present case. No alterations or concessions were made or requested, but, upon

the contrary, the plaintiffs proceeded to fulfill the exact terms of all the covenants of their contract, and are therefore not guilty of laches. Moreover, there is a distinction, in the application of the doctrine of laches between a cause for fraud sought to be maintained by means of an action of rescission and one which sounds in damages alone. In the former, the cause must be promptly and diligently pursued, while in the latter it may ordinarily be commenced at any time after the discovery of the fraud within the statutory period of limitations. 12 Cal. Jur. 796, § 59. Even though the complaint may contain defective allegations respecting some of the alleged false representations, a single material misrepresentation knowingly made to induce one to purchase land under circumstances similar to those presented in the present case, such as the statement that the lot was a corner lot and was bounded by public streets, will afford grounds for relief. *Del Vecchio v. Savelli*, 10 Cal. App. 79, 101 P. 32.

[7] Finally, the respondent asserts that this right of action for alleged fraud does not survive the assignment of the contract to plaintiffs. We are not in accord with this contention. Section 954 of the Civil Code has modified the common-law rule with respect to the assigning of a chose in action, and the statute now authorizes the maintenance of a suit for damages to real or personal property on the ground of fraud, on the part of an assignee of the original vendee. 3 Cal. Jur. 254, § 15; *Morris v. Standard Oil Co.*, 200 Cal. 210, 252 P. 605.

[8] The complaint sufficiently alleges a reliance upon the fraudulent representations, as well as that damages were sustained thereby. We are of the opinion that a cause of action is adequately stated.

The judgment is reversed. The trial court is directed to overrule the demurrer and permit the defendants to answer.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 268

MELLO v. TULARE COUNTY. (Civ. 5553.)

District Court of Appeal, Second District, Division 1, California. May 31, 1929.

Counties ⇨213—One giving check for prisoner's release from jail cannot sue county for amount without presenting statement of claim to board of supervisors (Pol. Code, § 4003, and § 4041, subd. 12; Pen. Code, § 1302).

One obtaining release of prisoner from jail by giving check could not maintain action against county for amount thereof without first presenting statement of claim to board of supervisors, with request that it be allowed and ordered paid, under Pol. Code, § 4003, and sec-

tion 4041, subd. 12, even if claim were valid under Pen. Code, § 1302.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by F. R. Mello against the County of Tulare. Judgment for defendant, and plaintiff appeals. Affirmed.

Dwight E. Jackson, of Tulare (Arthur H. Jackson, of Huntington Park, of counsel), for appellant.

Leroy McCormick, Dist. Atty., and Leslie A. Cleary, Deputy Dist. Atty., both of Visalia, for respondent.

CONREY P. J. Plaintiff appeals from a judgment entered in favor of defendant, pursuant to an order sustaining demurrer to the second amended complaint without leave to amend.

According to the complaint, one Crieghton was in custody of a constable by reason of his nonpayment of a fine of \$500 which had been imposed upon him with the alternative of imprisonment until the fine be paid. Crieghton, by means of certain misrepresentations concerning his ownership of property, etc., induced the plaintiff to deliver him a check payable to Crieghton for the sum of \$500. The stated purpose of Crieghton was to avoid going to jail that night, and he promised that he himself would pay the fine next day. Plaintiff informed Crieghton and the constable that he had not sufficient funds in the bank to pay the check, and instructed them to hold the check until noon of the next day. The constable so informed Kendrick, the justice of the peace, "before noon" of said next day. Nevertheless Crieghton was released from custody on the day when the check was given. The complaint does not state whether or not Crieghton paid his fine or was ever rearrested. On said next day, which was April 21, 1926, the justice of the peace threatened to arrest the plaintiff for wrongfully drawing his check on the bank, knowing that he had not sufficient funds to meet the same, and, under duress of said threat, plaintiff deposited additional funds in the bank, and the amount of the check was paid by the bank to the justice of the peace, who thereafter deposited in the county treasury of Tulare county the money thus obtained by him from the plaintiff.

There was no allegation in the complaint that any demand for repayment to him of said money was ever made by plaintiff, or any claim presented to the board of supervisors of Tulare county.

Plaintiff alleged that the check so given by him was to be "as a bond to release said Crieghton." Since it is admitted that the release of the prisoner was so obtained, and no facts are alleged to show that the implied conditions of the bail thus given were ever

complied with, as required by law, it is difficult to see how the plaintiff can be held to have had any valid claim upon the money. Pen. Code, § 1302; *Mundell v. Wells*, 181 Cal. 398, 184 P. 666, 7 A. L. R. 383.

Even if the plaintiff had a valid claim, he has no right to maintain this action without first presenting to the board of supervisors a statement of his claim requesting that the same be allowed and ordered paid. Pol. Code, § 4003, and section 4041, subd. 12; *Colusa County v. Glenn County*, 117 Cal. 434, 49 P. 457.

The judgment is affirmed.

We concur: **HOUSER, J.**; **YORK, J.**

99 Cal. App. 123

PEOPLE v. WILKERSON. (Cr. 1775.)

District Court of Appeal, Second District, Division 1, California. May 23, 1929.

1. Infants ⇨20—Information held insufficient to charge offense of contributing to delinquency of minor (Juvenile Court Law, § 21, and § 1, subd. 11).

Information alleging defendant, a negro, encouraged minor, a white girl 18 years old, to evade probation officer, hide away from her parents, and go to Mexico to marry defendant, held insufficient to charge offense of contributing to delinquency of minor under Juvenile Court Law, § 1, subd. 11 (St. 1915, p. 1226), and § 21 (St. 1915, p. 1246).

2. Infants ⇨20—In prosecution for contributing to delinquency of minor, evidence held insufficient to sustain conviction (Juvenile Court Law, § 21, and § 1, subd. 11).

In prosecution under Juvenile Court Law, § 1, subd. 11 (St. 1915, p. 1226), and section 21 (St. 1915, p. 1246), for contributing to delinquency of minor, evidence showing defendant, a colored man, at earnest solicitation of minor, an 18 year old white girl, took her to Mexico to get married, which marriage was prohibited by Civ. Code, §§ 60, 69, but legal in Mexico, held insufficient to sustain conviction.

3. Jury ⇨28(4)—Waiver of jury trial in criminal case must be manifested by consent of both parties, expressed in open court by defendant and counsel (Const. art. 1, § 7, as amended in 1928).

Under provisions of Const. art. 1, § 7, as amended in 1928, waiver of jury trial must be manifested by consent of both parties, expressed in open court; statement by attorney for defendant that "we desire to waive jury and ask that case be tried by court" being insufficient.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Squire Granville Wilkerson was convicted of contributing to the delinquency of a minor, and he appeals. Reversed and remanded.

Willedd Andrews, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

HOUSER, J. On conviction of the offense commonly known as that of contributing to the delinquency of a minor, defendant was sentenced to a term of 18 months in the county jail. He appeals from the judgment.

Subdivision 11 of section 1 of the Juvenile Court Law (Stats. 1915, p. 1225, as variously amended) contains the provision that it shall apply to one "who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life"; and by section 21 of the same act, among other things, it is provided that "any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions" of the statute, shall be guilty of a misdemeanor.

The information under which defendant was prosecuted charged that:

He "did wilfully and unlawfully commit acts and omit duties hereinafter more particularly set forth, to-wit: That the said defendant Squire Granville Wilkerson did wilfully and unlawfully encourage and allow one Virginia Myers to evade the officers and to hide away from her parents and her probation officer and the police, and to go to Tia Juana to marry the said Squire Granville Wilkerson, a colored man, contrary to the law of California, the said Virginia Myers being a white girl, and a ward of the court and under the age of twenty-one years of age, to-wit, of the age of eighteen years; the said Squire Granville Wilkerson having been warned to stay away from the girl by her father and her probation officer, and the juvenile police.

"All of which wilful and unlawful acts and course of conduct on the part of the said defendant Squire Granville Wilkerson, as aforesaid did thereby then and there manifestly tend to and did encourage, cause and contribute to the said Virginia Myers becoming and remaining such a person as is described in section 1 of said Juvenile Court Law, to-wit: A person under twenty-one years of age who is leading, or is in danger, from any cause, of leading an idle, lewd, dissolute and immoral life."

An examination of such information discloses the fact that the several alleged acts of defendant, through and by which he is charged with contributing "to the said Virginia Myers becoming and remaining * * * a person who is leading, or is in danger * * * of leading an idle, lewd, dissolute and immoral life," are that he did wilfully and unlawfully encourage and allow the

"ward (1) to evade the officers and hide away from her parents, her probation officer and the police; and (2) to go to Tia Juana to marry the said Squire Granville Wilkerson, a colored man, * * * the said Virginia Myers being a white girl, * * * having been warned to stay away from the girl by her father, her probation officer and the juvenile police."

The information contains no allegation in explanation of the reason why the girl was "a ward of the court," or as to the nature of the guardianship of which she was the subject. For aught that appears, she may have been a "ward" by reason of her insanity, or her feeble-mindedness; or because of her non-age and consequent legal inability to administer her property interests; or, by inference only, because of some moral or other delinquency, possibly she may have been a ward of the juvenile court. If within the last-named category, the information is silent as to whether by order of the court she was detained in custody of the juvenile court officer, or had been released therefrom; and if the latter condition prevailed, what terms and conditions, if any, had been prescribed by the court in connection therewith. Considering only that she was a "ward of the court * * * of the age of eighteen years," it was her right, if she chose to do so, to "evade the officers" or to "hide away from her parents"; in fact, if unconditionally a ward of the juvenile court, it is manifest that the parents of the girl were legally entitled to no control over her. Being a white woman, according to our statutes it would have been unlawful for her to have married a negro in this state (sections 60 and 69, Civ. Code); but it is not here suggested or intimated that any legal obstacle prevented the consummation of a marriage between the girl and defendant in the republic of Mexico, even though, as alleged in the information, defendant was "warned to stay away from the girl by her father and her probation officer and the juvenile police." Parenthetically, it may be observed that just what proper place such an allegation as that to which reference has just been had would have in the information, or what legal purpose was expected or hoped to be subserved thereby, is not clear.

[1, 2] In the premises, it is manifest that if, based on the allegations contained in the information, no legal restrictions were placed upon the conduct of Virginia Myers with reference to the particulars noted therein, and to which reference has been had, it would not be unlawful for defendant to encourage her to do those things. Nor is it readily discernible how such acts could possibly have caused the "ward" to lead an idle, a dissolute, a lewd, or an immoral life. But even conceding the possibility that in a proper pleading any of such acts would or might have such a tendency, the record contains not even the slightest evidence that defendant committed any of

the acts of which he is charged. From the transcript of the record it appears that, following the disappearance of the girl from her home, defendant was informed that the parents of the girl and the probation officers were endeavoring to locate her, and that with such assumed knowledge, at the earnest solicitation of the girl, defendant took her to Tia Juana, Mexico, and there married her; which act, in itself, was of no different legal consequence than though the marriage of the parties (if lawful) had occurred at any place within the county of Los Angeles. But even if such act on the part of defendant could be construed as illegal, it is impossible by any stretch of the imagination to classify it as immoral, or as having a tendency to reduce the girl to the state of an idle, a lewd, or a dissolute person. Theoretically, at least, even in this day and generation, the law regards marriage favorably and with some degree of reverence and sanctity. Nor was any evidence introduced or offered on the trial of the action by which the patent and vital defects in the information might have been remedied. The most that appeared in the evidence against defendant was that Virginia Myers, "a ward of the court," of the age of 18 years, living with her parents, disappeared from her home on a certain date; that thereupon a warrant was issued for her arrest, of which defendant had cognizance and promised to aid the several officers in locating her whereabouts; notwithstanding which he took her to Tia Juana and there was legally married to her. Although on this appeal it is not contended by respondent that, because defendant was a colored man, the offense of which he was charged became the more flagrant or heinous, the fact that he is a negro is emphasized in the information and was dwelt upon in the evidence. However, as stated by the judge of the trial court at the conclusion of the trial, "the marriage is just an incident, the color of these people is just an incident; it would not make any difference whether one was black and one white, or whether both were white or both black."

[3] It appears that when the case was called for trial, the attorney for defendant made the statement that "we desire to waive a jury and ask that the case be tried by the court." Defendant personally made no such request. Thereupon, the case went to trial by the court sitting without a jury. Although the point is not here raised by appellant, it is apparent that under the provisions of section 7 of article 1 of the Constitution, as amended in 1928, the waiver of a jury trial must be manifested by "the consent of both parties, expressed in open court by the defendant and his counsel." *People v. Garcia* (Cal. App.) 277 P. 747.

As the record is entirely wanting and insufficient either for the purpose of stating the commission of a public offense, or supplying the evidence necessary to support a verdict

even on a legal charge, it is ordered that the judgment be and it is reversed and the cause remanded to the superior court for such further proceedings as may be consistent with this opinion.

I concur: CONREY, P. J.

I concur in the judgment: YORK, J.

MADDUX v. MORA et al. (Civ. 5374.) ★

District Court of Appeal, Second District, Division 2, California. May 29, 1929.

Appeal and error ⇨65—Judgment of superior court on appeal from judgment of justice court in contract action is final, from which there is no appeal (Code Civ. Proc. §§ 112, 974, 980; Const. art. 6, § 5).

Under Const. art. 6, § 5, conferring appellate jurisdiction on superior courts in cases prescribed by law, and under Code Civ. Proc. § 112, giving justices' courts jurisdiction of contract actions for recovery of sums less than \$300, and under sections 974 and 980 permitting appeals to superior court and trial de novo, the judgment of the superior court on trial de novo from justice court in such cases is final, from which there is no appeal to Supreme Court or to District Court of Appeal.

Appeal from Superior Court, Riverside County; Wm. H. Ellis, Judge.

Action by M. C. Maddux against Joe Mora and another. Judgment for plaintiff on appeal from judgment in justice court, and the defendant named appeals. Appeal dismissed.

J. L. Granttham and Frank C. Scherrer, both of Riverside, for appellant.

Best & Best, of Riverside, for respondent.

CRAIG, J. The respondent instituted the above-entitled action in Perris township, Riverside county, for the recovery of \$106.50, which by amendment to the complaint was subsequently increased to \$162.49, together with \$100 attorney's fees, interest and costs, upon a contract alleged to have been intended to be performed, was partially performed, and breached, in said township, between residents of Imperial county. Judgment was rendered in favor of the plaintiff, and an appeal was taken to the superior court of Riverside county, wherein judgment was again rendered in favor of the plaintiff, after trial de novo. From the latter judgment the defendant Joe Mora appealed to this court.

Section 5, art. 6, of the Constitution, confers appellate jurisdiction upon superior courts in their respective counties in such cases as may be prescribed by law. The civil jurisdiction of justices' courts embraces all cases in actions arising on contract for the

recovery of sums, exclusive of interest, not amounting to \$300. Code Civ. Proc. § 112. Any party dissatisfied with a judgment rendered in a justice's court may appeal to the superior court of the county in which the action was first tried, and the same may be therein tried anew, in all respects, as other trials in the superior court. Code Civ. Proc. §§ 974, 980. In such cases the judgment of the superior court is final, and there is no appeal therefrom to the Supreme Court or to the district court of appeal. *O'Meara v. Hables*, 163 Cal. 240, 124 P. 1003.

Since the attempted appeal in this case is obviously without foundation, this court being without jurisdiction to consider it, the same is dismissed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

99 Cal. App. 205

THOMSON et al. v. MORTGAGE INV. CO. et al. (Civ. 6712.)

District Court of Appeal, First District, Division 1, California. May 29, 1929.

1. Appeal and error ⇨854(5)—Respondents may show dismissal was justified for any reason, where record does not show one point only was considered by trial court.

Where there is nothing on face of record to show that only point considered by trial court in ordering dismissal was right of minority stockholders to sue on behalf of corporation, the respondents have right to show that action of trial court was justified for any reason.

2. Appeal and error ⇨948—Denial of leave to further amend cannot be held abuse of discretion without request for filing of amended complaint.

Where record on appeal does not affirmatively show request for filing of an amended complaint, an abuse of discretion cannot be imputed to lower court in denying leave to further amend.

3. Corporations ⇨210—Stockholders suing on behalf of corporation and stockholders are mere nominal plaintiffs.

Stockholders bringing suit on behalf of corporation and of stockholders are mere nominal plaintiffs, the corporation being the real party in interest, and any judgment recovered inuring to its benefit.

4. Contracts ⇨95(4)—Mortgagee's threats to foreclose after indebtedness became due was not coercion as to directors of mortgagor corporation.

Threats of mortgagee to foreclose after principal indebtedness had become due were justifiable, and did not constitute coercion in so far as certain agreements and execution of promissory note by directors of mortgagor corporation were concerned.

5. Usury ⇨11(4)—Complaint in stockholders' action to cancel incumbrances on corporate property on ground of usury did not state cause of action (St. 1919, p. lxxxiii).

Complaint in action by stockholders on behalf of the corporation to have certain incumbrances on corporate property declared invalid on account of usurious loans within St. 1919, p. lxxxiii, *held* insufficient to state a cause of action on such grounds.

6. Pleading ⇨18—Amended complaint in suit to cancel incumbrance on corporate property *held*, in reference to alleged usury, demurrable as ambiguous, uncertain, and unintelligible.

Language of amended complaint, seeking cancellation of incumbrance on corporate property on ground of usury, *held*, in reference to alleged usury, so ambiguous, uncertain, and unintelligible as to justify sustaining of demurrer.

7. Corporations ⇨202—Stockholders may sue on behalf of corporation only when acts of directors are ultra vires, illegal, fraudulent, or show willful neglect.

Actions may be instituted and maintained by stockholders in behalf of corporation only when acts of board of directors of corporation are either ultra vires, illegal, fraudulent, oppressive, or show willful neglect.

8. Corporations ⇨211(6)—Allegations of complaint as to wrongful or negligent acts of corporate directors were insufficient to establish right of stockholders to maintain action.

Allegations of complaint, in action by stockholders on behalf of corporation, in respect to wrongful or negligent acts of board of directors, *held* insufficient to establish right to institute and maintain action.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by A. P. Thomson and another against the Mortgage Investment Company and others. Judgment of dismissal, and plaintiffs appeal. Affirmed.

Kimball Fletcher, of Los Angeles, for appellants.

Julius V. Patrosso, C. C. Mishler, and Earle M. Daniels, all of Los Angeles, for respondent Mortgage Inv. Co.

LUCAS, Justice pro tem. This is an appeal from a judgment of dismissal following an order sustaining, without leave to amend, the demurrers of defendants Mortgage Investment Company and B. & H. Circuit, Inc., to plaintiffs' amended complaint.

Plaintiffs, stockholders in the defendant B. & H. Circuit, Inc., brought suit on behalf of said corporation and its stockholders, including themselves, seeking generally to establish the corporation's title to certain properties and to have certain incumbrances thereon declared invalid on account of alleged usurious loans. The amended complaint al-

leges that B. & H. Circuit, Inc., is the owner of and entitled to the possession of certain real property situate in the city of Los Angeles, and is also the holder of a leasehold interest in and entitled to the possession of certain other real property situate in said city; that upon the property alleged to be owned by said defendant B. & H. Circuit, Inc., there has been erected and maintained a certain building for theater purposes known as the Forum Theater; that prior to December 17, 1924, in building and equipping said theater defendant B. & H. Circuit, Inc., had incurred and was owing debts in excess of \$600,000, and in addition was owing balances upon certain lease contracts for furnishings; that of such indebtedness approximately \$522,500 was owing to defendant Mortgage Investment Company; and that \$500,000 thereof was secured by a mortgage and three deeds of trust upon said real property. The balance of the indebtedness was unsecured.

It is alleged that when the loan aggregating said sum of \$500,000 was made the defendant Mortgage Investment Company "extracted and deducted from the amount paid to defendant B. & H. Circuit, Inc., or for its benefit" certain bonuses in violation of the usury laws of the state of California; that notwithstanding the usurious character of said incumbrances defendant Mortgage Investment Company, prior to and upon December 17, 1924, "threatened to foreclose said mortgage and order sales under said trust deeds, well knowing that defendant B. & H. Circuit, Inc., was unable to pay the same, and by said threats coerced defendant B. & H. Circuit, Inc., to execute" an agreement dated December 17, 1924, between defendants B. & H. Circuit, Inc., and Mortgage Investment Company. By the terms of this agreement it was provided that defendant B. & H. Circuit, Inc., should allow defendant Mortgage Investment Company to take possession of all of its property; that its leasehold contracts for furnishings and equipment and its leaseholds on realty and insurance contracts should be conveyed to said defendant Mortgage Investment Company; and that said last-named defendant would accept said possession and conveyances, operate said theater, have a lien on all the property thereof for money paid on leasehold contracts, retain all its rights unimpaired under said mortgage and trust deeds, and that in the event defendant B. & H. Circuit, Inc., paid all amounts due under the terms of said mortgage and trust deeds and all further advancements of defendant Mortgage Investment Company, together with the stipulated interest, then defendant Mortgage Investment Company would reconvey to defendant B. & H. Circuit, Inc., all said real and personal property. In the event of foreclosure defendant B. & H. Circuit, Inc., was to be given an

extension of time within which to redeem its property.

It is further alleged that by the terms of said agreement defendant Mortgage Investment Company was let into the possession of the real property of defendant B. & H. Circuit, Inc., and given the management of said theater as trustee for said last-named defendant and its creditors, obligating itself to operate the same in such manner as would build up a substantial and profitable business, and to redeliver said property to defendant B. & H. Circuit, Inc., upon October 22, 1925, unless said defendant Mortgage Investment Company sooner acquired superior rights by foreclosure, or unless defendant B. & H. Circuit, Inc., repaid its indebtedness prior to said date. The property above mentioned constituted the sole assets of the defendant B. & H. Circuit, Inc., and while in possession thereof and on January 21, 1925, defendant Mortgage Investment Company "by further threats to foreclose its encumbrances coerced defendant B. & H. Circuit, Inc., to enter into and execute" another agreement which is set out in full in plaintiff's complaint. This latter agreement provided a new plan for refinancing the affairs of defendant B. & H. Circuit, Inc., and provided for the execution of certain notes, mortgages, and deeds of trust, the last of which, a note for \$400,000, payable to defendant Mortgage Investment Company bearing interest at 7 per cent. per annum, was to become due February 18, 1930.

It is further alleged in said amended complaint that the interest upon each of the several notes above referred to is payable quarterly, and that the principal sum upon none of them is yet due; that by the terms of said agreement defendant Mortgage Investment Company "exactd" from defendant B. & H. Circuit, Inc., an agreement to pay as a part of one of the trust deeds the sum of \$25,000 as a brokerage fee; and that said agreement in this is contrary to the usury laws of California and violative of the duty owed by said defendant Mortgage Investment Company to defendant B. & H. Circuit, Inc., because of the fiduciary relationship existing between the two.

Allegation is further made that by the terms of said agreement the payment of the then existing indebtedness of defendant B. & H. Circuit, Inc., from the proceeds of the new incumbrances was to be handled through an escrow at the Security Trust & Savings Bank, and that defendant Mortgage Investment Company agreed upon the closing of said escrow to redeliver to defendant B. & H. Circuit, Inc., all the property taken possession of under the agreement of December 17, 1924; that said escrow was closed on or about June 26, 1925, but that said defendant Mortgage Investment Company nevertheless remained in possession of said property except for a period of time during which said properties were in the possession of receivers

appointed in a suit brought by defendant B. & H. Circuit, Inc., against several of the defendants herein.

In said last-mentioned action defendant B. & H. Circuit, Inc., sought to restrain defendant Mortgage Investment Company from causing a foreclosure and sale under one of the trust deeds made and executed by virtue of the agreement of January 21, 1925, on the ground that the notes secured by said trust deed were usurious. The receivers in said action held possession of the properties of defendant B. & H. Circuit, Inc., from about February 8, 1926, to about September 4, 1926.

It is further alleged that at the time of the making of the contract of January 21, 1925, defendant B. & H. Circuit, Inc., had no money or property except the real property and theater hereinabove referred to and which was in the hands of the defendant Mortgage Investment Company as mortgagee in possession; that it had no income; that foreclosure was threatened by various holders of liens and incumbrances; that defendant B. & H. Circuit, Inc., was without funds to discharge the said liens and incumbrances, "although the said property was always of a value sufficient to defray all the debts, liens and incumbrances but that at that time it was impossible to sell said property for an amount sufficient to pay off the liens and incumbrances."

It is further alleged that on September 4, 1926, defendant Mortgage Investment Company claimed that a default in interest had occurred on certain notes executed in accordance with the provisions of the agreement of January 21, 1925, and thereupon the officers and directors of defendant B. & H. Circuit, Inc., or some of them, assented to the dissolving of the temporary restraining order forbidding the sale under the trust deed securing said last-mentioned notes, and to the immediate termination of the receivership in the suit hereinabove referred to, and to a dismissal of said suit, all to the great loss and damage of defendant B. & H. Circuit, Inc.; that on or about the said last-mentioned date defendant Title Guarantee & Trust Company, trustees, sold all of the properties belonging to defendant B. & H. Circuit, Inc., pursuant to the terms of the last referred to trust deed; and that defendant Mortgage Investment Company purchased said properties at said sale and is now the purported owner thereof but without right to the title or possession thereof.

The defendant Producers' Distributing Corporation became a party to the agreement of January 21, 1925, agreeing to pay off certain of the debts of defendant B. & H. Circuit, Inc., to assist in adjusting and settling other claims, and to advance money to be used as working capital. As this corporate defendant was never served with summons and has never made appearance herein, the allegations concerning it are of no importance in so far as said corporation is concerned. Neither are

they important as against the answering defendants, for no coercion is attempted to be shown by said corporation, and the allegations in reference to its exacting from defendant B. & H. Circuit, Inc., notes and trust deeds in violation of the usury laws of the state of California show neither culpability nor neglect on the part of the board of directors of said last-named corporation. In fact, an examination of the consideration for the said notes and trust deeds shows there was no usury practiced.

The final allegation of the amended complaint is to the effect that the two plaintiffs, Thomson and Fletcher, each demanded of the board of directors and officers of the defendant B. & H. Circuit, Inc., that they take proper and appropriate legal proceedings similar to the one ultimately brought by appellants, but that said board of directors and officers refused so to do and instead have actively aided the defendant Mortgage Investment Company in securing title to, and possession of, the properties of defendant B. & H. Circuit, Inc.

Plaintiffs thereupon pray that all of the said indebtedness, notes, mortgages, and trust deeds be declared usurious in character and invalid; that the parties defendant be directed to make a complete accounting; that the amount of interest paid to any of the defendants be determined, and that defendant B. & H. Circuit, Inc., have judgment for three times the amount thereof; that a receiver be appointed of all of said property; that the sale by defendant Title Guarantee & Trust Company under one of the trust deeds be set aside; that defendant B. & H. Circuit, Inc., be declared the owner of said properties, and restored to the possession thereof; that all of the defendants be enjoined from proceeding in or causing any sale or foreclosure of any of said properties; and for general relief.

To this amended complaint the defendants Mortgage Investment Company and B. & H. Circuit, Inc. (respondents herein), filed separate demurrers on the grounds that the amended complaint did not state facts sufficient to constitute a cause of action; that there is a misjoinder of causes of action and of parties defendant; and that the complaint is uncertain, ambiguous, and unintelligible in several particulars. These demurrers were sustained without leave to amend and a judgment of dismissal entered.

[1] In their opening brief appellants herein, plaintiffs below, assert that the only point urged in the trial court was that the plaintiffs, minority stockholders, have no right to sue. There is nothing on the face of the record, however, to show that this is the only point considered by the trial court, and this being true, the respondents are well within their rights in showing, if they can, that the trial court for any reason was justified in its action. *Burke v. Maguire*, 154 Cal. 456, 98 P. 21.

[2] The record upon appeal does not affirmatively show a request for the filing of an amended complaint; therefore there cannot be imputed to the lower court an abuse of discretion in denying plaintiffs' leave to further amend. *Aalwyn v. Cobe*, 168 Cal. 165, 142 P. 79; *Robertson v. Burrell*, 110 Cal. 568, at page 579, 42 P. 1086.

The only question, therefore, for this court to determine is whether or not the demurrers of the respondents were for any reason properly sustained.

Said demurrers were, in the opinion of the court, properly sustained for two reasons: First, because the amended complaint does not state facts sufficient to constitute a cause of action by appellants against either of said respondents on the ground of coercion or under the usury law of the state; and, second, because even if the facts alleged stated a cause of action on the part of B. & H. Circuit, Inc., for whose benefit appellants brought suit, the amended complaint does not state facts sufficient to authorize minority stockholders to prosecute such action.

[3] A stockholder in circumstances such as presented here is a mere nominal plaintiff, the corporation is the real party in interest, and any judgment recovered inures to its benefit. 6 Cal. Jur., p. 865.

Appellants herein accordingly attempted to state a cause of action for and on behalf of B. & H. Circuit, Inc., on the grounds that the directors of said corporation were coerced into entering into certain agreements and into executing certain promissory notes, which said promissory notes are void under the usury laws of California.

[4] In so far as the alleged coercion on the part of respondent Mortgage Investment Company is concerned, it is alleged that prior to and upon December 17, 1924, said respondent, to whom there was then and there owing upon a deed of trust the principal sum of \$500,000, "threatened to foreclose said mortgage and order sales under said trust deeds, well knowing that defendant B. & H. Circuit, Inc., was unable to pay the same, and by such threats coerced defendant B. & H. Circuit, Inc., to execute" a certain agreement. Whether or not the original loan for \$500,000 was, as alleged, usurious by reason of certain bonuses having been exacted, is immaterial because the principal sum being due at the time of the alleged threats, the said Mortgage Investment Company was in a position legally to enforce its claims as to said principal.

Under the Usury Law, Statutes 1919, p. lxxxiii, "no person, company, association or corporation shall directly or indirectly take or receive in money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money, goods or things in action than at the rate of twelve dollars upon one hundred dollars for one year." Upon

the violation of such inhibition the borrower may recover from the lender in an action at law treble the amount of the money so paid or value delivered in violation of said section, providing the action is brought within one year after payment or delivery; and the lender of money in violation of said inhibition is foreclosed from collecting the principal thereof until the full period of time for its payment has elapsed. The agreement is null and void as to interest only.

The principal sum of \$500,000 in this case being wholly due at the time the respondent Mortgage Investment Company is alleged to have threatened to foreclose its mortgage and order sales under its trust deeds, the corporation was well within its rights in demanding its payment and in making the threats complained of. "Persuasion is not coercion; insistence upon one's legal rights is not undue influence and pertinacious zeal to secure the payment of a just debt is not fraudulent." *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, at page 577, 108 P. 42, 44.

Further coercion on the part of said respondent Mortgage Investment Company is complained of in that on January 21, 1925, it "by further threats to foreclose its encumbrances coerced defendant B. & H. Circuit, Inc., to enter into and execute another agreement," namely, the agreement of January 21, 1925; but since under the agreement of December 17, 1924, said respondent corporation retained all its rights unimpaired under its original mortgage and trust deeds, it still had a right to foreclose its incumbrances, and therefore for the reasons above expressed its said threats were justifiable and did not constitute coercion.

[5] The only other attack made upon the validity of said agreements, and particularly upon the agreement of January 21, 1925, is that they call for usurious interest. In regard to this it is alleged that by the terms of said last-mentioned agreement respondent Mortgage Investment Company exacted from defendant B. & H. Circuit, Inc., an agreement to pay, as a part of the trust deeds securing the sum of \$143,103.52, the sum of \$25,000 as a brokerage fee, and that said agreement is therefore contrary to the usury laws of the state of California "and in defiance of the duty owed by said defendant Mortgage Investment Company to defendant B. & H. Circuit, Inc., because of the fiduciary relationship existing between defendant Mortgage Investment Company and defendant B. & H. Circuit, Inc." Further allegations of the amended complaint, however, show a complete refinancing of the affairs of respondent B. & H. Circuit, Inc., the extension of time within which its indebtedness might be paid, including the extension of the time of payment of a sum of \$400,000, for a period of five years, and the bringing into the affairs of the company the defendant Producers' Distributing Corporation with its agreement to

advance additional substantial sums of money and to settle outstanding unsecured claims against the said respondent B. & H. Circuit, Inc.

The language of the agreement of January 21, 1925, in reference to the so-called "exaction" of the sum of \$25,000 as a brokerage fee is as follows: "It is further understood and agreed that the party of the first part (B. & H. Circuit, Inc.) shall and will execute its promissory note in favor of the party of the second part (Mortgage Investment Company) in the sum of approximately \$135,000, said \$135,000 being made up of the following items: \$100,000 being the balance of the indebtedness secured by mortgage and trust deeds in favor of the party of the second part hereinabove referred to; \$25,000 thereof being brokerage fees agreed upon by first and second parties," etc.

It would appear from a reading of the said amended complaint that the brokerage fee referred to was not a fee exacted on account merely of the loan of \$135,000, but on account of all of the services and forbearances on the part of said respondent Mortgage Investment Company.

In the case of *Haines v. Commercial Mortgage Co.*, 200 Cal. at page 625, 255 P. 807 (53 A. L. R. 725), it is held that: "The maximum rate allowed for loans coming under the act is at the rate of 12 per cent. per annum for the full period of the loan, and that within such limit the parties may freely contract in respect thereto, if done in writing."

Considering the agreement of January 21, 1925, as a whole, the interest charged on all of the indebtedness of B. & H. Circuit, Inc., to Mortgage Investment Company under the new plan of financing, including the brokerage fee of \$25,000, does not equal or exceed the maximum rate of 12 per cent. per annum for the full period of the loans, and, therefore cannot be held usurious.

[6] For the foregoing reasons we are of the opinion that the amended complaint did not state a cause of action on behalf of appellants' corporation, B. & H. Circuit, Inc. Furthermore, the language of said amended complaint in reference to the alleged usury is so ambiguous, uncertain, and unintelligible that the demurrers of the respective defendants could properly be sustained on those stated grounds.

[7] As to said amended complaint stating facts sufficient to entitle appellants (minority stockholders) to institute and maintain this action, even if the corporation itself had a cause of action, it is the law that such actions may be instituted and maintained by stockholders only when the acts of the board of directors of the corporation are either ultra vires, illegal, fraudulent, oppressive, or show willful neglect. *Fletcher Cyclopedia of the Law of Private Corporations*, § 4065; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *United Copper Co. v. Amalgamated Copper*

Co., 244 U. S. 261, 37 S. Ct. 509, 61 L. Ed. 1119; *Donohoe v. Mariposa L. & M. Co.*, 66 Cal. 317, 5 P. 495.

[8] The two allegations concerning the acts of the board of directors of respondent B. & H. Circuit, Inc., upon which appellants rely as showing wrongful or negligent acts, are: "The officers and directors of defendant B. & H. Circuit, Inc., or some of them, assented to the dissolving of the temporary restraining order forbidding a sale under the last mentioned trust deed and to the immediate and summary termination of the receivership in said suit and to dismiss said suit, to the great loss and damage of defendant B. & H. Circuit, Inc.," and that after the demands by appellants of the board of trustees and officers of respondent B. & H. Circuit, Inc., "they take the proper and appropriate legal proceedings to have the usurious nature of all the said debts, notes and agreements determined, and said sale to defendant Mortgage Investment Company prevented and enjoined, and to prevent defendants from obtaining the present said wrongful position of advantage over defendant B. & H. Circuit, Inc., the board of directors and officers of defendant B. & H. Circuit, Inc., have stood idly by and have refused and so still refuse to take any such procedure; but, on the other hand, have actively aided the defendant Mortgage Investment Company in securing its apparent wrongful title to, and possession of, the properties of defendant B. & H. Circuit, Inc.; and that said properties constitute all of the assets of said B. & H. Circuit, Inc."

In regard to the board of directors assenting to the dissolution of the temporary restraining order and the termination of the receivership, there is no showing or allegation that such action was either in excess of the authority of the board, fraudulent, or willfully neglectful; and as to the great loss and damage alleged, no showing is made as to what constituted such loss and damage, if any there was.

Concerning the other allegations in reference to the refusal of the officers of respondent B. & H. Circuit, Inc., to bring suit as demanded and that they actively aided respondent Mortgage Investment Company in securing its apparently wrongful title to the properties of the defendant, there is no allegation or showing that such acts were in any wise culpable. The words "apparent wrongful title" have no force in view of the other allegations of the amended complaint which show that the respondent Mortgage Investment Company was well within its rights in requiring the sale of said properties and in buying in the same under the terms of their trust deed.

Considering the amended complaint as a whole, it may well be concluded that the acts of the board of directors of respondent

B. & H. Circuit, Inc., in dismissing the action referred to therein and in not objecting to the sale of its properties under the trust deed of respondent Mortgage Investment Company, instead of being wrongful, constituted an economical and efficient way of terminating an apparently unsuccessful business venture without incurring further and additional liabilities.

The judgment appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

99 Cal. App. 330

In re APPENFELDER'S ESTATE.

APPENFELDER v. SECURITY TRUST & SAVINGS BANK et al.

(Civ. 6412.)

District Court of Appeal, Second District, Division 2, California. June 7, 1929.

1. Constitutional law $\Leftrightarrow$ 70(1)—Court cannot add requirements to statute as to revocation of will (Civ. Code, § 1299).

Court cannot add to Civ. Code, § 1299, as to revocation of will by testator's marriage, any requirements not therein stated.

2. Wills $\Leftrightarrow$ 191—Will held not revoked by testator's marriage to devisee of interest in remainder, though not indicating that testator contemplated marriage to her (Civ. Code, § 1299).

Will devising interest in remainder to wife of testator's nephew *held* not revoked by her marriage to testator after divorce from nephew, under Civ. Code, § 1299, which does not require that will indicate testator's contemplation of marriage to person provided for therein.

3. Wills $\Leftrightarrow$ 296—Evidence that contestant, claiming revocation of will by her marriage to testator, was person to whom will devised interest in remainder, held admissible (Civ. Code, § 1299).

Testimony that one contesting will on ground that it was revoked by her marriage to testator, under Civ. Code, § 1299, was his nephew's wife, to whom will devised interest in remainder, when it was published, *held* admissible, not for purpose of construing will or rebutting presumption of revocation, but to show identity of contestant with person named in will.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Proceedings by the Security Trust & Savings Bank to probate the will of Charles Rudolph Appenfelter, deceased, in favor of Emma C. Appenfelter and others, contested by Katherine Louise Appenfelter. From an order admitting the will to probate, contestant appeals. Affirmed.

Clarke & Bowker, of Los Angeles, and James C. Hollingsworth, of Ventura, for appellant.

Arthur W. Eckman, Melvin T. Dunlavy, and Louis Thomsen, all of Los Angeles, for respondents Emma C. Appenfelder, Hugo William Appenfelder, and Fred A. Appenfelder.

Bert P. Woodward, of Glendale, for respondent Susan K. Appenfelder.

IRA F. THOMPSON, J. This is an appeal from an order admitting to probate the last will and testament, together with the codicil thereto, of Charles Rudolph Appenfelder, deceased. The decedent executed his will on August 24, 1924, and on March 2, 1926, made the codicil. By these instruments he bequeathed \$2,000 to his former wife (divorced at the time the will was published) and devised to her a life estate in certain real property situate in Glendale, Cal. Of the remainder over, $\frac{1}{8}$ was given to the appellant, Katherine Louise Appenfelder, described in the will as "my niece" but who at the time was in fact the wife of a nephew of the deceased. The balance of the remainder over was distributed among Emma C., Hugo William, and Fred Appenfelder. A like disposition was made of all the rest, residue, and remainder of the estate, i. e., $\frac{1}{8}$ to the appellant, $\frac{17}{40}$ to Emma C. Appenfelder, and $\frac{9}{40}$ each to Hugo William and Fred Appenfelder. On December 8, 1927, the deceased and appellant were married, she having been divorced from her former husband in the meantime. On March 19, 1928, Charles Rudolph Appenfelder died at Cheyenne, Wyo., being at the time a resident of Los Angeles county, Cal. The appellant filed a contest to the probate of the will on the ground that although married to decedent subsequent to the execution of the will no provision was made for her by marriage contract; no provision was made for her in the will; no intention was therein disclosed not to make provision for her, and hence under the provisions of section 1299 of the Civil Code the will was revoked. The section referred to reads as follows: "If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received." In addition to her assertion that the will was revoked by the provisions we have just quoted, the appellant complains that the court erred when it permitted counsel for respondents on cross-examination to elicit from her lips the information that she was the wife of a nephew of the deceased until after the will and codicil were executed and that she knew of no other person named Katherine Louise Appenfelder.

[1] Turning to the first contention of appellant, we quote two significant sentences from her brief which illustrate the underlying thought of her argument. She says: "Throughout all the cases it appears that there must be evidence that the testator would have the event, that is, his marriage 'in contemplation,'" and, "It appears to us to be the declared law of California that in order to overcome the presumption of revocation by marriage it must appear that the party named was provided for 'as a wife' or as an 'intended wife,' and that there must be language in the will indicating an intention upon the part of testator to make such a provision." The crux of the matter may then be said to be whether the quoted section of the Code requires the will to provide for the individual or to provide for the person in the capacity of an intended spouse. In other words, must the will disclose that it was executed in contemplation of marriage or is the section satisfied if the person is actually provided for? We must confess that the question is most interesting and from a strictly academic basis would warrant a résumé of the authorities from the early English cases down to the present time. However, we are not here dealing with the doctrine of implied revocation inherited and reluctantly adopted by the common law from the ecclesiastical courts, but we are confronted with a statutory enactment relating to the revocation of wills under specified circumstances. Or as was said in *Estate of Meyer*, 44 Cal. App. 289, 186 P. 393, in speaking of the companion section of the Code which refers to issue, "We cannot read into section 1298 any exception which the legislature did not incorporate therein." In the same case the court observed "It" (the will) "was revoked, not by implication, but by positive statutory enactment. * * *" It must be patent that if no exception can be read into the section, that no requirements not therein stated may be added. If the doctrine of implied revocation cannot be applied in the one case, we cannot resort to it in the other. Our problem then is wholly a question of statutory construction. The cases of *Ellis v. Darden*, 86 Ga. 368, 12 S. E. 652, 11 L. R. A. 51, and *Sutton v. Hancock*, 115 Ga. 857, 42 S. E. 214, relied upon by the appellant, are not persuasive or of assistance for the reason that the controlling section of the Code of Georgia specifically provides that the provisions of the will shall have been in contemplation of the event of marriage or birth of issue as the case may be. Nor are *Brown v. Scherrer*, 5 Colo. App. 255, 38 P. 427, and *In re Toepfer*, 12 N. M. 372, 78 P. 53, 67 L. R. A. 315, helpful. Both cases were decided upon the doctrine of implied revocation, and in neither was the surviving spouse in any way mentioned. In fact, the real question in each case was whether mar-

riage alone, without birth of issue, was sufficient, under the doctrine, to work a revocation by operation of law. On the other hand, the case of *In re Adler's Estate*, 52 Wash. 543, 100 P. 1019, involved a statutory enactment identical in all material respects with our own, and the comments of the Washington Supreme Court concerning its interpretation are very persuasive to our minds. The court says: "It will be seen by those who are inclined to follow the cases that our statute is a wide departure from the common law as well as the theories usually advanced to sustain that rule, and that it differs from the statutes of any other state, at least in so far as they have been construed in the decisions." The premise thus laid down is in its essence the same as that established in *Estate of Meyer*, supra, from which we have already quoted. The court then goes on to say:

"When the legislature has assumed to speak upon a given subject, courts must take its expression as it is; and, if it be certain in its terms, there is no reason for speculation as to its reasons or warrant for adding anything to meet a given case. The provisions of section 4598, Ballinger's Ann. Codes & St., are in the disjunctive. If [unless] a person shall have made a marriage settlement, or if [unless] the wife shall have been provided for, or if [unless] an intent not to make such provision is disclosed, the will is deemed revoked. It does not say that the provision must be made in contemplation of marriage. The only question open is whether the person who has become a proper object of the bounty of the testator is provided for. Nor will we take any concern of the amount of the provision. To bring ourselves within one of the several rules to which we have referred, we have no right to read into our statute the words 'unless it clearly appears,' or 'was made in contemplation of marriage.' It is conceded that parol evidence is incompetent to explain the will. This furnishes further reason to sustain our views. Taking the statute as it is, may we not say that, presuming that the testator did not, at the time of executing the will, have in mind the changed condition to be wrought by a subsequent marriage, upon the happening of that event, being mindful of his will, he was satisfied with the provision he had made for respondent? Under the common law and statutes in form different from our own, the law presumes a testator would have made another will, but under our statute the presumption should not follow, for the person in whose behalf the law was written is provided for, and the end of the law is fully accomplished. There is nothing in the will to show a counter intent. *To hold otherwise it seems to us would be in effect to say that we should overturn this will because the legislature was not as fully provided for as in our*

judgment a wife should be, or has not received as much as she would have received under the statutes of descent. [Italics ours.] If we could do that, we might, in the interest of heirs in a given case, overturn the will because the person provided for had more than enough to meet the presumed duty of the testator. Said Chancellor Kent: 'It would be dangerous, and might lead to loose speculations, to give greater effect than the settled doctrine of the English law has already done, to the occurrence of new domestic duties. Every person is permitted to make his own will, at his discretion; and he may even disinherit his children, if he should be so inclined, whether they deserved, or not, such extreme chastisement. Every material addition to the property of a testator, or alteration in the circumstances of his family, varies his relations and duties, either in kind or degree, and might be made the ground of very plausible and pathetic claims upon the court for the application of this doctrine of a presumed revocation. Courts would be running the hazard of substituting their will for that of the testator.' (*Brush v. Wilkins*, [4 Johns Ch. 506] supra.)

"In thus disposing of this case, we can give effect to another most salutary rule. While we have said that in our judgment the grounds upon which wills are or may be revoked are statutory, it is also the rule that revocation of wills by implication of law are not favored. The reason for overturning a will must supplant every other consideration. Where wills have been held to be so revoked by implication, it was because of some reason so controlling that the presumption followed that the testator himself upon the happening of the event would not have published the document as his will. There is nothing in the will before us, and nothing is suggested in the statute, that would warrant the indulgence of this presumption on our part. * * * Our conclusion then is that the words, 'or unless she be provided for in the will,' being in the disjunctive and in no way qualified by the usual term 'in contemplation of marriage,' refer to a condition existing at the time of death, and not necessarily to an intended wife. A person being provided for may, by intermarriage with the testator, bring herself within the operation of the statute. If she be provided for in the will, as she is in the case at bar, she comes within our statute, as under the rules to which we have referred she would have fallen without it. Alfred Adler having made his will, and afterwards married, his wife surviving him, at least one of three things must appear: He must have made a marriage settlement, or she must be provided for in the will, or so mentioned as to indicate his intention not to make such provision. The statute must be construed to read as follows:

"If after making any will the testator shall marry and the wife shall be living at the time of the death of the testator, such will shall be deemed revoked * * * unless she be provided for in the will. * * * " Hannah Adler is provided for in the will, and is concluded by its terms."

[2] Had it been the intention of the Legislature to say that the provision of the will should indicate that the testator had in contemplation the event of marriage, it would have been a very simple process for it to have inserted a phrase to that effect after the clause "or unless she is provided for in the will." For example, it might have added immediately after the word "will" the following: "In such a manner as to indicate that the testator had in contemplation the event of marriage." We read the Estate of Kurtz, 190 Cal. 146, 210 P. 959, as indicating the same construction of our Code as we think it should bear. In that case the will contained a clause disinheriting all persons claiming to be heirs at law except those named in the instrument and giving to any person asserting any claim to the estate other than by the will the sum of \$1. The day following the execution of the will the testator married and the Supreme Court held that the clause "any person whomsoever, who if I died intestate would be entitled to any part of my estate" included the surviving spouse, stating that it was not necessary to mention her by name, but was sufficient to include her "in the description of a class." We think the trial court was manifestly right in holding that there was no revocation.

[3] We now turn to the second argument of appellant, to the effect that the court erred in admitting testimony concerning the identity of the appellant. She argues that section 1299 is not concerned with the interpretation or construction of wills, and further that it provides that "no other evidence (other than the will) to rebut the presumption of revocation must be received." We do not understand that the testimony was received either for the purpose of construing the will or of rebutting the presumption of revocation. It related solely to the identity of the appellant whose name was identical with that in the will, and whose name was actually in the will. It was held in Estate of Kurtz, supra, that evidence of an engagement at the time the will was executed was admissible for the purpose of showing "who the maker of the will intended to include by the phrase 'any person whomsoever who, if I died intestate, would be entitled to any part of my estate,' a phrase which, if he had not been then engaged to marry the contestant, would be somewhat ambiguous, but which would be made certain by showing the fact of such engagement." So here the identity was established by showing that appellant

was in fact the wife of a nephew at the time the will was published.

Order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

99 Cal. App. 240

EAST BAY MUNICIPAL UTILITY DIST. v. KIEFFER et al. (two cases).★

SAME v. PACIFIC GAS & ELECTRIC CO. et al.

(Civ. Nos. 3480-3482.)

District Court of Appeal, Third District, California. May 29, 1929.

Rehearing Denied June 26, 1929. Hearing Denied by Supreme Court July 25, 1929.

1. Eminent domain ⇨153—Holder of option is not entitled to compensation for lands under option taken or severance of such lands from lands owned by him.

Option to purchase land is not interest in land itself but mere right of election to accept or reject present offer within time fixed, and holder of such option is not entitled to any part of compensation to be paid for land nor to any damages by reason of severance of such lands from other lands owned by him.

2. Eminent domain ⇨209—Determination by court without jury as to whether defendant's several tracts of land constituted single parcel held not error, where evidence was not conflicting (Code Civ. Proc. § 1248, subd. 2).

Determination by court without presence of jury whether several tracts of land owned by defendant constituted single parcel within meaning of Code Civ. Proc. § 1248, subd. 2, was not erroneous, where there was no conflicting evidence bearing on issue.

3. Eminent domain ⇨137—Where condemnation proceedings were tried within year of commencement, court properly ruled that tracts separated by lands held under option exercised during pendency of proceedings did not constitute "single parcel" (Code Civ. Proc. § 1249, and § 1248, subd. 2).

Where proceedings for condemnation of separate parcels of land were tried within year after commencement of proceeding, court properly ruled under Code Civ. Proc. § 1249, that defendant's tracts separated by lands which he held only under option at commencement of proceedings were separate tracts, not constituting single parcel under section 1248, subd. 2, notwithstanding he exercised option during pendency of proceedings.

4. Eminent domain ⇨320—Title acquired by plaintiff as against intervening rights of persons having actual or constructive notice of condemnation suits relates back to commencement of suits.

Title finally acquired by plaintiff in condemnation suits as against intervening rights of persons having actual or constructive notice of such suits relates back to commencement of such suits.

5. Eminent domain ⇨262(5)—Court's observation as to misleading purpose of defendant's attempt to introduce incompetent evidence held not prejudicial, in view of later admonition.

Court in eminent domain proceedings having determined on unconflicting evidence that defendant's lands did not constitute single parcel, remarks of court as to misleading purpose of defendant's insistence on attempting to prove to jury that lands constituted single parcel held not prejudicial, in view of court's admonition.

6. Evidence ⇨145—Evidence of current prices of water and electric energy held too remote on question of value of reservoir lands taken.

In eminent domain proceedings to condemn reservoir lands, evidence as to current price of water and electric energy held properly excluded as too remote on issue of market value of land taken.

7. Evidence ⇨502—Permitting cross-examination in proceedings to take land for reservoir purposes as to value of land with reservoir use eliminated held not error.

In eminent domain proceedings to take land for reservoir purposes, permitting cross-examination of defendant's witnesses as to market value of land with reservoir use eliminated held not erroneous.

8. Evidence ⇨558(8)—Cross-examination to test witness' knowledge and impeach opinions, as to other sales in vicinity and prices recently paid by defendant, was not erroneous.

In eminent domain proceedings, cross-examination of witnesses as to their knowledge of other sales of land in vicinity and of prices recently paid by defendant for lands taken was not erroneous for purpose of testing knowledge of witnesses and impeaching opinions as to value.

9. Eminent domain ⇨262(5)—Exclusion of testimony of value of condemned lands held not prejudicial, in view of numerous witnesses testifying on issue.

Exclusion of testimony of witness as to value of lands taken in eminent domain proceedings was not prejudicial, where 12 other witnesses testified on such issue, and testimony excluded would not have been of great weight.

10. Eminent domain ⇨262(5)—Exclusion of testimony as to obvious facts explanatory of cross-examination held not prejudicial.

In eminent domain proceedings, exclusion of testimony on redirect examination explanatory of witness' testimony as to market prices of land in another reservoir condemnation proceeding held not prejudicial, where testimony sought to be adduced was as to fact obvious to jury.

11. Eminent domain ⇨262(5)—Admission of water filings was not prejudicial, where substance of evidence was previously adduced without objection, and later defendant supplied list of filings and dates.

Admission of evidence of water filings in condemnation proceeding was not prejudicial, where most of facts shown by such filings were brought out without objection on cross-exam-

ination of appellant's witness, and on redirect examination appellant gave list of such filings and dates thereof.

12. Eminent domain ⇨202(1, 4)—On issue of value, defendant cannot show plaintiff's necessity to obtain water from particular source or special value to plaintiff of such supply.

In eminent domain proceedings to take land for water reservoir purposes, on issue of value of land defendant has no right to show plaintiff's necessity of obtaining supply of water from that particular source of special value to plaintiff of such supply.

13. Eminent domain ⇨202(4)—Exclusion of portions of engineer's report as to necessity and desirability of defendant's lands for reservoir purposes held not error.

Exclusion of portions of engineer's report showing desirability and necessity of defendant's lands for reservoir purposes held not error on issue of damages.

14. Eminent domain ⇨219—Permitting plaintiff to open and close was within discretion of trial court.

Permitting counsel for plaintiff in condemnation proceedings to open and close argument to jury was discretionary with trial court.

15. Appeal and error ⇨1060(1)—Limiting argument in condemnation proceedings to three hours held not prejudicial, in absence of objection or showing of injury.

Limitation of argument of counsel on each side to three hours held not prejudicial in eminent domain proceedings, in absence of any objection or showing of injury.

16. Eminent domain ⇨222(4)—Instruction as to "fair" value and price of lands held not misleading.

Instructions as to fair value and fair price of land to be taken held not misleading, in view of accurate definition of market value repeatedly given; word "fair" as so used meaning honest rather than average or middling.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Fair.]

17. Eminent domain ⇨222(4)—Instruction in condemnation proceedings not to consider defendant's claim of value of land to him held not erroneous as directing that his testimony be disregarded.

Instruction in eminent domain proceedings that in arriving at value of land jurors are not to consider what defendant claims it was worth to him held not erroneous as directing jury to disregard defendant's testimony.

18. Eminent domain ⇨222(4)—Instruction defining preponderance of evidence as not number of witnesses but evidence producing "conviction" in unprejudiced minds held not misleading.

In eminent domain proceedings, instruction that defendant is required to prove his side of issue by preponderance of evidence, and that by preponderance of evidence is meant not number of witnesses but that evidence which produces "conviction" in unprejudiced minds, held not er-

roneous or misleading, though academically inaccurate; word "conviction" in sense used meaning the state of being convinced, convincing by satisfactory proof.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Convicted; Conviction.]

19. Eminent domain $\S$ 262(5)—Refusal of instruction as to federal power license in ascertaining value of lands taken for reservoir purposes held not prejudicial, where jurors must have understood provisions.

In condemnation proceedings to acquire lands for water reservoir, where plaintiff's license was introduced in evidence, and certain articles thereof read to jury, and jury instructed that requirements of license might be considered in determining value of defendant's lands, refusal of instruction as to right of Federal Power Commission and plaintiff to modify or alter provisions of license was not prejudicial, in view of fact that jurors must have clearly understood provisions of article referred to without such instruction.

20. Eminent domain $\S$ 222(4)—Refusal of instruction as to commonplace facts to be considered in fixing value held not erroneous.

Refusal of instruction in eminent domain proceedings that jury, in testing opinions of witnesses who had considered other sales in arriving at market value, might consider whether parties to other sales knew and appreciated adaptability for useful purposes of property sold or purchased, was not erroneous, being statement of mere commonplace.

21. Trial $\S$ 260(5)—Refusal of instructions to consider plaintiff "competitor" of defendant, and "demand" for reservoir site in fixing value of land taken, held not erroneous, in view of other instructions.

In eminent domain proceedings to take lands for water purposes, refusal of instructions as to consideration by jury of defendant's status as competitor of plaintiff and as to demand for reservoir sites in general held not erroneous, in view of instruction given permitting jury to consider plaintiff as competitor for land sought to be condemned; word "demand" as used meaning desire to purchase commodity accompanied by means of payment, and word "competitor" meaning one who desires and endeavors to buy same property or in same market as another, and has means of payment.

[Ed. Note.—For other definitions, see Words and Phrases, Second and Third Series, Competitor; First, Second, and Third Series, Demand.]

22. Evidence $\S$ 568(4)—Award held not unsupported because less than values fixed by defendant's witnesses and considerably larger than those fixed by plaintiff's witnesses.

That defendant's witnesses in eminent domain proceedings all testified to values greatly in excess of award of jury, which, in turn, was considerably larger than values fixed by plaintiff's witnesses, held not to show that award was inadequate and not supported by evidence.

Appeals from Superior Court, Amador County; C. P. Vicini, Judge.

Separate condemnation proceedings by the East Bay Municipal Utility District, a body corporate and politic of the state of California, against Stephen E. Kieffer and others, consolidated for trial. From adverse judgments, the defendant named appeals. Affirmed.

James F. Peck and F. J. Solinsky, both of San Francisco, T. A. Farrell, of Sacramento, Wm. G. Snyder, of Jackson, and Charles F. Rafferty, of San Francisco, for appellant.

T. P. Wittschen, of Oakland, T. G. Negrich and Ralph McGee, both of San Francisco, and L. W. Irving, of Oakland, for respondent.

FINCH, P. J. The defendant Kieffer, who will be referred to as the defendant, has appealed from the judgments in three separate proceedings in eminent domain. The three cases were consolidated for trial and tried together.

The plaintiff district includes within its boundaries the principal cities on the easterly shore of San Francisco bay. For the purpose of providing a water supply for these cities, the plaintiff selected a reservoir site, referred to by the parties as the Lancha Plana site, on the Mokelumne river, with the object of impounding the waters of that stream. Northerly and over a ridge from the Lancha Plana site is another reservoir site, referred to as the Arroyo Seco site. The plaintiff was granted a license by the Federal Power Commission to construct and operate its proposed dam and reservoir, and it acquired some of the lands in the reservoir site. Prior to the commencement of these suits, the defendant had acquired title to large areas of land in both the Lancha Plana and the Arroyo Seco sites and options to purchase other lands in both sites. He had also acquired title to all but a small parcel of a strip of land connecting the larger areas owned by him in the two reservoir sites; this small parcel being in the middle of the strip, and the title thereto being in Lee De Vries. At the time the first two suits were commenced, the defendant held a mere option to purchase this De Vries parcel. He thereafter allowed the option to expire, but it was subsequently renewed, and he acquired title from De Vries before the third suit was filed.

September 7, 1926, the complaint in the first suit was filed and summons issued. The lands sought to be condemned by that suit consist of 5,657.1 acres owned by the defendant and lying on the Mokelumne side of the ridge. On the same day, in like manner, the plaintiff commenced the second suit to condemn 360 acres of land immediately along the Mokelumne river, owned by the Pacific Gas & Electric Company, on which the defendant held an option to purchase, and to which he acquired title before the trial. After the commencement of the first two suits,

the defendant acquired title to 1,248 acres of other lands on the Mokelumne side of the ridge, on which he held options when the first two suits were commenced, and on December 20, 1926, the plaintiff commenced the third proceeding, by which it sought to condemn those lands. Prior to that time, as stated the defendant had acquired title to the De Vries parcel of land, thereby consolidating all his holdings, except a small isolated parcel. The lands taken by the third suit, however, were entirely separated by those condemned in the first two proceedings from the other lands belonging to the defendant. The lands condemned in the three suits were not wholly within the reservoir site, but with two exceptions, included all of the defendant's contiguous lands; severance damages being thereby reduced to a minimum.

[1] The defendant in his answers claimed damages by reason of the severance of lands under option from lands owned by him which were taken. On motion of the plaintiff, the court struck out the allegations of the answers relating to such damages.

It may be conceded that an option to purchase land is property, but it does not constitute an interest in the land itself. "An option is not a transfer of property. No title is conveyed thereby. It is a mere right of election * * * to accept or reject a present offer within the time therein fixed." *Ware v. Quigley*, 176 Cal. 694, 698, 169 P. 377, 378; *Ludy v. Zumwalt*, 85 Cal. App. 119, 130, 259 P. 52. The holder of a mere option to purchase land being condemned is not entitled to any part of the compensation to be paid therefor. *Russakov v. McCarthy Co.* (Cal. Sup.) 275 P. 808; *In re Water Front on Upper New York Bay*, 246 N. Y. 1, 157 N. E. 911. The lands under option referred to in the allegations stricken out were not sought to be condemned by the plaintiff. If it be contended that the defendant's ownership of the options enhanced the value to him of the lands taken, the obvious answer is that the value thereof to him or to any person in his situation is immaterial; he being entitled only to the market value of such lands and not to any special value thereof to him by reason of his advantageous position. 10 Cal. Jur. 339; *Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 399, 153 P. 705. Since the appellant had no interest in the lands under option, it is axiomatic that he was not entitled to damages by reason of their severance from his lands which were taken, if such taking may be termed a severance. Of course, if the lands under option had been held under a contract obligating the defendant to purchase them, a different rule would apply.

[2, 3] Over the defendant's objection, the trial court, without the presence of the jury, heard and determined the issue of whether or not the several tracts of land owned by the defendant constituted a single parcel within the meaning of section 1248, subd. 2, of the

Code of Civil Procedure, relating to severance damages. Appellant contends that this issue should have been determined by the jury. It is unnecessary to decide what the general rule is, because in this case there is no conflict in the evidence bearing upon that issue, and it was therefore "essentially a question of law for the determination of the court." *Oakland v. Pacific Coast Lumber & Mill Co.*, supra. The court found that the defendant's lands on the Arroyo Seco side of the ridge constituted a separate parcel from those which were taken. It follows from what has already been said that this finding is the only one that could be made from the evidence in so far as the first two proceedings are concerned. "For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to the property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in section 1248," if the case is tried within a year after the commencement of the proceeding. Code Civ. Proc. § 1249. These proceedings were tried within a year after the first two were commenced. At the time they were commenced, the De Vries parcel, on which the defendant held a mere option, divided his holdings into two separate parcels. Damages by reason of severance is limited to land which is contiguous to that taken. *Oakland v. Pacific Coast Lumber & Mill Co.*, supra; *City of Stockton v. Ellingwood* (Cal. App.) 275 P. 228. In the *Oakland Case* there was an existing unity of use between the parcels of land in question, but no physical contiguity. In this case the unity of use asserted by the appellant is prospective and problematical only.

[4] Prior to the time the third proceeding was commenced, the defendant had acquired title to the De Vries parcel, thereby establishing physical contiguity between the two larger parcels. He contends that therefore he "has the right to have the question of severance damages, with reference to the last suit filed, determined just as though the first two suits had not been filed, except in so far as he would receive double allowance" by considering the facts of each case without reference to those of the others. However plausible this argument may seem at first blush, it will not bear analysis. At the time the first two suits were commenced, the defendant had not acquired title to the lands sought to be condemned by the third, and the latter lands were entirely separated by the lands involved in the first two suits from all other lands owned by the defendant. Had the first two suits been tried and title thereby acquired before the third one was commenced there would be no basis for appellant's contention that the lands taken by the third suit are a part of the

same parcel as the Arroyo Seco lands. The fact that the third suit was commenced before the others were tried rather than thereafter can make no difference. The defendant had answered the complaints in the first two suits, and therefore must have had knowledge thereof prior to the time he acquired title to the lands condemned by the third. The title finally acquired by the plaintiff in the first two suits, as against intervening rights of persons having actual or constructive notice of such suits, relates back to the commencement thereof. *Smith v. Jeffcoat*, 196 Ala. 96, 71 So. 717; *School District of Ogden v. Smith*, 113 Ark. 530, 168 S. W. 1089; *Currie v. Bangor & A. R. Co.*, 105 Me. 529, 75 A. 51; *Dowie v. Chicago, W. & N. S. R. Co.*, 214 Ill. 49, 73 N. E. 354; 16 Cal. Jur. 652. The defendant's right to damages by reason of severance in the third suit is the same as if, at the time the first two proceedings were commenced, he had conveyed to the plaintiff the lands condemned in those suits.

[5] After the trial court had determined that the defendant's lands in the two reservoir sites did not constitute a single parcel, a jury was impaneled to determine the compensation to which the defendant is entitled. At the trial before the jury, the defendant again sought to introduce evidence to show that all his lands constituted a single parcel. After sustaining numerous objections to the introduction of such evidence, the court said: "I can see the purpose of it, and it is absolutely intended to hereafter mislead somebody." In the final instructions to the jury, the court said: "Remarks and arguments of counsel * * * and any remarks made by the court during such arguments * * * should be disregarded by you in arriving at your verdict." Without attempting to justify the remarks in question, the error of making them is not deemed sufficiently serious, in view of the instruction quoted, to require a reversal.

While the court refused to permit proof that the market value of the defendant's lands in the Arroyo Seco basin would be depreciated by the taking of the lands condemned, the defendant was permitted to introduce evidence tending to show that the availability of the Arroyo Seco basin as a reservoir site enhanced the market value of the lands taken; the evidence showing that, when the Lancha Plana reservoir is full, the surplus waters of the Mokelumne river can be readily diverted through the reservoir and across the ridge mentioned into the Arroyo Seco basin. In an effort to overcome the effect of such evidence, the plaintiff introduced its federal license, by the terms of which the plaintiff is required, at its own cost and expense, to construct and maintain a spillway for the purpose of diverting such surplus waters to any authorized user thereof in the Arroyo Seco basin.

[6] The defendant was permitted to show

the volume of water flowing in the Mokelumne river, the capacity of the Lancha Plana reservoir, and the capacity of a reservoir which could be constructed in the Arroyo Seco basin, the amount of electric power which could be developed, the irrigable lands in need of water, the cities and towns, including those in the plaintiff district, which could be supplied with water and power from such a combined reservoir system and the amount now consumed by them, the available use of the system as a means of flood control and of protecting the delta lands of the Sacramento and San Joaquin rivers against salt water. The defendant was not permitted to show the present selling prices of water and power, the increase in the market value of the irrigable lands mentioned which would result from a "dependable water supply," the increase in value of delta lands which would be caused by holding back the salt water, and other evidence tending to show the returns to be received from the sale of water and electric power. The defendant sought to make such proof by his own witnesses and by cross-examining plaintiff's witnesses. In a proceeding to condemn a completed water and power system, in full operation, evidence of the character in question would have a direct bearing upon the value of the system.

The Supreme Court of this state has never said "that the value in use, as contradistinguished from the estimated value of a proposed problematical use, might not be given in terms of money, not as determinative of the question, but as being evidence of the ultimate fact which the jury is called upon to find, namely the market value." *Oakland v. Pacific Coast Lumber & Mill Co.*, supra. But the relation between the value of land in a proposed reservoir and the current price of water and electric energy is too remote and conjectural to be of any reliable assistance to the jury in determining the market value of the land taken. Although the evidence rejected consisted of proof of past and present facts, the inference sought to be drawn therefrom is highly speculative. Speculative and conjectural calculations of prospective receipts and expenditures and consequent profits to be derived from a prospective enterprise not only throw no light on the issue of the market value of the land to be used in the enterprise, but operate to confuse and mislead the minds of the jurors. *San Diego Land and Town Co. v. Neale*, 88 Cal. 50, 61, 25 P. 977, 11 L. R. A. 604. "It is said in some cases that it is proper to consider every element of value which would be taken into consideration in a sale between private parties. But this needs some qualification, since remote and speculative reasons are often urged by the seller in support of the valuation claimed." *Lewis on Eminent Domain* (3d Ed.) § 706. In section 709 of the same work, by way of illustration, it is said: "It may be shown that land is suitable for raising cran-

berries, but it is not competent to go into the price of cranberries, the quantity which might be raised, and the like." It is well settled in this state that evidence of the character in question is inadmissible. *City of Los Angeles v. Hughes*, 202 Cal. 731, 734, 262 P. 737; *City of Stockton v. Vote*, 76 Cal. App. 369, 400, 244 P. 609; *San Joaquin, etc., Canal & Irrigation Co. v. Stevinson*, 63 Cal. App. 767, 769, 220 P. 427. The admission of evidence which leads to conjectural speculations is equally harmful, whether on cross-examination or direct.

[7] Appellant contends that the court erred in requiring his witnesses, on cross-examination, "to state the market value of the land with the reservoir use eliminated." Such testimony was, in effect, a statement of the value of the land for particular purposes. Great latitude is allowed in the cross-examination of witnesses who have testified to the market value of land. 10 Cal. Jur. 1028. In *City of Stockton v. Ellingwood* (Cal. App.) 275 P. 228, the following language is quoted from *Tracy v. City of Mount Pleasant*, 165 Iowa, 435, 146 N. W. 78: "Undoubtedly inquiry would be proper on cross-examination as to what purpose a witness thought the property available for and his notion of its market value for such purpose."

[8] For the purpose of testing the knowledge of such witnesses and impeaching their opinions as to values, the court permitted the plaintiff to ask them, on cross-examination, to state their knowledge of other sales of land in the vicinity and of prices recently paid by the defendant for the lands taken. This was not error. 10 Cal. Jur. 364. The court instructed the jury that such evidence "can only be considered by you as testing the opinions of witnesses who testified to the value of the lands sought to be condemned."

[9] The court refused to allow the witness Campini to give his opinion as to the market value of the land. His knowledge of market values of lands was not such as to give much weight to any opinion he might have stated, but it would not have been error to permit him to give it. However, the defendant produced twelve other witnesses, who gave their opinions as to the market value of the lands taken, ranging from \$10,348,982.50 to \$15,000,000, and their estimates of severance damages ranging from \$210,000 to \$1,680,000. In *Vallejo, etc., R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 576, 147 P. 238, 252, in considering a similar ruling, the court said: "It does not appear that qualified witnesses on the subject were at all difficult to obtain. Before this witness was called the defendants had already called seven witnesses who had testified on the subject of value. Hence, even if the ruling had been clearly erroneous, we cannot say that it was sufficiently prejudicial to warrant a reversal."

[10] One of defendant's witnesses was questioned in cross-examination regarding sales

of land in the Exchequer reservoir basin, and, in an effort to account for the low prices paid for such land, he testified that it was necessary to move a railroad from that basin at a cost of \$5,000,000. In redirect examination he was asked why he included the \$5,000,000 so expended in the cost of that reservoir. The court sustained the plaintiff's objection to the question. While the objection might well have been overruled, no prejudice was sustained by appellant by reason of the ruling made. The reason sought to be shown by the witness is perfectly obvious and one which every juror must have inferred from the facts already proved. It cannot be presumed that any juror was so lacking in intelligence as not to know that, other things being equal, a reservoir site which is free from obstructions is of greater value than one from which an obstruction must be removed at great expense.

[11] Appellant contends that it was error to admit in evidence "certain water filings of J. W. Preston et al." Most of the facts shown by these filings were brought out, without objection, on cross-examination of the defendant's witnesses long before the filings themselves were introduced. Subsequently, and before the filings were introduced, the defendant, on redirect examination, gave a list of the Preston filings and the dates thereof. Under the circumstances stated the appellant cannot be heard to complain of the introduction of the filings in evidence.

[12, 13] The defendant sought to show that, in a report made to the plaintiff by one of its engineers, it was stated that the district was without a reliable water supply "and none that can be relied upon to meet the natural growth of future years. * * * Industries have, consequently, sought other locations. * * * The time has come when it is imperatively necessary for the East Bay District to undertake, as quickly as possible, the provision of a large and generous water supply of a high degree of purity, and to end, once and for all, the danger of water famine that has been hanging like a millstone around its neck for the past generation, impeding the growth of the cities and threatening their very existence." The court sustained plaintiff's objection to such parts of the report and other similar statements therein, as well as other evidence to the same effect. Appellant was permitted, however, to introduce parts of the report stating that "the surplus supply has never been large, and the district has at times been on short rations. * * * The (Mokelumne) supply is the nearest of any of which the quality is satisfactory. * * * The designated source" is "the quickest, the cheapest, the purest, the safest, and the best supply available. We are of the opinion that a supply of 50 M. G. D. can be obtained from the Mokelumne river by the construction of the first unit of this project at a capital ex-

penditure of about \$39,000,000." It is urged that the evidence excluded tends "to show the state and condition of the 'market' for the lands in question, from the viewpoint of their availability for reservoir use."

[14] Granting that the appellant had the right to show that the cities in the plaintiff district, as well as other cities and communities, furnished an available market for the water which could be impounded in the reservoir in question, that fact was abundantly shown by the parts of the report admitted in evidence. Indeed, the most skeptical would not require further proof thereof than the willingness of the plaintiff to expend \$39,000,000 to secure a supply of water from that source. The appellant did not have the right to show the plaintiff's necessity of obtaining a supply of water from that particular source or the special value to the plaintiff of such a supply. *City of Stockton v. Vote*, supra; *City of Stockton v. Ellingwood* (Cal. App.) 275 P. 228. Over the defendant's objection, the court permitted counsel for the plaintiff to open and close the argument to the jury. It was a matter within the discretion of the trial court. *Mendocino County v. Peters*, 2 Cal. App. 24, 29, 82 P. 1122; *People v. Hickman* (Cal. Sup.) 268 P. 909.

[15] It is contended that the court abused its discretion in limiting defendant's time to argue the case to a period of three hours. Admittedly, "the duration of an argument is a matter which rests largely in the discretion of the trial court." In this case there was but a single issue to be determined by the jury. Counsel for both parties consumed a part of the time allotted to them in the argument of matters which the jury had no right to consider. The material evidence bearing on the issue of value was not difficult to understand, and it cannot be held that the limitation was an abuse of discretion. Plaintiff's opening argument was completed at about the usual adjournment time in the evening, and the question arose as to the hour at which court should convene the next morning. Counsel who argued the case for the defendant said: "I would prefer nine, * * * because I want to get through before twelve. * * * It may not take that long." Appellant has not called attention to any objection in the record to the limit placed on the time for argument or to any request for further time. It does not appear that the defendant was prejudiced by such limitation.

The court gave the following instructions:

"I instruct you that the amount of the damage that should be awarded to the defendant Stephen E. Kieffer for the property sought to be condemned in these actions is the market value, which term 'market value' means the highest price, estimated in terms of money, which such property would have brought, * * * if exposed for sale in the open market, with a reasonable time within

which to find a purchaser buying with a knowledge of all the uses and purposes for which said lands are adapted, and for which same were and are capable. * * * The question for you to consider is, if Stephen E. Kieffer had wanted to sell these properties in the condition they were in on the dates heretofore mentioned, what could he have obtained for the said properties on the market, having been allowed a reasonable time in which to find a purchaser buying with a knowledge of all the uses and purposes to which such properties were adapted and for which said properties were capable, from parties who wanted to buy and who would give the fair value for such properties.

"You are not to consider what the land was worth to the defendant Stephen E. Kieffer, the owner, for speculation or merely possible uses, nor what he claims it was worth to him. * * *

"The term 'market value' and the term 'actual value' as used in these cases and in these instructions means one and the same thing. It means the highest price in terms of money at which the properties in question could have been sold. * * * It contemplates a seller who is not forced to sell, but who is willing to sell at a fair price. It contemplates a buyer who is willing to buy at a fair price and desires to buy the kind of property in question, but is not forced to buy. It contemplates a buyer who buys with an accurate knowledge of all the characteristics of the property. * * * It does not contemplate an execution sale, or a foreclosure sale, or any other forced sale."

[16, 17] Appellant objects to the terms "fair value" and "fair price" as used in the foregoing instructions. It is apparent that the word "fair" as here used means "honest" rather than "average" or "middling." The jury could not have been misled by the use of such terms after the accurate definition of the term "market value" which the court repeatedly gave. Objection is also made to the statement that in arriving at the value of the land the jurors are not to consider what the defendant "claims it was worth to him." Appellant contends that this was in effect a direction to disregard the defendant's testimony as to the value of the land. The contention is manifestly without merit. What the defendant claims the property is worth "to him" or what it is actually worth "to him" is immaterial; he being entitled only to its market value, regardless of what it is worth "to him."

[18] The court instructed the jury that the defendant "is required to prove his side of the issue by a preponderance of the evidence. By preponderance of the evidence is meant not the number of witnesses testifying for either party, but that evidence which produces conviction in the unprejudiced minds of the jurors." No other definition of the term "preponderance of the evidence" was

requested by either party or given by the court. The ordinary meaning of the word "conviction," in the sense here used, is the state of being convinced, and to convince is to satisfy by proof. To produce conviction in the mind is to satisfy the mind; the terms being synonymous. Instructions containing one or both of these terms have been considered in many cases. *De La Torre v. Johnson* (Cal. Sup.) 264 P. 485; *Boa v. San Francisco-Oakland T. Rys.*, 182 Cal. 93, 187 P. 2; *Estate of Ross*, 179 Cal. 629, 178 P. 510; *People v. Miller*, 171 Cal. 649, 154 P. 468; *Ergo v. Merced Falls Gas & Elec. Co.*, 161 Cal. 334, 119 P. 101, 41 L. R. A. (N. S.) 79; *Gregoriv v. Northwestern Pac. R. Co.* (Cal. App.) 273 P. 76; *Harker v. Southern California Edison Co.*, 83 Cal. App. 204, 256 P. 848; *Los Angeles City H. S. Dist. v. Schumann*, 78 Cal. App. 353, 248 P. 737; *Estate of Guilbert*, 46 Cal. App. 55, 188 P. 807; *Lawrence v. Goodwill*, 44 Cal. App. 440, 186 P. 781.

In the *Miller Case* the defendant was on trial for murder, and his only defense was that he was insane at the time he killed the deceased. On the issue of insanity the court instructed the jury that "preponderance of the evidence means that degree of evidence which proves to a moral certainty, or, in other words, that degree of proof that produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds." The court, in that case, also gave the usual definition of "reasonable doubt." By reason of the similarity of language in the two instructions the jurors were probably misled into the belief that it devolved on the defendant to prove his alleged insanity beyond a reasonable doubt. In discussing a similar instruction in the *Boa Case* it is said: "It may well happen in some cases that an instruction in the form here given would necessarily be considered prejudicially misleading. This is especially apt to be true of an instruction regarding the burden of proving the defense of insanity in a criminal case where the other instructions concerning burden of proof are of course framed to impress upon the jury that guilt must be proved to a moral certainty and beyond a reasonable doubt." The other instructions in this case are not misleading as to the proof required of the defendant. The outstanding feature of the instruction complained of, and the one which doubtless most impressed the jury, is that the testimony of the greater number of witnesses does not necessarily constitute a preponderance of the evidence. They probably understood it to mean merely that they were not bound to decide in conformity with the declarations of any number of witnesses against more convincing evidence. Academically, the instruction is inaccurate, and it should not have been given, but it is highly improbable

that the jurors were misled thereby. Appellant contends that many other instructions given by the court are erroneous, but a careful examination of them fails to substantiate the contention.

[19] Appellant complains of the court's refusal to give an instruction relating to the provisions of article 16 of the plaintiff's federal license. The license was introduced in evidence over the defendant's objection. Prior to its formal introduction, however, article 16 had been read before the jury, and much testimony as to the effect of its provisions had been given, all without objection. Articles 16 and 29 of the license read as follows:

"Article 16. The licensee shall construct said Lancha Plana dam, reservoir and spillways so that surplus waters in excess of amounts carried through its aqueduct to supply its municipal and domestic needs may be diverted northward from said reservoir to the Jackson creek watershed; and the licensee shall permit, without charge, any appropriator having specific authorization from the division of water rights, state of California, so to divert such surplus waters as may lawfully be diverted; provided, that the use of said dam and appurtenances by the licensee for the purpose of storing waters to be carried through its aqueduct shall be deemed to be the paramount use thereof and to be superior to their use for such diversion; that any one so diverting shall save the licensee harmless from any damage resulting therefrom; and that the licensee will not be required hereunder to permit such diversion unless the primary purpose thereof be for a beneficial use other than the generation of power."

"Article 29. With the written consent of the licensee, the commission may by order made under its seal, and after the public notice required by section 6 of the act, modify, alter, enlarge or omit, in so far as authorized by law, any one or more of the conditions or provisions of this license."

At the defendant's request the court instructed the jury: "In determining the market value of the lands sought to be condemned * * * you may * * * consider the requirements of the license issued by the federal power commission to plaintiff, * * * but in considering the same you will do so in the same manner that you would have considered such license had it been granted to some other person."

No other instruction was given in relation to such license. The instruction relating to article 16, which the appellant contends it was error to refuse, reads as follows:

"The defendants are not parties to the license issued to the plaintiff by the federal power commission and you are instructed that this license may be altered or modified without the consent of the defendants and

without consulting the defendants by mutual agreement between the federal power commission and plaintiff, and that, too, without the consent of the defendants. This right of the federal power commission and the plaintiff to modify and alter the provisions of said license applies to the provisions of the license introduced in this case concerning the discharge of any water into the Jackson creek watershed from the Mokelumne river."

Article 29 was read before the jury, and its provisions were frequently referred to and discussed by the attorneys and the witnesses during the trial. While the instruction in question might well have been given, it seems clear that the jurors must have understood the provisions of article 29 without any instruction as to the meaning thereof.

[20] The court refused to instruct that in testing the opinions of witnesses who had considered other sales in arriving at the market value of the land taken the jurors might "consider whether the purchaser or whether the seller in such other sales knew and appreciated the adaptability for useful purposes of the property sold or purchased." The proposed instruction is but the statement of a mere commonplace which any juror would consider without being told to do so.

[21] The court refused to give a series of instructions requested by the defendant, containing in varying terms the propositions set forth in the first thereof, as follows:

"You are not to fix the market value of the lands sought to be condemned by the necessities of the plaintiff, but this does not mean that you cannot consider the plaintiff as a competitor for the reservoir site constituted by the use of the lands sought to be condemned and other lands. The demand for a site in which to store water for use generally may be considered by you, and among other such demands you may consider the demands of the East Bay Municipal Utility District as they existed at the date of and prior to the dates respectively of the issuance of the summons in the several cases."

At the defendant's request the court instructed the jury as follows:

"You are not to take into consideration the necessities of the plaintiff in fixing the market value of the property sought to be condemned; however, you may consider the plaintiff as a competitor for the land sought to be condemned at the time the respective summons were issued and prior thereto."

It is not readily perceived in what manner the jury could consider the plaintiff as a competitor for the land sought to be con-

demned without considering the demands of the plaintiff. The word "demand," as used in the instruction refused, means "a desire to purchase a commodity, accompanied by means of payment." The word "competitor," as used in the instruction given, may be defined as "one who desires and endeavors to buy the same property or, in the same market as another and has the means of payment." It thus appears that the proposition of law stated in the instruction given is, in substance, the same as that contained in the one refused. To instruct the jury to consider the "demands" of the plaintiff, without any definition of that term, would have tended to confuse rather than to clarify.

The appellant urges that many other proposed instructions should have been given. They have been carefully considered and compared with those given, and no error has been discovered in the rulings of the court in relation thereto.

[22] Appellant contends that the verdicts and the judgments are not supported by the evidence. In his brief it is said: "Defendant's witnesses testified to values ranging from \$10,348,982.50 to \$15,000,000. Plaintiff's witnesses testified to values ranging from \$191,890 to \$280,500." The jury fixed the value at the sum of \$336,452.60, or, in round numbers, \$46 an acre. It is not perceived in what respect the evidence is insufficient to support the verdict and judgment. It is true that the evidence would have supported a larger verdict, but the amount to be awarded, within the reasonable range of the evidence, was a question for the sole determination of the jury and the trial court. It cannot be held as a matter of law that the market value of the land is greater than was found by the jury.

The reporter's transcript covers more than 5,000 typewritten pages. The briefs, exclusive of the supplements containing the evidence relied on, contain over 900 pages. As is usual in a record of such length, some technical errors are to be found therein, but none of them appear to be prejudicial. To specifically discuss all the points raised by the appellant would extend this opinion to an unreasonable length. They have all been carefully examined, and it is not deemed that any of them not discussed herein have any merit. Neither is it believed that the errors pointed out in this opinion warrant a reversal.

The judgments are affirmed; appellant to recover costs of appeal.

We concur: THOMPSON, J.; PLUMMER, J.

99 Cal. App. 191

In re HUNTER'S ESTATE.★**DUNCAN v. OAKLAND BANK.**

(Civ. 6686.)

District Court of Appeal, First District, Division 1, California. May 29, 1929.

Rehearing Denied June 28, 1929. Hearing Denied by Supreme Court July 25, 1929.

- 1. Executors and administrators** ⇨314(2)—
Statutory notice of proceeding for distribution gives court jurisdiction to determine rights of all persons to any portion of estate.

Proceeding for distribution of estate in probate is in nature of proceeding in rem, and by statutory notice whole world is called before court and court acquires jurisdiction over all persons for purpose of determining rights to any portion of estate.

- 2. Executors and administrators** ⇨315(4, 6)—
Decree of distribution not appealed is final and can be vacated only on motion pursuant to statute (Code Civ. Proc. § 473).

Where no appeal is taken from decree of distribution, it becomes final and conclusive and can be set aside only on motion pursuant to Code Civ. Proc. § 473 and upon grounds therein specified.

- 3. Executors and administrators** ⇨315(4, 6)—
Erroneous distribution of legacy is remediable by appeal without which decree is final, subject to be vacated only on motion within six months (Code Civ. Proc. § 473).

Claim of error in distribution of legacy is remediable by appeal from decree, and, in absence of appeal, decree is final and subject to be vacated only on motion made within six months after entry of decree under Code Civ. Proc. § 473.

- 4. Executors and administrators** ⇨315(4)—
Proceedings to set aside decree of distribution filed within six months after decree, but not called to court's attention for more than three years, was barred by statute (Code Civ. Proc. § 473).

Where more than three years elapsed between date of filing application for relief from decree of distribution and date on which petitioner in open court orally requested that relief be granted, court under Code Civ. Proc. § 473 was powerless to set aside decree whatever the excuses for delay, since such excuses could not operate to suspend six months' limitation fixed by statute.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

In the matter of the estate of Thomas W. Hunter, deceased, opposed by the Oakland Bank, as executor under the will of Thomas W. Hunter, deceased. Petition by A. D. Duncan, as administrator with the will annexed of the estate of William J. Danford, deceased, to set aside decree of final distribution in the estate of Thomas W. Hunter, deceased, was denied, and petitioner appeals. Affirmed.

Gavin McNab, Nat Schmulowitz, and A. Don Duncan, all of San Francisco, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondent.

KNIGHT, J. This is an appeal by A. D. Duncan, as administrator with the will annexed of the estate of William J. Danford, deceased, from an order denying the petition of appellant's testator to set aside the decree of final distribution in the estate of Thomas W. Hunter, deceased, upon the ground that a legacy of \$1,500, of which appellant's testator claimed to be the assignee, had been distributed to the wrong person.

The circumstances leading up to the denial of said petition were as follows: Thomas W. Hunter provided in his will for the payment to various persons of 10 cash legacies ranging in amounts from \$250 to \$1,500, and for the distribution of the residue of his estate to a residuary legatee. One of the legatees named therein was Anna M. Hunt, and the amount of her legacy was \$1,500. On September 30, 1922, The Oakland Bank, a corporation, as executor of the said will, filed its final account and petitioned for final distribution of the estate, and on October 11, 1922, after due notice given and proceedings taken as provided by law, said final account was allowed and settled, and a decree of final distribution was granted distributing the estate in accordance with the provisions of the will. Shortly afterwards, in conformity with the terms of the decree, said legacies were paid to the legatees named in the will, and vouchers therefor were filed in the office of the county clerk. The time for appeal from the decree of final distribution expired on December 27, 1922, and no appeal was ever taken. More than five months after the rendition and entry of the decree of final distribution, and nearly three months after the time for appeal therefrom had expired, to wit, on March 17, 1923, Danford filed a petition to have said decree vacated and set aside in so far as it directed the payment of said legacy to Anna M. Hunt, upon the ground that approximately a year and a half prior to the rendition and entry of the decree he filed in the office of the county clerk with the papers of said estate a duly acknowledged assignment to him of Anna M. Hunt's legacy. Upon the filing of said petition a citation was issued and served upon the bank directing it and Anna M. Hunt to appear and show cause on March 28, 1923, why said petition should not be granted. On the day mentioned, however, the petition was not presented to the court, nor were any proceedings whatever had at that time in the matter of said estate; and thereafter the petition was allowed to lie dormant for more than two years, at the end of which time, to wit, in May, 1925, appellant

was appointed special administrator of Danford's estate (the latter having died in October, 1923), and was substituted for Danford as the petitioner herein. Thereupon an alias citation was issued, and in July, 1925, was served on both the bank and Anna M. Hunt. August 5, 1925, was the date fixed for the hearing of the same, but on that day the matter was continued, and thereafter was continued from time to time until April 14, 1926, on which date the petition was presented to the court for the first time and heard; and on December 2, 1926, an order was entered denying the same. At the hearing of said petition, on April 14, 1926, it was shown that said assignment, although on file with the papers of said estate, was not brought to the attention of the court at the time the petition for final distribution was heard and granted, nor was there any claim made that the court had any knowledge of its existence until long after the rendition of said decree. With respect to the question of the bank's knowledge of the existence of said assignment, appellant offered in evidence at the hearing in April, 1926, an affidavit made by attorney Raine Ewell, in which it was averred that on April 12, 1921, he mailed a copy of said assignment to the bank, but in opposition to the averments of said affidavit the officials of the bank testified that no such document was ever received; and before the hearing was concluded appellant expressly disclaimed the existence of any fraud and, consequently, made no attempt to establish any such element. It was also shown that appellant had filed no request for notice of the probate proceedings, as is allowed by section 1380 of the Code of Civil Procedure.

The substance of appellant's contention is that the petition filed by Danford to vacate the decree of final distribution "may be considered either as a proceeding taken pursuant to section 473 of the Code of Civil Procedure, or as a motion to amend or vacate the judgment for entire validity or for irregularity by reason of error or mistake of fact appearing on the face of the record through inadvertence of the court or a party"; and in furtherance of his claim of right to attack said decree for irregularity he contends that the presence of the assignment among the records of the probate court prior to and at the time of the hearing of the petition for final distribution was sufficient to charge both the probate court and the executor with notice of the existence thereof; and that therefore, under section 1678 of the Code of Civil Procedure, the probate court was without jurisdiction to distribute the Hunt legacy to any person other than to Danford as such assignee; and that, having distributed the same to Anna M. Hunt, the decree in that respect is void.

[1, 2] The law is well settled, however, that a proceeding for the distribution of an estate in probate is in the nature of a proceeding in

rem, the res being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition; and that by giving the notice directed by the statute the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate. *William Hill Co. v. Lawler*, 116 Cal. 359, 48 P. 323. And it is also well settled that, where no appeal is taken from a decree of distribution thus granted, it becomes final and conclusive and can be set aside only on motion made pursuant to section 473 of the Code of Civil Procedure and upon the grounds therein specified. *Estate of Tymms*, 78 Cal. App. 79, 247 P. 1091; *Estate of Nolan*, 145 Cal. 559, 79 P. 428. In the *Estate of Tymms*, supra, as here, distribution was made to the wrong person, and in holding that appellants therein had not the right to attack the regularity of the decree after time for appeal had expired, the court said: "* * * It is argued [by respondents] that the order for final distribution, being an appealable order, became final and conclusive in the absence of an appeal after the time for an appeal therefrom had expired and that the only method of setting it aside was by motion based upon the grounds of mistake, inadvertence, surprise, or excusable neglect within the terms of section 473 of the Code of Civil Procedure. That such is the rule there is of course no ground for argument. The section of the code expressly so provides and the language is so plain and unmistakable that no judicial interpretation is necessary." The same rule is applied to other appealable probate decrees and orders. *Estate of Nolan*, supra; *Estate of Leonis*, 138 Cal. 194, 71 P. 171.

[3] In the present case, as already shown, the prerequisite notices of the time and place of the hearing of the petition for final distribution were given in the manner and for the period prescribed by statute, and the decree so recites. The court was therefore clothed with full and complete jurisdiction to distribute said estate, and there is nothing appearing in the decree itself to show that it is irregular or erroneous. The attack appellant makes against its validity is, in substance, the same as the one made against the decree in the *Estate of Tymms*, supra. Therefore, in conformity with the decision in that case, it must be held here that appellant's attack amounts to no more than a claim of error in the distribution of a legacy which should have been taken advantage of by an appeal from the decree; and, since this was not done, the decree became final and conclusive, subject only to being set aside on the grounds specified in section 473 of the Code of Civil Procedure. *Estate of Tymms*, supra; *Estate of Nolan*, supra.

Assuming, therefore, as appellant contends,

that the petition herein may be treated also as an application, made under the authority of section 473 of the Code of Civil Procedure, to set aside the decree upon the grounds mentioned in said section, it is clear, in view of the authorities already cited, that unless he has complied with the legal requirements of said section, and made a sufficient showing thereunder, he was not entitled to any relief as the result of the proceeding instituted by said petition.

The section mentioned provides, among other things, that the court may "relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken." In construing the meaning of said section it has been held that the filing and service of the pleading to set aside the judgment, order, or other proceeding is not the making of the application therefor; and that, where said application is filed and served, and thereafter is continued from time to time, by the consent of the parties, beyond the statutory six months' period, during such period the party seeking the relief makes no oral request in open court to have the court grant the relief sought, the requirements of said code section are not complied with, and the court has no jurisdiction after such period to hear or grant the application. *Colthurst v. Harris* (Cal. App.) 275 P. 868 and authorities therein cited. In applying the foregoing rule in the case of *Jones v. Superior Court*, 78 Cal. App. 163, 248 P. 292 the court said: "To make an application is to make a motion. (Code Civ. Proc. § 1003.) To appear in court and announce one's readiness to make a motion is not the making of the motion any more than would be the service of notice that one will make a motion. That the latter procedure is insufficient is well established (*Herrlich v. McDonald*, 80 Cal. 472 [22 P. 299]; *Thomas v. Superior Court*, 6 Cal. App. 629 [92 P. 739]; *Wheelock v. Superior Court*, 67 Cal. App. 601 [227 P. 931] * * *). The only provision of law under which respondent Bryant might proceed is explicit in its requirement that one who would avail himself of its aid shall not merely direct the court's attention to his presence in court in the proceeding in which he is interested, but shall move for the particular relief desired, that is, orally request that the court take action as indicated in his notice. (*People v. Ah Sam*, 41 Cal. 645; *Spencer v. Branham*, 109 Cal. 336 [41 P. 1095].)"

[4] Here the record shows without conflict

that more than three years elapsed between the date of filing of the application for the relief and the date on which the appellant, in open court, orally requested that the relief be granted; and consequently, under the rule of the cases cited, the court was powerless to grant the prayer of the petition even though the evidence so warranted. In his opening brief, and in explanation of the delay above mentioned, appellant states that on March 28, 1923, the day fixed for the hearing by the original citation "the matter did not appear on the calendar of the court"; and that thereafter, and up to the time of the issuance of the alias citation in July, 1925, the delay was caused by Danford's illness, with which he was stricken in 1923, by a contest to his will after his death, and an appeal to the Supreme Court; and that from July, 1925, until the date of the oral presentation of the application in April, 1926, "most of the continuances were on account of the fact that there was either no judge to hear the matter or the court was engaged with other matters." It is also asserted that at the time Danford filed said petition and for a considerable period thereafter he was acting as his own attorney. However, it is apparent that the cause of the three years' delay, whatever it may have been, could not operate to suspend the six months' limitation fixed by the statute; and therefore, the matters urged by appellant in explanation of such delay become immaterial.

The case of *In re Yoder*, 199 Cal. 699, 251 P. 205, upon which appellant relies, is not in point for the reason that the record there did not indicate that the petition was brought to the attention of the trial court prior to the expiration of the six months' limitation; and it was therefore presumed on appeal that the application was seasonably made. And in the other case emphasized by appellant, *Brownell v. Superior Court*, 157 Cal. 703, 109 P. 91, the facts show and the court on appeal held that the application was presented within the six months' period.

Aside from the two grounds above discussed, upon which we believe the order appealed from must be affirmed, we have examined the evidence set forth in the record relating to the merits of the application, and it may be stated that we find nothing therein which would justify the conclusion that in denying said application the trial court abused its discretion. The other points urged by appellant are either incidental to those already mentioned or do not possess sufficient force to call for discussion.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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IN RE MALLORY'S ESTATE.

NEIGHBOURS v. RITTENHOUSE et al.

(Civ. 6413.)

District Court of Appeal, Second District, Division 1, California. May 22, 1929.

1. Executors and administrators §504(6)—Evidence in opposition to executor's account is limited by exceptions presented.

The rule that evidence must be confined to the point at issue is applicable to the contest of an executor's account, contestants being limited by exceptions presented.

2. Fraud §50—Undue influence of person profiting by confidential relation is presumed, absent showing of independent advice.

Where one person profits by transaction with another over whom he had influence by reason of confidential relation, law presumes undue influence, in absence of showing of independent advice.

3. Contracts §99(1)—Injury through abuse of confidence must be proved to set aside transaction for undue influence.

Injury through abuse of confidence is essential element of rule that transactions with person in confidential relation are presumed to be result of undue influence, and it must be proved that relationship was used to obtain unfair advantage or that confidence was violated.

4. Attorney and client §166(1)—Contingent fee contract between attorney and client is not presumably due to undue influence, in absence of showing of injury.

Contingent fee contract between client and attorney, at time when relationship of attorney and client already existed, is not presumably result of undue influence, in absence of showing of damage resulting to client.

5. Attorney and client §143—Rule that attorney is limited to reasonable sum, without regard to contract for fees made during existence of relation of attorney and client, is not universally applicable.

The rule that, where relation of attorney and client already exists when contract is made concerning attorney's fees, the attorney is precluded from recovering more than reasonable sum without regard to attempted contract, is applicable only in special circumstances, as where special relations of confidence exist or where client had no other independent legal advice, or where attorney failed to make full disclosure or secured assurance of compensation greater than was previously agreed upon.

6. Executors and administrators §504(6)—Disallowance of claims for legal services on ground of undue influence held unwarranted, where sole exception to account was that claims were not owed at decedent's death.

Exceptions to executor's account, alleging invalidity of claims for legal services and that decedent did not owe same at time of death, held not to support disallowance of claim for undue

influence of executor and attorney over decedent.

7. Attorney and client §76(2)—Rule that death of client terminates relationship of attorney and client is inapplicable in case of specific contract to conduct suit to final judgment on agreed fee for entire case.

The relation of attorney and client is terminated by client's death, but the rule does not apply to a special contract of employment to conduct suit to final judgment on agreed fee for entire case.

8. Executors and administrators §506(3)—Order disallowing as item of account claim of attorney under contingent fee contract, on ground that services had no value in excess of sum paid by decedent during lifetime, held unsupported by evidence.

Evidence that attorney's services under contingent fee contract benefited client's estate very materially, and that fee was fair and reasonable, held not to support finding disallowing claim shown in executor's account as paid, on ground that services had no value in excess of sum paid by decedent during her lifetime.

9. Executors and administrators §504(6)—Finding in accounting proceeding involving claim contest, predicated on undue influence, cannot be sustained, where exceptions raised no such opposition.

A finding in accounting proceedings involving claim contest, predicated on ground of undue influence, cannot be sustained, where exceptions raised no such ground of opposition.

10. Executors and administrators §104(3)—That executor kept estate funds in personal bank account held not to warrant charging him interest on same.

That executor kept funds of decedent's estate on deposit in his personal bank account held no ground for charging him with interest thereon, where balance of account at all times was in excess of amount due estate and no part of estate funds was ever used by executor.

11. Executors and administrators §501—Statute contemplating allowance on account of commissions before completion of administration should be liberally construed (Code Civ. Proc. § 1616, as amended in 1911).

Code Civ. Proc. § 1616, as amended in 1911, plainly contemplates allowance on account of executor's commissions before administration is completed, and, being remedial, should be liberally construed to effect purpose for which enacted.

12. Executors and administrators §501—Allowance of commissions before final accounting is ordinarily discretionary; denial of commissions in advance of final accounting will not be disturbed merely for erroneous ruling that claim was not substantiated by evidence (Code Civ. Proc. § 1616, as amended in 1911).

The allowance of commissions before administration is completed, as permitted by Code Civ. Proc. § 1616, as amended in 1911, is ordinarily within discretion of trial court, the exercise of which will not be disturbed on appeal merely on showing that allowance was denied

because of erroneous holding that claim was not substantiated by evidence.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

In the matter of the estate of Jennie Rittenhouse Mallory, sometimes known as Mrs. F. E. Mallory, deceased. Exceptions to the account of Burrel D. Neighbours, as executor of the estate of Jennie Rittenhouse Mallory, deceased, filed by Annette Rittenhouse and others, were sustained, and the executor appeals. Affirmed in part, and in part reversed.

F. A. Jeffers, of Los Angeles, for appellant.

John Perry Wood and Paul Sandmeyer, both of Los Angeles, for respondent Annette Rittenhouse.

Haight & Mathes, and John Perry Wood, all of Los Angeles, for respondents Mary H. Rittenhouse, Eugene M. Rittenhouse, and Page A. Rittenhouse.

Everts, Ewing, Wild & Everts, of Fresno, and John Perry Wood, of Los Angeles, for respondents Frederick Eugene Mallory and Sue B. Schmitz.

YORK, J. The appellant, as executor of the estate of Jennie Rittenhouse Mallory, deceased, in the course of administration of her estate, made payment to himself of the sums of \$1,000 and \$5,514.75, upon verified claims which had been presented to and approved by the court, which sums the executor claimed were due him for services as attorney at law rendered by him under a contract with the decedent, a copy of which contract was appended to and formed a part of the claims as presented to the court.

The record on appeal shows that prior to April, 1923, the decedent was the widow of one Frederick Eugene Mallory and legatee under his will. Part of the assets of his estate was a block of 1,700 shares of Ohio Fuel Supply Company stock, the income and dividends from which he had devised to said widow for and during her life. During the early part of 1923 the Ohio Fuel Supply Company declared a 100 per cent. stock dividend, which was claimed by the widow as her individual property; but said claim was resisted by the heirs of the deceased husband. The widow consulted with the appellant here regarding her rights to the dividend, and entered into a contract with him on September 7, 1923, by which he was employed to act as counsel for her in the matter, and to assist and associate with the attorneys of the estate in said matter. The record further shows that appellant instituted proceedings in Erie county, Pa., during the lifetime of Mrs. Mallory, and that at the time of her death on April 7, 1924, the proceedings in Pennsylvania had not been finally determined. However, upon a later date, under the decree of that court, 1,032 shares of the stock were transferred to the estate of Mrs.

Mallory, at which time the market value thereof was \$35 $\frac{5}{8}$ per share or \$36,765. Under the contract, appellant was to receive \$2,500 retainer fee and 15 per cent. of the market value of the stock secured for Mrs. Mallory. Fifteen hundred dollars was paid during the lifetime of decedent, and the sums of \$1,000 and \$5,514.75 comprise the balance due under the contract.

After the death of Mrs. Mallory, appellant was appointed executor of her estate, and upon a hearing of first account current, various heirs of deceased filed written exceptions to the same, particularly to the two items noted, alleging that "*decedent did not owe the same or any part thereof at the time of her death, and on the further ground that said claims and each of them are for alleged legal services rendered by said executor after the death of said decedent and the claims therefore are invalid.*" There was also an exception to the fact that the executor had not charged himself with interest for cash on hand during the time he had such cash on hand, and also an objection to allowance of commissions to him as executor of the estate.

Upon the issues presented by the written exceptions, the matter came on for trial before the probate court, at which time the executor, appellant here, was the only witness examined, with the exception of one of the attorneys for the contestants, who was the judge who approved the claims objected to, at the time they were presented to the court for approval.

At the end of the trial, the court settled the account current, disallowing the two contested items of \$1,000 and \$5,514.75, charging the executor with 7 per cent. interest on the cash he had on hand at various times and refusing to make any allowance "at this time" to said executor on fees or commissions. The court made voluminous findings of fact, and from the judgment based thereon the executor has appealed, alleging as error:

1. Refusal of the court to allow the executor credit for the two items of \$1,000 and \$5,514.75.

2. Charging him with interest to the amount of \$1,004.92 which the court found was the interest that should be charged on the funds of said estate in the hands of the executor to April 8, 1927, which funds the court found were "commingled with the private funds of said executor."

3. Refusal of the court to make any allowance to said executor on fees or commissions due him by virtue of law as such executor.

Appellant's main contention is that the findings and decree of the court are not sustained by the evidence.

The findings with which we are concerned are as follows:

1. That on September 7, 1923, the date of the contract, and for several years prior thereto, the appellant was the personal attor-

ney of the decedent, and that a confidential and fiduciary relation existed between them.

2. That decedent entered into said contract without any independent advice.

3. That the services to be performed by appellant under the purported contract were not completed during the lifetime of decedent nor prior to appointment of appellant as executor of said estate, nor at the time he presented the claims against the estate.

4. That a large and substantial portion of said services remained unperformed at the date of his appointment on May 7, 1924.

5. That the contract upon which said claims are based was obtained by undue influence of said appellant and is invalid.

6. That all employment thereunder terminated at the death of decedent, and that the services rendered during the lifetime of decedent have no value in excess of the sum paid to him by decedent during her lifetime.

7. That the appellant is chargeable with each of said sums of \$1,000 and \$5,514.75 and interest thereon.

8. That appellant is chargeable with interest at 7 per cent. per annum on all funds of estate commingled with his own funds during the time said funds were so commingled or the sum of \$1,004.92.

9. That no allowance should be made at this time on account of executor's statutory commission.

We will discuss the evidence adduced at the trial and its sufficiency to support each finding in the order above enumerated.

1. The evidence shows that appellant first performed legal services for decedent in 1918 or 1919 and rendered services for her in various affairs "off and on," but did not do any great amount of work; that he was employed in 1923 to take care of the stock transaction; that she first came to him in relation to this transaction on or about April 2, 1923. Upon cross-examination appellant was asked:

"* * * Was any of the work on account of which you paid yourself, this \$1000 and this \$5514.75, * * * performed by you after the death of Mrs. Mallory? A. A small portion of it was performed after her death.

"Q. Some portion of it was performed after her death? A. A small portion after her death, the greater portion was before."

2. There is no evidence in the record that the decedent entered into said contract without any independent advice.

3 and 4. The evidence set out under point 1 above is surely not sufficient to sustain the finding: "A large and substantial portion of said services remained unperformed at the date of decedent's death."

5. There is no evidence that the contract was obtained by the undue influence of appellant. In this connection appellant maintains that the account current, together with the written exceptions thereto, constitute the

only pleadings in the case; that a party contesting an account presented for settlement must file written exceptions thereto and set out specifically the grounds of his objections, and at the hearing he is held limited to the exceptions so presented; that without an allegation of fraud, overreaching, or other deceitful act, a finding as to undue influence is such error as will entitle appellant to a reversal of the judgment.

On the other hand, the respondents take the position that since the contract was entered into while the relationship of attorney and client existed, a presumption arose as a matter of law that said contract was obtained without sufficient consideration and by the undue influence of appellant; many cases being cited to uphold this position.

[1] The rule that evidence must be confined to the point at issue is applicable to a contest of an account. The contestants are limited by the exceptions presented, and the evidence is to be limited accordingly. 12 Cal. Jur. p. 51, § 820; Estate of Boyes, 151 Cal. 143, 90 P. 454; Estate of Vance, 141 Cal. 624, 75 P. 323; Estate of Marre, 127 Cal. 128, 59 P. 385; Estate of More, 121 Cal. 635, 54 P. 148; Estate of Sylvar, 1 Cal. App. 35, 81 P. 663. While it is the duty of the court to scrutinize the account and correct all errors therein, it is only where an independent investigation is set on foot by the court that the rule limiting evidence is inapplicable. Estate of Boyes, supra.

In view of this, it would seem that contestants, having failed to allege fraud or undue influence in their exceptions to the account (and especially where the exceptions are to payment of an allowed claim), were thereby precluded from introducing any evidence upon this point. No such evidence was introduced, however, and the finding of undue influence is therefore erroneous, unless, as contended by the respondents, the presumption of undue influence arose as a matter of law upon a simple showing that the contract was entered into while the relationship of attorney and client existed.

[2, 3] The rule has been many times declared that no one who holds a confidential relation towards another shall take advantage of that relation in favor of himself or deal with the other to his own advantage upon terms of his own making; that in every such transaction the law will presume that he who held an influence over the other exercised it unduly to his own advantage, and that the transaction will not be upheld unless it appears that such other had independent advice and that his act was not only the result of his own volition, but that he both understood the act he was doing and comprehended its result and effect. An essential element of the rule is that one person has suffered some injury through the abuse of confidence by another, and that fact must be al-

leged and proved. It must be made to appear that the relationship was used to obtain an unfair advantage or that confidence was violated. *Dimond v. Sanderson*, 103 Cal. 97, 37 P. 189; *Cole v. Wolfskill*, 49 Cal. App. 52, 192 P. 549.

[4] To raise the defense of undue influence in an action by an attorney on an obligation of the client, it is insufficient merely to plead the existence of the professional relation at the time the obligation arose. *Metropolis Trust & Savings Bank v. Monnier*, 169 Cal. 592, 147 P. 265. "An essential element of the rule is, that the attorney, * * * 'bargains in a matter of advantage to himself,' or, what amounts to the same thing, that the client has suffered injury through the abuse of confidence by the attorney. This fact must be both alleged and proven. It is not enough to show that the relation of attorney and client existed, and that during the existence of the relation the parties entered into a contract, the client being induced thereto by the abuse of confidence by the attorney. If this were so it would follow either that the contracts of an attorney and client are voidable, like those between a trustee and cestui que trust, which is not true (1 Sto. Eq. Juris., sec. 311); or that a party is entitled to relief on the ground of fraud, without showing that damage resulted from the fraud—which is *contrary to the undoubted principles of law*." *Kisling v. Shaw*, 33 Cal. 425, 441 (91 Am. Dec. 644).

[5] The rule that where the relation of attorney and client already exists when a contract is made concerning attorney's fees, the attorney is precluded from recovering more than a reasonable sum without regard to the attempted fixation of the value of such services by the agreement, "is not to be given universal application to every agreement made between attorney and client while the relation exists, but only to those agreements where the circumstances under which they are entered into disclose some special reason for its application—as where the written contract provides for greater compensation than was either expressly or impliedly agreed upon prior to the existence of the confidential relation (4 Cyc. 961); or where special relations of confidence exist, or where the client had no other independent legal adviser, or where there was some failure on the part of the attorney to make full disclosures to the client as to the extent of the services required. * * * Both of the parties to the contract understood what legal services plaintiff had already performed, and what further services he was to perform in the particular action to which the contract referred. The parties stood in no special confidential relation to each other which would give rise to either opportunity or imputation of any undue influence attending the making of the written agreement as to the amount

of plaintiff's fees." *Countryman v. California Trona Co.*, 35 Cal. App. 728, at 735 and 736, 170 P. 1069, 1073.

[6] In each of the cases cited by respondents on pages 29 and 30 of their brief, fraud and undue influence were put in issue by the pleadings. In the instant case the written exceptions to the account allege "decendent did not owe the same or any part thereof at the time of her death, and on the further ground that said claims and each of them are for alleged legal services rendered by said executor after the death of said decendent, and the claims are therefore invalid." There being no allegation of fraud, undue influence, or other deceitful act on the part of appellant, and no evidence tending to prove the allegations of the exceptions beyond a mere showing of the relationship of attorney and client, by which the presumption of undue influence was attempted to be raised, the finding of the trial court was in error and cannot be sustained.

[7] 6. Respondents maintain that the contract in question terminated at the death of decendent, while appellant contends that it remained in full force and effect until final judgment in the Pennsylvania case was rendered. It is an elementary rule of law that the relation of attorney and client is terminated by the death of the client, but an exception is made in the case of a special contract of employment, such as a specific contract to conduct a suit to final judgment, or some agreement on a fee for the entire case. Both of these elements are in the contract in this case. 2 Ruling Case Law, p. 959, § 31; *In re Agee's Estate* (Utah) 252 P. 891, 50 A. L. R. 641.

[8] The record shows that the estate benefited very materially through the efforts of the appellant, and the fee provided for in the contract is neither unreasonable nor unfair. The record is devoid of any evidence touching the value of the services rendered by appellant during the lifetime of the decendent, so that the finding that such services had no value in excess of the sum paid by decendent during her lifetime is utterly unsupported. Furthermore, the sum so paid was part of a retaining fee agreed upon.

[9] 7. This finding is predicated upon the finding of undue influence and cannot be sustained.

[10] 8. The evidence shows that funds of the estate were kept on deposit in the bank in the same account where appellant had his own personal funds, but that the balance at all times was in excess of the amount due to the estate and that no part of the estate funds was ever used by appellant. Appellant testified that he charged himself with 3 per cent. interest upon the lowest monthly balance standing in the account to the credit of the estate, which was the regular amount of interest allowed by the bank, or \$430.67. 11

Cal. Jur. p. 1043, § 669: " * * * It has been held that the mere fact of mingling of funds without using them in the business of the representative or making any profit from their use does not justify charging him with interest." Estate of Sarment, 123 Cal. 331, 55 P. 1015. Respondents, on page 80 of their brief, contend that this case is not determinative of the question here and that the portion of the opinion quoted by appellant in his opening brief at page 61 is veriest dictum. The cited case was one in which the trial court found that there was an embezzlement and wrongful mingling of estate funds by administrators, and upon appeal the respondents sought upon this finding to sustain the order of the court charging the administrators with compound interest; the appellants contending that the finding was not supported by the evidence. The court held: "We are of the opinion * * * that the claim of * * * appellants that these findings are not supported by the evidence must be sustained. The court does not find, nor is there any evidence, that the administrators used the funds of the estate in their own business, or made any profit from their use. The mere fact that one of them mingled the proceeds of the sale with his own funds would not justify charging him with interest thereon since he had the right to their custody, and there is no provision of law which required him to keep them separate from all other funds."

It should be understood, however, that we do not approve of the practice of mingling such funds with the executor's own funds, whether in bank or elsewhere, and we can see great danger to an executor in following this practice, since it is likely to create controversies such as the present.

[11] "Under the amendment to section 1616 of the Code of Civil Procedure enacted in 1911 it is provided that at any time after one year from the admission of a will to probate, or the granting of letters of administration, the executor or administrator may, upon such notice to the other parties interested as the court may by order require, apply to the court for an allowance to himself upon his commissions (Estate of Piercy, 168 Cal. 750, 145 P. 88; Estate of Jones, 166 Cal. 147, 135 P. 293), and the court is empowered, upon the hearing of such application, to make an order allowing such portion of the commissions as may seem proper, and the portion so allowed may be thereupon charged against the estate. This provision plainly contemplates an allowance on account of commissions before the administration is completed, and to this extent changes the law as formerly existing. (Estate of Jones, supra.) * * * The provisions are remedial, and should be liberally construed to effect the purpose for

which enacted. (Estate of Ellis, 6 Cal. Prob. Dec. 413.)" 11 Cal. Jur. 1175, 1176, § 774.

[12] All of the portions of the order appealed from are reversed except the order denying executor's fees. As to the appeal from that portion of the order denying any allowance on account of executor's statutory commissions, this will be affirmed, because of the fact that it is ordinarily within the discretion of the trial court whether or not he will allow the executor any fees prior to the final accounting.

We concur: CONREY, P. J.; HOUSER, J.

99 Cal. App. 306

PEOPLE v. SAMPSON. (Cr. 1081.)★

District Court of Appeal, Third District California. June 5, 1929.

Rehearing Denied June 20, 1929.

1. Robbery ☞17(5)—Information charging property was in prosecuting witness' possession was sufficient, without alleging ownership where evidence showed his ownership (Pen. Code, § 956, as amended by St. 1927, p. 1042, § 2).

Information for robbery, charging that property was in possession of prosecuting witness and was taken from his person and immediate presence against his will and by force, *held* sufficient without alleging who was owner of property under Pen. Code, § 956, as amended by St. 1927, p. 1042, § 2, where evidence showed that property belonged to prosecuting witness.

2. Robbery ☞24(1)—Evidence that prosecuting witness was struck blow on head rendering him unconscious was sufficient to raise inference that dangerous weapon was used (Pen. Code, § 211a).

In prosecution for robbery, evidence that prosecuting witness, while riding in automobile driven by defendant and while looking to side, was hit on head and was rendered unconscious by blow, together with evidence of injury consisting of bump or bruise on side of head, was sufficient to warrant inference that dangerous weapon was used in commission of robbery, under Pen. Code, § 211a.

3. Robbery ☞24(1)—Character of weapon used by defendant in robbery may be shown by circumstantial evidence (Pen. Code, § 211a).

Under Pen. Code, § 211a, character of weapon used by defendant in course of robbery may be shown by circumstantial evidence.

4. Criminal law ☞1202(3), 1211—Evidence defendant pleaded guilty to prior conviction for grand larceny, and testified that he had served prison term, warranted inference that he served in penal institution authorizing imprisonment for life (Pen. Code § 667).

In prosecution under information charging defendant with robbery and prior conviction for grand larceny, evidence that defendant pleaded guilty to prior conviction and testified that he had served a term in prison after pleading guilty

to charge of grand larceny on examination by own counsel held sufficient to warrant inference that he had "served a term—in a penal institution," authorizing imprisonment for life under Pen. Code, § 667.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Harry Sampson was convicted of robbery, and he appeals. Affirmed.

J. W. Kingren, of Point Arena, and Burt Busch, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information charges the defendant with the crime of robbery and with having been previously convicted of the crime of grand larceny. On his arraignment he "entered a plea of guilty as to a prior conviction and not guilty as to the new charge in the information." The jury found him guilty of robbery in the first degree. His motion for a new trial was denied, and he was sentenced to imprisonment in the state prison for life. This appeal is from the judgment and the order denying a new trial. The proof is overwhelmingly that the defendant committed the alleged robbery, and it is not contended that it is insufficient.

[1] The information charges that the property therein described was in the possession of the prosecuting witness and was taken from his person and immediate presence, against his will and by means of force and fear, by the defendant. It is not alleged who was the owner of the property, although it was clearly proved at the trial that it belonged to the prosecuting witness. Section 956 of the Penal Code (as amended by St. 1927, p. 1042, § 2) provides: "When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, or of the place where the offense was committed, or of the property involved in its commission is not material."

In *People v. Price*, 143 Cal. 351, 353, 77 P. 73, 74, after quoting section 956, it is said: "This is a rule of criminal pleading, and applies to burglary as well as to larceny and other cases. Under it the name of the owner of the property entered is immaterial, except where necessary to identify the property." Other cases are to the same legal effect. *People v. Foster*, 198 Cal. 112, 119, 243 P. 667; *People v. Melson*, 84 Cal. App. 10, 21, 257 P. 555; *People v. Smith*, 78 Cal. App. 68, 70, 248 P. 261. There is no doubt in this case, either from the averments of the information or from the evidence as to the identity of the property taken.

[2, 3] Appellant contends that the evidence fails to show that he was armed with a dan-

gerous or deadly weapon, at the time the robbery was committed, as required by section 211a of the Penal Code to constitute robbery in the first degree. The prosecuting witness testified that while he was riding in an automobile driven by the defendant, and while the witness was "looking out to the side of the machine," the defendant hit him "on the left side of the head." He testified: "I couldn't see what he hit me with. * * * I was riding along and looking out at the trees and he hit me over the head and that's the last I remember until I was on the road to Willits. * * * I seen a motion on the side and before I could look around something hit me in the head." The witness was found lying in the road shortly after the robbery and was taken in another automobile to Willits. He was unconscious when first found and did not get "his right mind back" until he had been taken 20 miles along the road to Willits. A deputy sheriff testified that, apparently two days or more after the robbery, he saw a bump or bruise on the side of the head of the prosecuting witness. "It was like a ridge, where it had been struck and a swelling" about two inches long. The blow on the head did not break the skin or cause bleeding. The prosecuting witness testified that he did not know with what he was struck and he admitted on cross-examination that it might have been with the defendant's fist. Having been rendered immediately unconscious by the blow, and not having seen in advance the instrument with which he was struck, the witness could not know what weapon was used. The character of weapon used by the defendant may be shown, of course, by circumstantial evidence, and proof that the victim was rendered unconscious by the blow and remained in that condition for a considerable time, together with the nature of the injury inflicted, warrants the inference, in the absence of other evidence, that a dangerous weapon was used.

[4] While the defendant "entered a plea of guilty as to a prior conviction" of grand larceny, he now contends that the evidence does not show that he "served a term therefor in any penal institution," and that, therefore, his sentence to imprisonment for life is not authorized by the provisions of section 667 of the Penal Code. During his examination in chief, the defendant was questioned by his own counsel as follows:

"Q. You had a little trouble before, have you, Mr. Sampson? A. I have, yes.

"Q. And you have been in prison on that account? A. I have.

"Q. How old were you at that time? A. Not quite twenty years old when I was sentenced."

On cross-examination he testified:

"Q. Mr. Sampson, you testified under direct examination this morning that you were in prison at one time? A. I did, yes.

"Q. How many times have you been in prison? A. Once.

"Q. Just once? A. Yes.

"Q. What was the charge? A. Grand theft.

"Q. At that time known as grand larceny? A. Yes.

"Q. You were, then, convicted of a felony? A. I pleaded guilty to it.

"Q. Grand theft, at that time grand larceny, and that's the only time you have been in prison on any charge? A. Yes."

This evidence, coming from the defendant himself after his plea of guilty of the prior conviction of grand larceny, is sufficient to warrant the inference that he had "served a term therefor" in a "penal institution." He entered a plea of guilty at the time of his arraignment on the prior charge, he was "sentenced" on that charge, and he was "in prison on that account." While the district attorney might well have made the matter certain by asking the defendant in what penal institution he was imprisoned, it is beyond belief that counsel for defendant, having voluntarily opened the inquiry, would not have asked him in what institution he was imprisoned, if it was not a penal institution.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

99 Cal. App. 235

LUDWIG v. STEGER et al. (Civ. 3793.)★

District Court of Appeal, Third District, California. May 29, 1929.

As Modified on Denial of Rehearing June 28, 1929. Hearing Denied by Supreme Court July 25, 1929.

1. Sales ⇨48—Illegal act, though merely *malum prohibitum*, cannot become basis of valid consideration for sale.

Illegal act cannot become the basis of a valid consideration for the sale or transfer of property, though the act is merely *malum prohibitum*.

2. Bills and notes ⇨106—Note is not sustained by consideration in violation of statute (Civ. Code, § 1667).

Promissory note cannot depend upon consideration which is in violation of express statutory inhibition under Civ. Code, § 1667.

3. Automobiles ⇨19—Note given for price of automobile held void for seller's failure to transfer certificate of ownership (Civ. Code, § 1667; Motor Vehicle Act, § 45, as amended by St. 1925, p. 402, § 7, and § 45½, as added by St. 1927, p. 1424, § 10).

Note given for purchase price of automobile held void under Civ. Code, § 1667; Motor Vehicle Act (St. 1923, p. 517), § 45, as amended by St. 1925, p. 402, § 7, and § 45½, as added by St. 1927, p. 1424, § 10, where certificate of ownership of automobile was not signed or trans-

ferred by vendor and motor vehicle department as result never issued a new certificate, since under the statute no title to the automobile passed.

4. Automobiles ⇨19—Maker of note given for price of automobile, where he received no title, could defend suit on note for failure of consideration without offering to restore automobile, notwithstanding remedy by rescission (Civ. Code, § 1689).

That maker of note had right to sue for rescission, where consideration was void under Civ. Code, § 1689, did not prevent assertion of failure of consideration as defense in suit upon note given for the purchase price of automobile to which no title passed and maker of note could avoid liability thereon, though he failed to restore automobile to the owner.

5. Automobiles ⇨19—Remedy of seller of automobile who failed to transfer certificate of ownership was by replevin suit with demand for compensation for reasonable value of buyer's use of machine (Motor Vehicle Act, § 45, as amended by St. 1925, p. 402, § 7, and § 45½, as added by St. 1927, p. 1424, § 10).

Seller of automobile who failed to transfer certificate of ownership to buyer under Motor Vehicle Act (St. 1923, p. 517), § 45, as amended by St. 1925, p. 402, § 7, and § 45½, as added by St. 1927, p. 1424, § 10, could not recover purchase price, but was limited to remedy by suit of replevin with demand for compensation for reasonable value of use of machine.

6. Automobiles ⇨19—Evidence held insufficient to require finding of estoppel of buyer of automobile to assert seller's failure to transfer certificate of ownership, in action on note given for price (Motor Vehicle Act, § 45, as amended by St. 1925, p. 402, § 7, and § 45½, as added by St. 1927, p. 1424, § 10).

In action by seller of automobile on note given for purchase price thereof, evidence held insufficient to requiring finding of estoppel of buyer to assert seller's failure to deliver certificate of ownership under Motor Vehicle Act (St. 1923, p. 517), § 45, as amended by St. 1925, p. 402, § 7, and § 45½, as added by St. 1927, p. 1424, § 10.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Alex Ludwig against Richard Steger and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Carter & Smith, of Redding, for appellant. Anderson & Northup, of Redding, for respondents.

THOMPSON, J. This is an appeal from a directed verdict in favor of the defendants, in a suit upon a promissory note given in payment for the purchase price of an automobile. The motor vehicle certificate was not transferred, and it was held that the consideration for the note failed.

In March, 1927, W. B. Scott sold and delivered to defendants a used Hudson automo-

bile for the sum of \$600, in payment for which the defendants executed and delivered to the vendor their note for \$572 and an old Buick automobile. The note was dated April 2, 1927, and became due 90 days after its date. The note was assigned to plaintiff. The owner's motor vehicle license was not signed by him or transferred to the defendants. Mr. Scott, however, testified that he had the "pink slip" at his home and forgot to transfer it, but that the defendants said they would stop and get it, but never did so. He said: "It has been an oversight * * * I guess, never thought about the pink certificate I had up there at the house until they brought the case in." After a colloquy between the court and counsel, in which it was conceded that the certificate of ownership had never been signed, transferred, or delivered to the purchasers, the court instructed the jury to return a verdict for defendants, which it accordingly did.

The appellant contends that a failure to transfer the motor vehicle certificate of ownership cannot be relied upon as a defense to a promissory note given in payment for the purchase of an automobile, and that the defendants were estopped from asserting the failure of consideration for the note because they omitted to call for or demand the transfer and delivery of the certificate.

Section 45 of the Motor Vehicle Act of California (Stats. 1925, p. 402), provides that, upon the transfer of the title to an automobile, the owner must sign and deliver the certificate of ownership, which must be sent to the motor vehicle department for registration within 10 days of the transfer, and that: "(e) Until said division shall have issued said new certificate of registration and certificate of ownership * * * delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

At the time of the trial of this cause, which occurred December 17, 1928, the transfer of the certificate of ownership had not been signed or delivered to the defendants. The vendor failed and neglected to conform to the law in this respect. The Motor Vehicle Act was amended by adding section 45½ thereto (Stats. 1927, p. 1424), making it a misdemeanor for "any person who refuses or neglects to deliver a certificate of ownership to a transferee entitled thereto under the provisions of this act. * * *"

[1] An illegal act cannot become the basis of a valid consideration for a sale or transfer of property, even though the act is merely *malum prohibitum*. *Smith v. Bach*, 183 Cal. 259, 191 P. 14; *Berka v. Woodward*, 125 Cal. 119, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; *Wallace v. Zinman*, 200 Cal. 585, 588, 254 P. 946.

[2] A promissory note may not depend upon

a consideration which is a violation of an express statutory inhibition. 19 Cal. Jur. 1005, § 158; 8 C. J. 243, § 383; 3 R. C. L. 950, § 146. Section 1667, of the Civil Code provides: "That is not lawful which is: 1. Contrary to an express provision of law."

[3] Since the certificate of ownership of the automobile, the sale of which furnishes the only basis of consideration for the promissory note involved in the present action, was never signed or transferred by the vendor and the motor vehicle department has consequently never issued a new certificate of ownership, the title to the machine did not pass to the defendants, but still remains in the owner, Scott. Hence, the note was without consideration and void. 42 C. J. 775, §§ 305, 306. In an elaborate memorandum following the case of *State of Missouri v. Cox*, 37 A. L. R. at page 1466, the following statement is supported by numerous authorities: "The cases are agreed that the failure to comply with the statute precludes an action for the purchase price of the car, or upon a note or check therefor."

Under a statute similar to section 45 of the California Motor Vehicle Act, in the case of *Swank v. Moisan*, 85 Or. 662, 166 P. 962, the Oregon Supreme Court said: "The sale of plaintiff's automobile became invalid ten days after the date of sale by operation of this statute. There being nothing immoral or unlawful in the contract of the parties, the law will not leave them where it finds them. Plaintiff could replevy his automobile and recover the value of its use by the defendants. * * * But plaintiff cannot recover on a note given to evidence the purchase price on a sale which is invalid."

[4, 5] It is true that the defendants might have instituted an action for rescission under section 1689 of the Civil Code on the ground that the consideration for the note was void, but this was not their only remedy. This remedy does not preclude the urging of the defense of failure of consideration in reply to a suit upon a void promissory note, even without offering to restore the machine to the owner, who has his remedy in a suit of replevin with a demand for compensation for the reasonable value of the use of the machine. *Swank v. Moisan*, supra.

[6] The appellant relies upon the case of *Boles v. Stiles*, 188 Cal. 304, 204 P. 848, to support his assertion that the respondents are estopped from denying that the title to the automobile passed to them. This case, however, does not uphold appellant's contention. That was a suit by one partner against another to replevin an automobile. It decides only that where one who claims title to a machine "by his own act and agreement having placed the plaintiff in the immediate and exclusive possession of the automobile is not in position to invoke the provision of the statute referred to." In the present case the situation is just

the reverse. The right of possession of the car is not here involved, but rather, the question of whether there was a consideration for the execution of a promissory note.

The respondents did not waive their defense or right to the certificate of ownership signed by the vendor. It was the duty of the owner to deliver this certificate to the purchasers. This was essential to a valid transfer of title. Fairly construed with a view of upholding the judgment, the record indicates that there was no understanding between the parties to the effect that the defendants agreed to call at the home of the owner, Scott, for the certificate. Upon the contrary, he testified: "I guess (I) never thought about the pink certificate * * * until they brought the case." The failure to deliver the certificate was evidently the fault and negligence of the plaintiff. The record contains no evidence of his ever offering to remedy this omission by delivering it, prior to the trial of said cause. If the plaintiff relied upon the asserted understanding that the defendant agreed to call for the certificate, he should have at least offered to definitely prove this fact.

We are of the opinion that the judgment is sufficiently supported by the evidence.

The judgment is, therefore, affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 341

SWITHENBANK v. WOOD et al.*
(Civ. 3741.)

District Court of Appeal, Third District, California. June 7, 1929.

Rehearing Denied July 5, 1929.

1. Landlord and tenant §90(1)—Court held warranted in concluding that presumption that lessee continued in possession after expiration of lease with permission of owner of undivided interest was overcome (Code Civ. Proc. § 1161, subd. 2).

Where, before expiration of lease, plaintiff who owned undivided interest in leased property refused to lease his interest in land to lessee, and, after expiration of lease, refused to join with cotenants in leasing property to lessee, but by mutual exchange of bills of sale with lessee established respective parties' ownership in lambs on leased ranch, and answer in action for partition of personalty alleged that defendants were at all times ready, willing, and able to pay plaintiff his share of rental, it could not be said as matter of law that trial court was not warranted in concluding that presumption, arising under Code Civ. Proc. § 1161, subd. 2, from plaintiff's failure to demand possession within 60 days after expiration of term, that lessee held possession with plaintiff's permission after end of term, was overcome, and that

plaintiff and defendants were in possession as tenants in common of property described in lease after its expiration.

2. Trial §404(2)—On appeal on judgment roll alone, conclusion of law may be treated as finding of fact to uphold judgment.

If necessary to uphold judgment on appeal on judgment roll alone, a finding misplaced among the conclusions of law may be treated as a finding of fact, under the rule that every intendment not contradicted by, or inconsistent with, record on appeal, must be indulged in favor of orders and judgments of superior courts.

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

Action by Lee Swithenbank against Charles W. Wood and others. From an adverse judgment, named defendant and a certain other defendant appeal. Affirmed.

H. C. Nelson, of Eureka, for appellants.

A. G. Bradford, of Eureka, for respondent.

FINCH, P. J. This is an action for the partition of personal property. The defendants Charles W. Wood and Lena Wood have appealed, on the judgment roll alone, from the parts of the interlocutory decree which award the plaintiff the increase of certain sheep and lambs "from and after August 26, 1926," and the wool therefrom during the same period, and also the increase of other live stock from and after July 16, 1926. The court found the following facts:

April 16, 1921, Mary Jane Swithenbank and others leased the Swithenbank ranch, together with the live stock and other personal property thereon to the defendant Charles W. Wood for a term expiring July 16, 1926. Plaintiff then had no interest in such property. The ranch is agricultural land. The rental provided in the lease was \$1,600 for the first year, and at the rate of \$1,700 a year for the remainder of the term for both the real and personal property. The lease provided that, at the expiration of the term, Wood was to leave on the premises a stated number of different kinds of live stock, concerning which there is no controversy. February 14, 1922, Mary Jane Swithenbank died, and, upon the settlement of her estate, there was distributed to the plaintiff "an undivided one-twelfth interest in and to" the leased property, both real and personal. Prior to the expiration of the term, the other owners sold all their interest in the personal property to Wood. Prior to such expiration Wood "requested plaintiff to execute a new lease of said real and personal property but * * * plaintiff refused to execute such lease." After the expiration of the term, the owners, other than the plaintiff, leased their interests in the land to defendant Charles W. Wood and Ernest D. Wood, but the plain-

tiff refused to join therein. August 16, 1926, by mutual exchange of bills of sale, the defendant Wood conveyed to the plaintiff 117 of the sheep and 25 of the lambs, and the plaintiff conveyed to Wood the remainder thereof, "to be classified and determined as per said lease."

* * * The purpose and intent of said parties in delivering and exchanging said bills of sale was to establish the ownership of each of said parties, respectively, in said sheep and lambs in numbers, rather than in undivided fractional interests." During the preceding month, the owners of the land "were negotiating with each other for a partition, division, or sale of said ranch, * * * and as a part of the * * * transaction relating to said bills of sale exchange between said plaintiff and defendant Charles W. Wood, said plaintiff stated to said defendant Wood that said sheep would not be segregated or separated until a sale or partition of said ranch. * * * No sale nor partition of said ranch has been had." "No segregation or division of said sheep has been made as determined in said lease, or otherwise or at all." "Plaintiff did not within sixty days from and after July 16, 1926, nor within sixty days from and after July 16, 1927, demand or request possession of plaintiff's interest in said lands or premises, nor did said plaintiff at any time demand or serve any notice to quit said premises upon said defendants or either of them."

As conclusions of law, the court found "that from and after the date of the expiration of said lease dated April 16, 1921, plaintiff and defendant Charles W. Wood have been in possession as tenants in common of the real and personal property described in said lease," and that plaintiff is entitled to judgment as hereinbefore stated.

Appellants' only contention is that, because of the plaintiff's failure to demand possession of the premises within 60 days after the expiration of the term, they were entitled to hold under the terms of the lease for another full year, and that therefore it was error to award the plaintiff any part of the increase of the live stock; the lease providing for the delivery of a stated number of each kind of live stock upon the surrender of the premises. Section 1161, subd. 2, of the Code of Civil Procedure, provides:

"In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of the term without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed

to be holding by permission of the landlord, or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year."

"Holding over in view of the circumstances outlined by this statute establishes a presumption prima facie of the renewal of the lease for another year upon the terms formerly existing, but such presumption may be rebutted by evidence offered by either party to the lease." *Cowell v. Snyder*, 171 Cal. 291, 297, 152 P. 920, 923; *Ambrose v. Hyde*, 145 Cal. 555, 557, 79 P. 64.

[1] Before the expiration of the term the plaintiff refused to lease his interest in the land to Wood. After the expiration of the lease, the plaintiff refused to join with his cotenants in the execution of a lease to Wood. The lease provided for payment of rent "quarterly in advance." The answer alleges: "The defendants have at all times been ready, willing and able and have offered to pay and do now offer to pay said plaintiff his share of the rental provided in said lease." This allegation implies that the defendants offered to pay the rental in advance for the quarter commencing July 17, 1926, and that the plaintiff refused to accept such payment. A month after the end of the term the mutual exchange of bills of sale took place between plaintiff and Wood. It cannot be held as a matter of law that the court was not warranted in concluding that the presumption that Wood held possession with permission of the plaintiff after the end of the term was overcome by the facts stated, and that the plaintiff and the defendants were "in possession as tenants in common of the real and personal property described in the lease" from and after the expiration of the term thereof.

[2] If necessary to uphold the judgment, the appeal being on the judgment roll alone, the finding that the plaintiff and the defendants were so in possession as tenants in common may be treated as a finding of fact, misplaced among the conclusions of law. *Collins v. Ramish*, 182 Cal. 360, 366, 188 P. 550; *Stanward v. Yellow Taxicab Co.*, 75 Cal. App. 96, 102, 241 P. 902. "Every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of superior courts." 2 Cal. Jur. 852; *Philbrook v. Randall*, 195 Cal. 95, 104, 231 P. 739; *Platner v. Vincent*, 194 Cal. 436, 442, 229 P. 24.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

99 Cal. App. 347

BAILEY v. HOFFMAN et ux. (Civ. 6676.)

District Court of Appeal, First District, Division 2, California. June 7, 1929.

1. Appeal and error ⇨345(1)—Notice of appeal, filed within 30 days after denial of motion for new trial, held timely (Code Civ. Proc. § 939).

Notice of appeal, filed within 30 days after denial of appellant's motion for new trial, notice of intention to move for which was served 5 days after entry of judgment appealed from, was filed in due time, under Code Civ. Proc. § 939.

2. Evidence ⇨376(1)—Book account held sufficiently identified as that sued on to warrant its reception in evidence (Civ. Code, § 1647).

Book account, headed "Dr. Hoffman Job at Emerald Lake," 1924, listing chronologically charges for labor done and materials furnished from January 7 to February 12, inclusive, without entries on credit side, and summarizing materials, labor, and freight at stated sums, held sufficiently identified as account sued on to authorize its receipt in evidence; parties being entitled to introduce explanatory evidence, under Civ. Code, § 1647, and appellate court bound to assume facts supporting judgment.

3. Account, action on ⇨22—Evidence held to support finding that all allegations of complaint in action on book account were true.

Evidence in action on book account held to support trial court's finding that all allegations of plaintiff's complaint were true.

4. Limitation of actions ⇨53(1)—Action on book account, commenced within four years after last item, held not barred (Code Civ. Proc. § 337, subd. 2, 344).

Action commenced January 31, 1928, on book account, in which last item was February 12, 1924, held not barred by four years statute of limitations (Code Civ. Proc. § 337, subd. 2), which was intended to eliminate distinctions between actions on book accounts and actions for balances due on mutual, open and current accounts, in which cause of action is deemed to have accrued from time of last item proved, under section 344, though omitting word "balance."

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by J. H. Bailey against E. B. Hoffman and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Kincaid & Fitzpatrick, of Redwood City, for appellants.

David Cosgrave, of Redwood City, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover on a book account. The defendants filed a joint answer. The action was tried before the court sitting without a jury. The

court made findings of fact in favor of the plaintiff, and from a judgment entered thereon the defendants have appealed, and have brought up a bill of exceptions which, on its face, appears to be a digest only of the proceedings below.

[1] The plaintiff makes a preliminary objection to the hearing of the appeal. He calls attention to the fact that more than 60 days elapsed between the date the judgment was entered and the date of the filing of the notice of appeal. The defendants reply that the judgment was entered July 25, 1928, that on July 30, 1928, they served a notice of intention to move for a new trial, that afterwards they made their motion, and that the motion was denied September 17, 1928. Thereupon they show that within 30 days they filed their notice of appeal. Under these facts their notice of appeal was filed in due time. C. C. P. § 939.

[2] The first point made by the defendants is that the court erred in receiving in evidence the plaintiff's alleged book account. From the bill of exceptions it appears that the plaintiff produced a certain book kept by him and in which appeared the said account. The heading is "Dr. Hoffman Job at Emerald Lake"; then follows the year, 1924. Below in chronological order were entered charges for labor and materials January 7th to February 12th, both dates inclusive. No entries are made on the credit side. At the end the materials are summarized at \$161.35, labor at \$478.75, and freight at \$4.75. Specifying their objections to the purported account, the defendants say that it does not show against whom the charges are made, it does not show in whose favor the charges are made, and that it is not a detailed statement in the nature of debit and credit arising out of contract or some fiduciary relation, and they cite and rely on *Wright v. Loaiza*, 177 Cal. 605, 171 P. 311.

The authority cited is not applicable to the facts. The statements or entries are made in detail. They are all debits. No credit appears, and none was claimed. The book was produced from the possession of the plaintiff, and there was nothing in the evidence showing or tending to show that he kept any accounts in favor of anybody but himself. Therefore it cannot be said that there was not some evidence showing that the account was in his favor. The account does not show expressly that it was against these defendants. But it will not be controverted that the parties were entitled to explain the account by the introduction of evidence regarding the circumstances under which it was made and the matter to which it related. Civ. Code, § 1647. Nothing to the contrary appearing in support of the judgment, we are bound to assume that evidence was introduced showing that these defendants occupied property at

Emerald Lake, that there were not other Hoffmans occupying property there, or, if there were, that the other Hoffmans were not known as "Dr. Hoffman." Following the same line of reasoning, there are other facts, which we are likewise entitled to assume, all of which go to establish the identity of the debtor. Under these circumstances we think it cannot be said that there was no evidence before the trial court identifying the account as the account alleged in plaintiff's complaint. The trial court did not err in receiving the account in evidence.

[3] The trial court made a finding that "all the allegations of plaintiff's complaint are true." The defendants contend the finding is not supported by the evidence. This attack is based on the facts which we have just discussed. For the reasons stated above, we think the point is not well taken.

[4] In their answer the defendants pleaded that the action was barred by the statute of limitations. Code Civ. Proc. § 337, subd. 2. The last item in the account was February 12, 1924. The action was commenced January 31, 1928. The trial court made a finding that the action was not barred. The defendants claim that the finding was not sustained by the evidence. They also assert that if the account was proved as alleged that the statute barred all items not falling within the four-year term. They also assert that the amendment of 1907 applied to actions to recover "a balance due * * * upon an open book account," but that the amendment of 1917 is addressed to actions "to recover upon a book account." They stress the change made by omitting the words "a balance," and claim that the present rule is that the statute bars all items not falling within the four-year period. All of these contentions present solely a question of statutory interpretation. If the statute, as it stands, commences to run from the date of the last item proved by the plaintiff, all of the contentions just stated must be ruled against the defendants.

We think *Furlow v. B. Co. v. Balboa L. & W. Co.*, 186 Cal. 754, 200 P. 625, rules the point. That was an action to recover on an open book account. When the facts occurred (1913-14) an action to recover a balance due upon a mutual open and current account would be barred in four years. Code Civ. Proc., § 337. If there were no other statutes on the subject, it might be argued that the expression "balance" applied to items that were entered within the four-year period. But there was another statute. It provided that, "in an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side." Code Civ. Proc. § 344. It will be observed that both statutes were limited to

mutual, open, and current accounts. Section 344 was not amended. Section 337 was amended, and it placed on an even footing, under the four-year term, a mutual, open, and current account and an open book account. No doubt the court took all of these matters into consideration. Thereafter it expressed its conclusion as follows: "The rule has long been settled in this state with reference to a 'mutual, open, and current account' mentioned in subdivision 2, section 337, of the Code of Civil Procedure, that the statute runs from the date of the last item shown in the account. *Carter v. Canty*, 181 Cal. 749, 186 P. 346. The evident purpose of the amendment, subdivision 2, section 337 of the Code of Civil Procedure, was to put an open book account upon the same basis." In other words, the court decided that the Legislature sought to eliminate all distinctions in applying the statute of limitations to the two classes of accounts.

When the amendment of 1917 was made we think that the Legislature sought to eliminate any distinction as to accounts generally and sought to place actions to recover (1) upon a book account whether open or not; (2) upon an account stated; (3) a balance due upon a mutual, open, and current account all on the same basis. The omission of the word "balance" is of negligible importance. It is expressly used regarding a mutual account. It is necessarily implied as to an account stated. In the sense of "a total" it is necessarily implied as to a book account, because to hold otherwise would authorize a plaintiff to sue for one item at a time as distinguished from suing on an account. As amended in 1917, the expression "a book account" includes and refers to an open book account, and also to a book account which consists of entries on one side only. As to the latter class it would be illogical to speak of "a balance." There can be "a balance" on account only when there are items on both sides.

Moreover, when the amendments of 1907 were adopted extraordinary conditions prevailed in this state. The greatest municipal fire of all times had occurred. Many persons were without available funds who, in a short space of time, would collect insurance and be prepared to pay their debts. To protect both debtor and creditor amendments were made to sections 337 and 339 of the Code of Civil Procedure. The Legislature sought to protect, not only both classes, but all in each class. While these reasons were not mentioned, we think they were in mind when the *Furlow Case*, supra, was decided. Therefore, basing our ruling on the same line of reasoning as adopted in the *Furlow Case*, we hold that the statute commenced to run from the last item proved in the account, to wit, February 12, 1924. If we are mistaken in this holding, then it follows the plea of the statute would eliminate every entry not falling

within the statutory period both as to a book account and also an open book account, because the statute, "upon a book account whether consisting of one or more entries, * * *" speaks of both without discriminating between them. In other words, the rule proclaimed in the Furlow Case would be abrogated by the amendment of 1917. That ruling we are not inclined to make.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

99 Cal. App. 357

MESNICKOW v. FAWCETT et al. (Civ. 6451.)

District Court of Appeal, First District, Division 2. California. June 8, 1929.

1. Automobiles $\S$ 181(1)—Motorist warned of approaching danger from blinding lights must use more than ordinary care to avoid striking objects temporarily hidden.

Where motorist carrying guests had ample warning of approaching danger caused by blinding lights, she had duty to use more than ordinary care to avoid striking objects on path temporarily hidden.

2. Automobiles $\S$ 244(20)—In action for injury to guests, evidence showed negligence of driver striking parked truck when blinded by lights of approaching car.

In action for injuries to guests when automobile struck truck parked at side of highway, evidence relative to driver of car in which plaintiffs were riding being blinded by lights of approaching car would have been sufficient to sustain finding of negligence on her part.

3. Negligence $\S$ 93(1)—Negligence of driver of automobile will not prevent recovery for injuries to guests against owner of parked truck which car struck.

In action against owner of truck parked beside highway for injuries to guests in automobile which struck truck, negligence of driver of such automobile will not prevent recovery, unless guests by failure to act in premises were guilty of contributory negligence.

4. Automobiles $\S$ 224(5)—Guests held not contributorily negligent in not warning driver of danger from blinding lights.

Guests in automobile held not guilty of contributory negligence for failure to warn driver of danger caused by blinding effect of lights on passing car.

5. Automobiles $\S$ 173(2)—Driver parking on public highway must move off paved or traveled portion if practicable, and leave unobstructed width of 15 feet (Motor Vehicle Act, $\S$ 136).

Under Motor Vehicle Act, $\S$ 136 (St. 1923, p. 561), driver parking truck on public highway outside of business or residence district must

move it off paved or traveled portion when practicable, leaving unobstructed width of 15 feet.

6. Appeal and error $\S$ 1011(1)—Finding on conflicting evidence cannot be disturbed.

Where there was conflicting testimony as to whether defendant was negligent in parking car along highway, finding of negligence cannot be disturbed.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Elizabeth Mesnickow and others against K. E. Fawcett and another. Judgments for plaintiffs, and defendant S. Catelli appeals. Affirmed.

Gillis & Edwards, of Oakland, for appellants.

Forrest M. Pearce, of Oakland, for respondent.

NOURSE, J. Three separate actions were instituted against a number of defendants for personal injuries incurred in an automobile collision. The three actions were consolidated for trial, by stipulation, before the court sitting without a jury. Separate judgments were rendered in favor of each of the three plaintiffs and against the defendant Catelli alone. This defendant has appealed on typewritten transcripts, and, by stipulation, these appeals are heard under the title designated above.

The three plaintiffs were riding in a Studebaker automobile as the business guests of Mrs. K. E. Fawcett at about 7:30 p. m. of the evening of November 10, 1926, on a public highway about three miles north of the town of Windsor in Sonoma county. Preceding them on the same highway, the defendant Catelli had driven a Chevrolet truck in the same direction. He found he was having trouble with the motor of the truck, and, fearing that he was out of gas, pulled off to the right side of the highway, stopped, and went back to the gas tank to test the gas. While the truck was thus standing in this position, the defendant Fawcett, traveling at a rate of 25 or 30 miles an hour, crashed into it, causing the injuries to the passengers for which they sued. Mrs. Fawcett was joined with Catelli as a party defendant.

[1, 2] The trial court found that the defendant Catelli was negligent in parking the truck on the side of the highway and that the defendant Fawcett was neither careless nor negligent in the manner in which she operated the Studebaker car. The appeals from the several judgments are based upon these findings. Particular criticism is made of the finding of want of negligence on the part of defendant Fawcett. The evidence is that she was traveling on a public highway which gave a straight stretch of more than a mile before the point of collision. She claimed she had been blinded by the headlights of an-

other car passing in the opposite direction which came around a curve in the highway just prior to the collision. But this curve was shown to have been a quarter of a mile beyond the point of collision. She had, therefore, ample warning of the approaching danger caused by the blinding lights. When confronted by such conditions it is the duty of the operator to use more than ordinary care to avoid striking objects on his path which are temporarily hidden from his view. Such is the rule of *Giorgetti v. Wollaston* (Cal. App.) 257 P. 109, upon an almost identical state of facts. There was therefore evidence which would have sustained a finding of negligence on the part of this defendant.

[3, 4] However, though the plaintiffs might all have had judgment against the defendant Fawcett because of her negligence, this does not avail the appellant Catelli at this time unless he can show that the respondents, by their failure to act in the premises, were guilty of contributory negligence. This he has failed to do. The respondents were merely invited guests having no control over the operation of the car in which they were riding (*Shields v. King* [Cal. Sup.] 277 P. 1043); and, besides this, the danger caused by the "blinding" of the passing lights was so sudden, and in such close proximity to the collision, that they had no opportunity to warn the driver before the collision occurred.

[5, 6] On the issue of appellant's negligence the evidence was sharply conflicting. Witnesses testified that he had pulled the truck off the highway to the edge of a ditch, and that when he started out on his journey, some time prior to the collision, the tail-light on the truck was burning. Other witnesses testified that this light was not burning at the time of the collision and that the truck was standing partially on the paved portion of the highway. The duty of a driver in parking on a public highway outside of the business or residence district is fixed by section 136 of the Motor Vehicle Act (St. 1923, p. 561). He must move it off the paved or traveled portion of the highway "when it is practicable" to do so, and must leave a clear and unobstructed width of 15 feet upon the main portion of the highway opposite the parked vehicle for the free passage of other vehicles. There was testimony which would have supported a finding favorable to appellant on this issue, but there was also some evidence supporting the finding of negligence. Under these conditions the judgment cannot be disturbed.

Some comment should be made upon the amount of the several judgments. The three respondents suffered "cuts and bruises" of varying degree. The trial court awarded the respondent Mesnickow \$122, the respondent Barnes \$711.60, and the respondent Sundberg \$315.35. These awards were in accord with the statutory measure of damages in

cases of this character as "the amount which will compensate for all the detriment proximately caused." Section 3333, Civ. Code. In view of the constant flow of "sympathy," verdicts coming to us arising out of motor vehicle collisions, it is a hopeful sign to note a trial judge mindful of this statutory injunction.

The judgments are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

99 Cal. App. 396

PEOPLE v. MENDOZA. (Cr. 1533.)

District Court of Appeal, First District, Division 1, California. June 12, 1929.

Intoxicating liquors §236(19)—Evidence held sufficient to sustain conviction for ownership and operation of still (St. 1927, p. 497).

Evidence held sufficient to sustain conviction for owning and operating still for manufacture of intoxicating liquor under St. 1927, p. 497, in view of defendant's entry by means of key into premises in which there was a house practically vacant except for the presence of still and whisky, and in view of defendant's admissions.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Antone Mendoza was convicted of owning and operating a still for the manufacture of intoxicating liquor, and he appeals. Affirmed.

Jo Lawrence, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant, Antone Mendoza, together with Frank Barbosa, was charged by information with the violation of chapter 277, Statutes of 1927, in that on or about the 14th day of November, 1928, they were the owners of and had an interest in and operated a still designed and intended for use in the manufacture and production of intoxicating liquor for beverage purposes. The jury returned a verdict of guilty. This is an appeal on behalf of defendant Mendoza from the judgment of conviction.

The only point urged for reversal is that the verdict is contrary to the law and the evidence. There is no merit in the appeal. The evidence shows that on May 14, 1928, appellant, accompanied by his wife, drove up to a certain house situated in Alameda county, turned into an alleyway and then drove their car into a garage situated on the premises. A police officer had entered the house the previous evening and had remained there over night. But for the presence of a still, some manufactured whisky, and a large amount of grain mash and a mattress, the

house was vacant. After driving into the garage appellant entered the premises by means of a key and was confronted by the officer. Upon being questioned he stated that he was there for the purpose of purchasing some whisky. He later admitted that he was employed to operate the still. He was placed under arrest, and on the way to the police station he stated to the officer that he desired to pay his fine and be through with the matter. He subsequently informed the police officers that Barbosa was the owner of the still and informed them where he could be found. There was evidence of the neighbors to show that both appellant and Barbosa had during a period of some five months constantly visited the premises. There was also evidence to show that appellant had paid half the cost of the grain that was last used in the manufacture of the whisky. Under these circumstances it cannot be said that the evidence is insufficient to support the verdict.

The judgment is affirmed.

99 Cal. App. 366

PEOPLE v. SILVA et al. (Cr. 1078.)

District Court of Appeal, Third District, California. June 8, 1929.

1. Criminal law ⇨1144(17)—Presentation of matters which might have been presented and would have authorized judgment is presumed, where evidence is not brought up on appeal.

Any matters which might have been presented to court below, and which would have authorized judgment of conviction, will be presumed to have been presented, where evidence has not been brought up on appeal.

2. Criminal law ⇨202(3)—Acquittal of possessing still did not prevent conviction for operation thereof (Pen. Code, § 971).

Acquittal of defendants on charge of possessing still did not prevent conviction for operation of still, since defendants, under Pen. Code, § 971, could be convicted without being near place where still was operated, provided they aided and abetted in its operation.

3. Criminal law ⇨1144(16)—If necessary to support verdicts acquitting defendants of possessing still and convicting them for operation of still, it must be presumed, in absence of evidence, that separate stills were involved.

If necessary to support verdicts acquitting defendants on charge of possessing still and convicting them on charge of operating still, it must be presumed, in the absence of evidence, that the first count relates to possession of still in one place and that proof under second count shows operation of another still at different place.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Tony Silva and another were convicted of operating a still, and they appeal. Affirmed.

Frank G. Warren, of Stockton, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information contains two counts. In the first the defendants are charged with the offense of having "in their possession and control a still, stillworm, still cap and still condenser designed, used and intended for use in the manufacture and production of intoxicating liquor for beverage purposes." In the second it is charged that, on the same day, they did "operate and cause to be operated, a stilling device designed, used and intended for use in the manufacture and production of intoxicating liquor for beverage purposes."

The jury found the defendants guilty on the second count and not guilty on the first. The defendants separately moved for new trials, which were denied, and judgments of conviction followed. They have appealed from the judgments and the orders denying new trials. The appellants requested a transcript of the "reporter's notes of the * * * examination of the jury panel during the time of securing the jury," but made no request for a transcript of the reporter's notes of the evidence taken at the trial, and no part of such evidence is contained in the record.

[1] Appellants contend that the "verdicts are incompatible, incongruous, inconsistent and opposed to each other, and the verdict of guilty of the second count cannot stand in law in the face of the acquittal of the charges encompassed in the first count." There are several answers to the appellants' contention, only two of which need be mentioned. Since the evidence has not been brought up, "any matters which might have been presented to the court below, which would have authorized the judgment, will be presumed to have been thus presented." *Platner v. Vincent*, 194 Cal. 436, 442, 229 P. 24, 26.

[2, 3] Section 971 of the Penal Code provides: "All persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal." If it be assumed that both counts relate to the same still, the defendants may not have had possession of the still and may not have been near the place where it was operated, and yet they may have been concerned in its operation and may have aided and abetted in the operation thereof. But, if necessary to support the verdicts and the judgments, it must be presumed, in the absence of the evidence, that the first count

relates to the possession of a still in one place and that, in support of the second count, the proof shows that the defendants operated another still in a different place.

The judgments and the orders are affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

CONTINENTAL MORTGAGE CO. v. EYRAUD. (Civ. 3779.)★

District Court of Appeal, Third District, California. June 13, 1929.

Rehearing Denied July 13, 1929. Hearing Granted by Supreme Court Aug. 12, 1929.

1. Sales ☞300—Seller retaining title has no lien (Civ. Code, § 3049).

Where seller of furniture actually delivered possession to buyer but specifically retained in itself title to property, no lien thereon was reserved, under Civ. Code, § 3049, since existence of seller's lien presupposes that title has passed.

2. Payment ☞41(2)—Where obligations for rent and purchase price of furniture belonged to same class, payments without request for specific application should be prorated according to statute (Civ. Code, § 1479).

Where obligation for payment of rent and for payment of monthly installments on purchase price of furniture belonged to same class and interest on payment of furniture installments was included in amount specified, and no request was made for specific application of payments to either obligation, sums paid should be prorated between the two obligations, in action for rent, according to provisions of Civ. Code, § 1479.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action for rent by the Continental Mortgage Company against Albert Joseph Eyraud. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellants.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for respondents.

THOMPSON, J. This is a suit for the recovery of rental for an apartment house and the furniture therein contained. The complaint alleged that the defendant was indebted to the plaintiff in the sum of \$15,750 for rent due upon a contract for "The Stratford Apartments, including the furniture." The evidence is undisputed that the defendant occupied and used the premises and furniture 26 months and 3 days, from October 1, 1924, to December 4, 1926.

The agreement upon which this action is based was dated November 11, 1924, and granted to the defendant the right "(1) To lease from the optionor [plaintiff] the Strat-

ford Apartments * * * for a term of years, commencing October 1, 1924, and continuing to March 31, 1930, at a rental of \$750.00 per month, * * * payable upon the first day of each and every successive calendar month. * * * (2) To sell to the optionee [defendant] * * * the furniture, furnishings and equipment in the said Stratford Apartments upon a conditional sales contract, the title to remain in the optionor until the total purchase price is fully paid. * * * The optionee agrees to pay * * * the sum of \$37,691.28, * * * in the following manner, to-wit: The sum of \$800.00, or more, * * * per month * * * which said installments shall include the interest on said principal sum remaining due at the rate of eight per cent per annum. * * * If said optionee shall at any time within the life of this agreement exercise the option herein contained, all installments theretofore paid by him (exclusive of rent) shall be applied on account of said purchase price, and if he fails to exercise said option, all such installments paid * * * shall be deemed as the consideration for the option herein contained, and not otherwise. * * *

Subsequent to the execution of the foregoing document, the defendant remained in possession of the apartment house and its furniture, operating it and appropriating the income therefrom until December 4, 1926. Thereupon he voluntarily relinquished possession of both the apartment house and furniture, joining with plaintiff in the execution of another contract with relation thereto upon the last-mentioned date, by the terms of which it was agreed that the apartment house and furniture were to be immediately delivered to the plaintiff "without prejudice to the legal rights of the parties to said agreement, dated November 11, 1924, except the optionee waives the right granted by said contract to complete the purchase of the said property and to remain in possession thereof; * * * and the said optionee shall hereafter be released from the obligation to pay to the optionor the rent for said Stratford Apartments, and \$800 per month, upon the purchase price thereof. * * * Any indebtedness * * * under the terms of said contract dated November 11, 1924, * * * shall not be affected by this contract; * * * said indebtedness, if any, to be determined as of this date, the same as if this contract had not been executed. * * *

There is no language in the terms of either of the foregoing contracts to warrant the court in holding that the monthly installments of \$800 may under any circumstances be construed to be applied to rent for the use of either the apartment house or the furniture. These payments were specifically designated as installments upon the purchase price of the furniture. Neither the question

of the forfeiture of these \$800 installments which were actually paid upon the purchase price of the furniture, nor defendant's liability for similar installments remaining unpaid at the time of the execution of the last document were involved in this action. This was a simple action for the recovery of unpaid rent. Nothing else was involved in the issues of the case.

The trial court evidently erroneously assumed that these \$800 installments upon the purchase price of the furniture were to be treated as rental, and that the unpaid installments thereof, which were due prior to the execution of the last document were within the issues of this case. Without distinguishing between these installments and the agreed rental for the apartment house, the court found that "the aggregate amount due to the plaintiff * * * amounted to the sum of \$39,255.00, and prior to the commencement of this action, the defendant had paid on account of said indebtedness the sum of \$24,300.00 and no more, leaving the balance due * * * of \$14,955." This finding is not wholly supported by the evidence, nor is it warranted by the pleadings.

The only material evidence which the record contains respecting the payment of money by the defendant under the terms of the contract upon which this action is founded was plaintiff's book account of the transaction, which is entirely unexplained. This account credited the defendant with having paid plaintiff the aggregate sum of \$23,700. These credits were made up of 79 separate items of payments ranging from \$150 to \$1,150, showing merely the dates and amounts of the several payments. The book account fails to credit any of these sums to either rental of the apartment house or the purchase of the furniture. The account does, however, charge the defendant with 26 months' and 3 days' rent of the apartments at \$750 a month, and also charges the defendant with approximately a similar number of monthly installments of \$800 each for the purchase of the furniture.

[1, 2] Without conflict of evidence it appears, as the court found, that the defendant obligated himself to pay 26 months' and 3 days' rental of the apartment at \$750 a month, and that he had paid to plaintiff only the aggregate sum of \$24,300 an account of both of the existing obligations which were due. The only questions involved under the issues of this case are, what obligations of the defendant were entitled to credit for the sums of money which were paid to the plaintiff, and what amount of rent for the apartment house remains unpaid? The record is silent as to any agreement or request on the part of the interested parties regarding the application of the sums of money which were paid by the defendant. He was subject to two distinct obligations toward the

plaintiff: One was to pay plaintiff \$750 a month for the rental of the premises, and the other was to pay \$800 a month on the purchase price of the furniture. These obligations were created by the same document, at the same time. Neither party having designated to which of these two obligations they desired the several payments to apply, they must be credited pursuant to the rule declared in section 1479 of the Civil Code, which provides:

"Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

"One. If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.

"Two. If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance. * * *

"Three. If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably:

"1. Of interest due at the time of the performance.

"2. Of principal due at that time.

"3. Of the obligation earliest in date of maturity.

"4. Of an obligation not secured by a lien or collateral undertaking.

"5. Of an obligation secured by a lien or collateral undertaking."

Neither of the obligations in the present case was secured by a lien. Since the plaintiff actually delivered possession of the furniture to the defendant, and specifically retained in itself the title to the property, no lien thereon was reserved. Section 3049 of the Civil Code provides that: "One who sells personal property has a special lien thereon, *dependent on possession*. * * *"

In 24 Ruling Case Law 121, § 391, it is said: "The existence of a seller's lien always presupposes that the title to the goods has passed to the buyer, since it would be an incongruous conception that a person might have a lien upon his own goods." *Greenleaf v. Gallagher*, 93 Me. 549, 45 A. 829, 74 Am. St. Rep. 371; *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147; *Hoven v. Leedhalm*, 153 Minn. 95, 189 N. W. 601, 31 A. L. R. 574.

The obligation for the payment of rent for the apartment house, and the obligation to pay monthly installments on the purchase price of the furniture, therefore, belonged to

the same class. Interest upon the payment of the installments for the purchase of the furniture was included in the amount specified. The contract provided that the defendant agreed to pay upon the total purchase price of the furniture "the sum of \$800, or more, per month * * * which said installments shall include the interest. * * *" Since the obligations were of the same class, and no request for specific application of the payments to either obligation was made it becomes necessary to prorate the sums which were paid, between the two obligations, according to the provisions of section 1479 of the Civil Code. Since this is not a suit to recover unpaid installments on the purchase price of the furniture, it is only necessary to prorate the money paid by the defendants in order to ascertain what proportion of the agreed rent for the apartment house remains unpaid. By mere mathematical calculation it appears that \$12,542 from the total sum of \$24,300, which was paid, should be credited on the furniture account. This leaves a balance of \$11,758 to apply to the credit of the defendant on the rent account. The period during which the defendant occupied the premises was 26 months and 3 days. At the rate of \$750 per month, the total obligation for rent amounted to \$19,575. This leaves a balance of rent, which was due to the plaintiff on December 4, 1926, of \$7,817. The plaintiff's complaint prayed for 7 per cent. interest on the amount of rent which was due on the last-named date. The plaintiff is entitled to at least this sum of interest to May 4, 1927, at which time the judgment was entered in said cause. This amounts to \$228 additional.

The judgment is therefore modified by striking therefrom the sum of \$14,955, which was awarded to the plaintiff, and by allowing it in lieu thereof the sum of \$8,045 with interest at the rate of 7 per cent. per annum from the date of the entry thereof. As so modified the judgment is affirmed, appellant to recover his costs.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 368

BRADY v. SUTTER BUTTE CANAL CO.
(Civ. 3817.)

District Court of Appeal, Third District, California. June 10, 1929.

Animals  44—Complaint for poisoning grass by irrigation company without notice, whereby sheep of plaintiff, who owned pasturage, were injured, held to state cause of action.

Complaint alleging the ownership of a tract of land by third person, the purchase from him by plaintiff of the right to pasture thereon, the

maintenance and operation by defendant irrigation company of a distributing canal, running through a portion of the tract and not fenced or otherwise separated from the land on either side thereof, the wrongful entry on said lands and spraying of same with poison by defendant, and its negligent failure to give any notice thereof, though knowing stock grazed thereon, resulting in the poisoning of plaintiff's sheep, held to state a cause of action; any ownership by defendant of a right of way to the premises and right to enter thereon and spray it with poison being a matter of defense, it not appearing from the complaint.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Marion R. Brady against the Sutter Butte Canal Company. From a judgment for defendant on the pleadings, plaintiff appeals. Reversed with directions.

Lawrence Schillig, of Yuba City, and Desmond Winship, of Berkeley, for appellant.

Seth Millington, of Gridley, for respondent.

PLUMMER, J. This action is before us upon the plaintiff's appeal from a judgment of the superior court of the state of California, in and for the county of Sutter, entered in favor of the defendant after sustaining defendant's demurrer to the plaintiff's amended complaint without leave to amend.

The amended complaint sets forth the following facts: That at all the times mentioned in the complaint the defendant was a corporation organized and existing under the laws of this state, having its principal place of business in Gridley, county of Butte, state of California; that the defendant is a public utility furnishing water for irrigation to consumers in the counties of Butte and Sutter, in said state; that at all the times mentioned in the complaint one Edgar Preston Brinegar was the owner, and one Rudolph Knox was in possession and entitled to the possession, of that certain land in the county of Sutter, state of California, described as follows: (Here follows a particular description of the lands alleged to belong to Edgar Preston Brinegar, situate in the county of Sutter, state of California, containing 450 acres, more or less); that at all the times mentioned in the complaint the defendant maintained and operated one of its distributing canals running in a northerly and southerly direction through a portion of said described tract of land belonging to said Edgar Preston Brinegar and in the possession of said Rudolph Knox; that said canal so maintained by said defendant was not inclosed and not fenced or otherwise set off or separated from the land on either side thereof, but the said canal and said pieces of land on either side thereof were so joined and connected as to form, and they did form, one parcel of land; that the plaintiff, during the year 1926, purchased from

said Rudolph Knox, the pasture and feed then and there growing, and to be grown during said year 1926, on said above-described lands, in the possession of said Rudolph Knox, with the right of entry thereon, and placing sheep thereon for the purpose of pasturing and feeding on said grasses and feed growing on said lands; that the defendant, prior to the 14th day of July, 1926, the exact date of which was unknown to the plaintiff, wrongfully and unlawfully entered upon the above-described lands and sprayed the grass and verdure growing on the land on both sides of said canal, which grass and verdure plaintiff had purchased from said Rudolph Knox, with a dangerous and deadly poison, to wit, a solution of arsenic, for the purpose of killing the grass and verdure so growing on the lands adjoining said canal, well knowing that said solution of arsenic so sprayed on said grass was a dangerous and deadly substance and injurious to any animal eating the same, and well knowing that stock grazing upon the lands hereinabove described passed over and grazed on the lands so sprayed with said poisonous solution of arsenic by said defendant; that knowing all these things, the defendant nevertheless wrongfully entered upon said lands, and wrongfully, carelessly, and negligently sprayed said grasses growing thereon with said poisonous solution of arsenic, and willfully, negligently, and carelessly failed and neglected to give proper, adequate, or any warning, by posting notice or otherwise, that said poisonous solution of arsenic had been sprayed on said grass; that on or about the 14th day of July plaintiff, pursuant to his said agreement with said Rudolph Knox, for the pasturing of said lands, and not knowing that the grasses on said lands on both sides of said canal had been sprayed with said poisonous solution of arsenic, placed a large band of lambs, then and there of the value of \$9 per head, on said premises to graze thereon; that as a direct and proximate result of the negligence of defendant in so spraying said poisonous solution on said grasses on both sides of said canal, and because of defendant's negligence in not giving proper, adequate, or any notice that said grasses had been so sprayed, plaintiff allowed the said lambs so placed on said premises to eat the grass and verdure so sprayed with said poisonous solution, and said lambs became poisoned thereby; that as a result thereof 225 of said lambs, of the value of \$2,025, died, and became of no value to the plaintiff, and that 900 lambs were injured and stunted by such poison, and that plaintiff was unable to sell the same and had to carry said lambs over until the next year, at an expense of \$1,400, etc. Other damages are alleged, the total of which aggregated, according to the complaint, \$4,685, for which plaintiff asked judgment.

To this complaint the defendant interposed a demurrer, stating three grounds: First, that said complaint does not state facts sufficient to constitute a cause of action; second, that the complaint is uncertain, in that it is nowhere alleged or cannot be ascertained therefrom whether said defendant was the owner of the distributing canal running in a northerly and southerly direction through a portion of said above-described tract, or whether Edgar Preston Brinegar was the owner of said right of way, that said complaint is uncertain for the further reason that it is nowhere alleged therein nor can it be ascertained therefrom whether or not the defendant entered upon said right of way or whether the said defendant entered upon the balance of said tract alleged to belong to Edgar Preston Brinegar to spray the grass and verdure growing on the right of way of defendant, nor can it be ascertained therefrom whether or not the defendant entered upon any lands belonging to Edgar Preston Brinegar; and, third, that said complaint is unintelligible for the same reason that it is uncertain.

It requires only a reading of the complaint to show that the grounds of demurrer set forth in the second and third specifications, relied upon by the respondent, are inapplicable. The complaint alleges that the premises, consisting of 450 acres, more or less, belonged to and were owned by Edgar Preston Brinegar; that said premises had been leased to one Knox; and that the lessee had sold the grasses growing on said premises to the plaintiff in this action. So far as the complaint is concerned, no right of way belonging to the defendant is involved. If the defendant owned a right of way to said premises, and had a right to enter thereon, and sprayed the same with poisonous substances, that is a matter of defense; it does not appear from the complaint. After stating that the premises belonged to Edgar Preston Brinegar, and had been leased to Rudolph Knox, it is alleged that the defendant wrongfully and unlawfully entered upon the same and sprayed the grasses growing thereon with poisonous substances. Paragraphs VI and VII of the amended complaint set forth facts which, as stated, constitute a cause of action, that the defendant wrongfully and unlawfully entered upon the described lands, spraying the grass and verdure along both sides of the canal with poisonous substances, well knowing that the substance was dangerous and deadly to animals, and well knowing that stock grazing upon the lands described in the plaintiff's complaint passed over and grazed upon the lands so sprayed, and that, well knowing these things, the defendant, after wrongfully entering upon the lands, etc., and spraying the same, negligently and carelessly failed to give any notice or warning of what it had done. If the fact be that stock

was accustomed to graze along the banks of the canal, and the defendant was aware of that fact, and, while being so aware of such fact, entered thereon and sprayed the grass where the stock would go to feed with a poisonous substance, and neglected to give notice, we fail to see how the ownership or easement of a right of way through the premises would need to be stated in order to set forth a cause of action. Be that as it may, the complaint alleges the ownership of the land, its leasing to Knox, and the purchase of the pasturage by the plaintiff, and all the other facts necessary to set forth a cause of action against the defendant for injuries resulting from its negligence. This being true, there is no necessity to review the cases cited by counsel, wherein the particular facts stated have been held insufficient to state a cause of action, nor is it necessary to review the cases holding that an owner of land who places a poisonous substance thereon is not liable for injuries resulting to trespassing stock. Those cases are not in point so far as the allegations of plaintiff's complaint are concerned. What we have stated sufficiently shows that the first specification in the demurrer, that the complaint does not state facts sufficient to constitute a cause of action, is without merit.

The judgment of the trial court is reversed, with directions to overrule defendant's demurrer and allow the defendant to file an answer to plaintiff's complaint, if it be so advised, within such time as the trial court may lawfully fix.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

99 Cal. App. 390

**LOS ANGELES CITY SCHOOL DIST. OF
LOS ANGELES COUNTY v. TUCKER
et al. (Civ. 3756.) ***

District Court of Appeal, Third District, California. June 11, 1929.

Rehearing Denied July 11, 1929.

1. Assignments $\S$ 48—No precise form is necessary to establish equitable assignment, clearly apparent intent to pass title being sufficient.

No precise form of words or writing is necessary to establishment of an equitable assignment, which will be held to have taken place if it clearly appears from entire transaction that parties intended to pass title to property assigned.

2. Assignments $\S$ 50(2)—Contractor's order, authorizing school board to deliver warrant for amount due him to company supplying materials, held equitable assignment.

Where order signed by contractor, authorizing board of education to deliver warrant for amount due him for altering and repairing school building to lumber company for materials supplied was accepted by board and relied on

by lumber company, which filed no stop notice, trial court was warranted in holding that equitable assignment had taken place.

3. Assignments $\S$ 59—Contractor's letter to school board held not to affect his prior order to deliver warrant for amount due him to company supplying materials.

Contractor's order, authorizing board of education to deliver warrant for amount due him for altering and repairing school building to lumber company for materials supplied, being sufficient to transfer funds in board's hands, contractor's subsequent letter, requesting board to handle situation as they thought proper, was of no effect, even if showing that contractor did not intend order to operate as absolute assignment.

4. Mechanics' liens $\S$ 198—Claim of company filing stop notice after contract time for final payment was subordinate to contractor's assignment of amount due him to another company.

Claim of tile company, filing stop notice after expiration of 35 days from completion of work, when final payment became due under contract for alteration and repair of school building, was subordinate and subject to contractor's assignment of warrant for amount due him to lumber company before expiration of such time, which began to run when work was completed, not when board of education filed notice of completion.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Interpleader by the Los Angeles City School District of Los Angeles County against Lewis Tucker, the Patten & Davies Lumber Company, the Southern Surety Company, and others, in which defendants lumber company and others filed cross-complaints. From judgments for defendants lumber company and another, defendant surety company appeals. Affirmed.

W. I. Gilbert and Kenneth Keeper, both of Los Angeles, for appellant.

Dana R. Weller and Glen Behymer, both of Los Angeles, for respondents.

G. C. Mansfield, of Los Angeles, for defendant.

Everett W. Mattoon, of Los Angeles, for City School District.

Harry G. Sadicoff, of Los Angeles, for cross-defendants Harris & Harris.

PRESTON, Justice pro tem. This is an appeal by defendant Southern Surety Company from a judgment rendered in favor of defendant Patten & Davies Lumber Company for the sum of \$574.50, and from a judgment rendered in favor of defendant Noyes Marble & Tile Company for the sum of \$264.

The facts are not in dispute and are briefly these: Lewis Tucker, a contractor, entered into a contract with the plaintiff Los Angeles city school district on the 27th day of February, 1925, for the alteration and repair of a

school building in the city of Los Angeles for the contract price of \$2,298. On the same date said Lewis Tucker as principal and appellant Southern Surety Company as surety executed a bond in the sum of \$1,149, being 50 per cent. of the contract price, in compliance with the requirements of the act of 1919 (Stats. 1919, p. 487), entitled "An Act to secure the payment of the claims of persons employed by contractors upon public works, and the claims of persons who furnish materials, supplies * * * used or consumed by such contractors in the performance of such works, and prescribing the duties of certain public officers with respect thereto." This bond, by its terms, inured to the benefit of persons who furnished materials and performed labor on said school building. After the execution of said bond the said Lewis Tucker entered upon the performance of said contract. Among the persons furnishing materials were Patten & Davies Lumber Company and Noyes Marble & Tile Company, defendants and respondents herein.

The contract was completed by Tucker on the 30th day of April, 1925, and within 10 days thereafter, to wit, on the 9th of May, 1925, notice of completion was recorded in the office of the county recorder of Los Angeles county. The balance of the contract price due Tucker at the time of the completion of the building was \$574.50.

On May 20, 1925, a writing was filed with the board of education, signed by Lewis Tucker, reading as follows:

"Los Angeles, Cal., May 20th, 1925.

"Mr. C. F. Lenz, Auditor L. A. Board of Education—Dear Sir: I hereby authorize you to deliver my warrant for the sum of \$574.50, which is the 35-day payment for alterations to the old building at the Normandie Avenue School House, to Patten & Davies Lumber Co., this money being due them for material supplied by them for above mentioned work; said payment being due June 5th, 1925; when said warrant is ready for delivery I will endorse same to Patten & Davies at your office. Please notify me.

"Lewis Tucker, Contractor."

The board of education on June 1, 1925, caused to be entered upon its minutes the following:

"Regarding the contract for Alterations to the Old Building at the Normandie Avenue School, Lewis Tucker, Contractor:

"The Secretary reports that he is in receipt of a letter dated May 25, 1925, from Patten & Davies Lumber Company, enclosing an order signed by Lewis Tucker to deliver the amount of \$574.50, representing the final payment on the above-mentioned contract, to Patten & Davies Lumber Company.

"We recommend that a warrant of \$574.50, covering the final payment on the contract for Alterations to Old Building on the Normandie Avenue School site, be made payable

to Lewis Tucker, contractor, when said warrant becomes due and payable, but that the Auditor be authorized and requested to deliver said warrant to Patten & Davies Lumber Company in case it has not otherwise become encumbered, and that both Lewis Tucker, contractor, and the Patten & Davies Lumber Company be notified by the Secretary of this action."

A stop notice was filed by respondent Noyes Marble & Tile Company with said board of education on June 8, 1925. Thereafter the said board of education, through an interpleader complaint, tendered said sum of \$574.50 into court and requested that all interested parties litigate their claims therein. The parties to this action appeared and filed appropriate pleadings, but the only parties appearing at the trial were respondents Patten & Davies Lumber Company and Noyes Marble & Tile Company and appellant Southern Surety Company.

The trial court entered judgment in favor of Patten & Davies Lumber Company for \$574.50, by virtue of the order from Lewis Tucker dated May 20, 1925, above set forth, and directed the clerk to pay to Patten & Davies Lumber Company said sum, which had been deposited in court by said board of education.

Appellant contends that the evidence offered by respondent Patten & Davies Lumber Company was insufficient to constitute an assignment of the funds belonging to Lewis Tucker. Patten & Davies Lumber Company, on the contrary, contends that the writing of May 20, 1925, above set forth, from Lewis Tucker to the auditor of the board of education, constituted an equitable assignment of Tucker's claim to said sum of \$574.50.

[1, 2] No precise form of words or writing is necessary to the establishment of an equitable assignment. If, from the entire transaction, it clearly appears that it was the intention of Lewis Tucker and respondent Patten & Davies Lumber Company when the letter or order of May 20, 1925, was given, to pass title to the \$574.50 in the hands of the board of education to Patten & Davies Lumber Company, then an assignment will be held to have taken place. *Lawrence National Bank v. Kowalsky*, 105 Cal. 41, 38 P. 517; *McIntyre v. Hauser*, 131 Cal. 11, 63 P. 69; *Goldman v. Murray*, 164 Cal. 419, 129 P. 462; *McGown v. Dalzell*, 72 Cal. App. 201, 236 P. 941; *Dunlap v. Commercial National Bank*, 50 Cal. App. 480, 195 P. 688. Here we have an order signed by the contractor authorizing the board of education to deliver his warrant for the full amount due him under the contract to Patten & Davies Lumber Company, for materials supplied by them to him in the execution of his contract, and the board of education accepted the order. Patten & Davies Lumber Company relied upon this order and did not file any stop notice with said board of education.

We conclude that, under such circumstances, the trial court was warranted in holding that an equitable assignment had taken place.

[3] Appellant argues that a letter written by Tucker to the secretary of the board of education on June 24, 1925, shows that it was not the intention of Tucker when he gave the order on May 20, 1925, that said order should operate as an absolute assignment to Patten & Davies Lumber Company. We do not so understand the letter of June 24, 1925; it specifically recognizes the order theretofore given to Patten & Davies Lumber Company, but merely requests the board of education to handle the situation as they think proper, etc. Furthermore, the order of May 20, 1925, being sufficient to transfer the funds in the hands of the board of education from Tucker to Patten & Davies Lumber Company, any subsequent order or instructions given by Tucker regarding said funds would be of no effect.

[4] Appellant also contends that if Tucker did make an equitable assignment to Patten & Davies Lumber Company, such assignment would not take precedence over the claims of laborers and materialmen who had filed their claims in the manner provided by law, and further that such an assignment would not take precedence over the rights of appellant Southern Surety Company.

In the face of the undisputed evidence in the case at bar appellant's contentions are untenable. Said contract was completed by Lewis Tucker and accepted by said board of education on or about April 30, 1925. Under the terms of said contract final payment was to be made to Lewis Tucker *35 days after completion of work*, which would make the final payment *due and payable on June 5, 1925*. Noyes Marble & Tile Company filed its verified claim or stop notice for \$264 with said board of education *on June 8, 1925, or 3 days after the final payment was due Tucker under his contract*. No verified claim or stop notice was filed by any person prior to June 5, 1925. Therefore, on June 5, 1925, when the final payment fell due, there was no valid reason why Patten & Davies Lumber Company as assignee of Lewis Tucker was not entitled to collect the final payment from the board of education.

Appellant assumes in its argument that the 35 days for final payment under the contract did not begin to run until May 9, 1925, the date the board of education filed the notice of completion, and then argue that the 35 days would not expire until June 13, 1925, and that Noyes Marble & Tile Company's stop notice was filed June 8, 1925, or before the final payment was payable under the contract, and therefore Noyes Marble & Tile Company had priority over said assignment from Tucker to Patten & Davies Lumber Company to the funds in the hands of the board of education. This is erroneous; the 35 days began

to run under the contract when the alterations and repairs *were completed, which was April 30, 1925*.

If Noyes Marble & Tile Company had filed its stop notice *before* the 35 days expired under the contract, then it would have had the right to satisfy its claim out of the funds in the hands of the board of education before the assignment to Patten & Davies Lumber Company would be effective, but said stop notice being filed *after* the 35 days expired, and *after the final payment matured and was payable*, such claim is subordinate to and subject to said assignment. *Southern California Electric Co. v. McDonald et al.*, 178 Cal. 386-392, 173 P. 760; *Newport Co. v. Drew*, 125 Cal. 585, 58 P. 187; *Long Beach School District v. Lutge*, 129 Cal. 409, 62 P. 36; *Miles v. Ryan*, 172 Cal. 207, 157 P. 5; *Maryland Casualty Co. v. Shafer*, 57 Cal. App. 580, 208 P. 192.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

CITY OF SAN DIEGO v. CUYAMACA WATER CO. et al. (CITY OF EL CAJON et al., Interveners). (L. A. 10171.)★

Supreme Court of California. June 20, 1929.

Rehearing Granted July 18, 1929.

1. Courts ⇨93(1)—Right of pueblos and successors to use waters of rivers and streams cannot, under rule of stare decisis, be disturbed.

Under rule of stare decisis, the prior and paramount right of pueblos and successors to use of waters of rivers and streams passing through and over or under surface of allotted lands in so far as necessary for inhabitants and for ordinary municipal purposes, being rule of property, cannot be disturbed.

2. Waters and water courses ⇨140—Purported grant of water right to Mission of San Diego did not create right prior to that of pueblo.

Purported grant by viceroy of Spain to Mission of San Diego of right to use and benefits of waters of San Diego river held insufficient to create a right prior or paramount to right to use thereof by the pueblo of San Diego in so far as necessary for inhabitants and for ordinary municipal purposes.

3. Evidence ⇨11—Judicial notice is taken of public history.

The Supreme Court takes judicial notice of public history.

4. Waters and water courses ⇨140—Pueblo of San Diego on its establishment became invested with land and water rights, regardless of rights of mission.

Pueblo of San Diego upon its establishment became invested with whatever land and water rights it was entitled to under the laws, institutions, and regulations of Spain and Mexico, regardless of purported right to use of waters of San Diego river by the Mission of San Diego, which at that time either had ceased or would presently cease to be.

5. Waters and water courses ⇨138—Right to waters of stream by prescription requires adverse use under claim of right acquiesced in by those otherwise entitled thereto.

Nature of right claimed to have been acquired in waters of flowing stream by prescription rests as prime essential on adverse use thereof by claimant under claim of right which has, to extent thereof and for required term of years, been acquiesced in by person or persons otherwise entitled to ownership and enjoyment of such waters.

6. Waters and water courses ⇨138—City's failure to object to use of waters which at time of diversion did not interfere with present use did not create right by prescription.

Failure of city to object to use of waters of stream at time diversion thereof constituted no interference with right of city to use thereof did not operate so as to create a right by prescription or in favor of those using waters, the right of city being always uncertain and conjectural, depending upon particular needs of city or its inhabitants at each particular stage of its development as a municipality.

7. Waters and water courses ⇨152(2)—City's failure to object to use of river waters not interfering with own use did not defeat its right thereto on ground of laches.

Right of city of San Diego to use of waters of San Diego river was not defeated on ground of laches by reason of failure to object to use of waters by others at time diversion constituted no interference with present use.

8. Waters and water courses ⇨127, 152(2)—City's right to use waters of river was public right as respected prescription and laches.

Right of city of San Diego to use waters of the San Diego river constituted a public right as respected prescription and laches urged by others making use of waters of stream.

9. Estoppel ⇨52—Defense of estoppel rests on doctrine that party cannot assert defense because of certain facts and conditions rendering its assertion inequitable.

Defense of estoppel rests upon doctrine that a right conceded for purposes of such defense to exist in party, he shall not be permitted to assert against another to the latter's injury because of the existence and proof of certain facts and conditions which would render its assertion inequitable.

10. Estoppel ⇨62(8)—City was not estopped to assert prior right to waters of river because of failure to object to prior diversion.

Where diversion and use of waters of San Diego river did not at time of diversion interfere with any of the uses which the city of San Diego was making of the waters thereof, the city was not estopped to assert its prior right to use of waters by reason of its failure to object to use at time of diversion.

11. Waters and water courses ⇨140—Those diverting waters of river must be held to have known as matter of law of existence of city's preferential right thereto.

Those appropriating and diverting waters along upper reaches of San Diego river and its tributaries must be held to have known as a matter of law of the existence in the city of San Diego of a prior and preferential right to use of waters and to the assertion thereof whenever expanding needs of city or its inhabitants required it.

12. Territories ⇨6—United States in taking over Alta California did not adopt statutes of limitation as applicable to public lands or waters.

United States in taking over territory known as Alta California under the treaty of

Guadalupe-Hidalgo did not also take over and agree to adopt the statutes of limitation of either Spain or Mexico as applicable to lands or waters diverted to public use.

13. Estoppel ◯121—Findings held to establish that city was not estopped to assert prior right to use of river waters (Code Civ. Proc. § 1962, subd. 3).

Findings of trial court held to establish that city of San Diego was not estopped, under Code Civ. Proc. § 1962, subd. 3, from asserting prior and preferential right to use of waters in San Diego river in so far as necessary for inhabitants and ordinary municipal purposes.

14. Waters and water courses ◯140—Disturbing and disastrous consequences to others furnish no right to deprive city of prior and paramount right to river waters.

That prior and paramount right of city of San Diego to use of waters of San Diego river may be fraught with disturbing and even disastrous consequences affecting other users furnishes no reason for a deprivation of the city of its prior and paramount right to use thereof.

15. Action ◯6—Trial court's attempt in declaratory action to give determination further effect than that of declaratory judgment was erroneous.

Where city bringing declaratory action for purpose of having its prior and paramount right to use of waters of river established neither pleaded nor attempted to prove any facts entitling it to other or affirmative relief, an attempt of trial court to give determination any other or further effect than that of declaratory judgment was erroneous.

In Bank.

Appeal from Superior Court, San Diego County; M. W. Conkling, Judge.

Action by the City of San Diego against the Cuyamaca Water Company and others, wherein the City of El Cajon and others intervened, and wherein defendants filed a cross-complaint. From the judgment, all parties to the action appeal. Affirmed in part, and in part reversed.

James O'Keefe, Shelley J. Higgins, and Arthur F. H. Wright, all of San Diego, and Hunsaker, Britt & Cosgrove, of Los Angeles, for appellants.

Crouch & Sanders and Sweet, Stearns & Forward, all of San Diego, Philip Storer Thacher, of El Cajon, and E. V. Winnek, of San Diego, for respondents.

RICHARDS, J. This action was instituted by the city of San Diego, a municipal corporation, having for its purpose the determination of the question of its title to certain rights in and to the waters of the San Diego river to which the original defendants in said action were asserting and exercising certain adverse claims. The precise nature of this action was aptly described in certain earlier appeals to this court. In the case of Cuyamaca Water

Co. v. Superior Court, 193 Cal. 584, 588, 226 P. 604, 605 (33 A. L. R. 1316), it was thus stated: "In the pending quiet title action it will not, of course, be determined that the city is or is not entitled to any particular quantity of water. If the litigation terminates favorably to the plaintiff, the only right which will be established and determined to be vested in the city will be a right to the water and the use thereof prior and paramount to the defendants' rights therein, and then only to the extent necessary for the needs of the city and its inhabitants. The amount needed is necessarily uncertain and conjectural and dependent upon conditions such as rainfall and other established sources of supply. The subject matter of the action is the establishment of the priority of right, and not the quantity of water to be taken." In the case of City of San Diego v. Andrews et al., 195 Cal. 111, 231 P. 726, which was a proceeding in mandamus to compel the respondent judge of the superior court of the county of San Diego to proceed to hear and determine the present cause, this court restated in substance the purpose of the instant case. The importance of the foregoing clear concept of the nature and purpose of the present action will appear as we proceed with the consideration of the several issues involved therein. The original defendants in this action were Cuyamaca Water Company, a corporation, Cuyamaca Water Company, a copartnership, and certain individuals and the survivors and personal representatives of the members of said copartnership. The action was commenced in the early part of the year 1923, the amended complaint therein being served and filed on the 9th day of June, 1923. The defendants united in filing their demurrer to said amended complaint on June 18, 1923, said demurrer being both general and special and being based upon thirteen alleged grounds of demurrer. The demurrer was upon hearing overruled; whereupon and in December, 1923, said defendants served and filed their answer, embracing 17 separate defenses presented by the defendants jointly, and also a number of special defenses urged on the part of certain of said defendants individually. The defendants also presented and filed at the same time their cross-complaint, wherein they asserted affirmatively the particular foundation of their adverse claims to certain portions of the waters of the San Diego river over which the plaintiff was undertaking to have established its alleged prior and preferential right. To the defendants' answers and cross-complaint the plaintiff on December 21, 1923, served and filed its demurrer upon 42 specified grounds. Thereafter and while said demurrer was pending and undisposed of, certain other parties appeared separately in the action with applications for leave to intervene. These were one Carroll H. Smith, who in his proffer-

ed complaint in intervention alleged himself to be a resident, citizen, and taxpayer of the city of La Mesa in the county of San Diego, and also an owner of property within the La Mesa Lemon Grove & Spring Valley Irrigation District in said county, which said city and said irrigation district had for the sole source of water supply of each the waters of the San Diego river, which said waters they and each of them were receiving under and by virtue of an agreement with the defendant Cuyamaca Water Company, a copartnership, with which copartnership and the surviving members thereof the said petitioner wished to join in resisting the claim of prior and preferential rights thereto asserted by said plaintiff. The said Carroll H. Smith also alleged himself to be the owner of certain lands within the so-called Ex-Mission Rancho and to be thereby entitled to certain paramount and exclusive rights to the use of the waters of said river derived from grants of said rancho to his predecessors made by and under the Spanish crown. The La Mesa Lemon Grove & Spring Valley Irrigation District also and at the same time presented its application for leave to intervene in the action, basing its alleged right so to do upon its proffered complaint in intervention, wherein were set forth substantially the same averments as were embodied in the complaint in intervention of said Smith. In addition to these, the city of El Cajon, a municipal corporation, situate in the county of San Diego, also petitioned for leave to intervene, making substantially the same allegations as to the source and right of water supply from the waters of the San Diego river as were set forth by said other applicants for leave to intervene. The court upon a hearing permitted the several parties to file their respective complaints in intervention, and in due course the plaintiff, city of San Diego, presented and filed its several demurrers thereto. Thereafter the demurrers of the plaintiff to the answer and cross-complaint of the original defendants and also to the complaints in intervention of said several interveners were submitted to the trial court for decision; and the court in ruling thereon sustained the said plaintiff's demurrer to certain specified portions of the original defendants' answer and cross-complaint without leave to amend, and also sustained the demurrer of the plaintiff to certain other specified portions of said defendants' answer and cross-complaint with leave to amend. The trial court also at the same time overruled the plaintiff's demurrers to the several complaints in intervention. The effect of these several rulings by the trial court was that of determining as a matter of law that the city of San Diego had by virtue of its incorporation and right of succession become the successor and owner of those certain prior and preferential rights to the waters of the San Diego river with which, from its inception, the Pueblo of San Diego, as established in the

year 1834, had become invested by virtue of its formation under the laws of Spain and Mexico. The question as to whether as a matter of law the plaintiff, city of San Diego, had originally become invested with these prior and preferential rights in and to the waters of the San Diego river by virtue of its succession to whatever rights of that nature existed in the Pueblo of San Diego, is thus presented upon this appeal, involving as it does the correctness of the aforesaid rulings of the trial court touching that point upon demurrer. As to the issues presented by those other specified portions of the original defendants' answer and cross-complaint, and which involve the question as to whether the plaintiff had lost its original superior right to the waters of the San Diego river, derived from said source by prescription, or by laches or by estoppel operating in favor of some or all of said defendants and their successors in interest, the trial court permitted said defendants to present amended pleadings, and upon their doing so overruled the plaintiff's later demurrers thereto; and having already overruled the plaintiff's demurrers to the several complaints in intervention, and the interveners having also amended their pleadings so as to embrace and conform to the defendants' amended answer and cross-complaint, and the plaintiff having answered the interveners' complaints and the amended cross-complaint of the defendants, the cause was thus brought to issue and proceeded to trial upon the disputed questions of fact thus presented. The cause was tried without a jury; a large mass of evidence was presented involving the testimony of many witnesses and the introduction of numerous exhibits, thus creating a record of unusual proportions, upon which was superimposed briefs and arguments of counsel evincing extraordinary effort, diligence and research. The cause was finally submitted to the trial court for its decision, and in due course the findings and conclusions of law of the trial court were filed, the correctness and sufficiency of which furnish the weighty burden laid upon this court in its determination of the merits of the several appeals, which have been taken and are being prosecuted by all of the parties to this action. By the findings, conclusions of law, and judgment based thereon of the trial court it was found and determined:

"That about the year 1834 there was founded, and until about the year 1850 there continued to exist upon what is now the site of The City of San Diego, a certain Mexican pueblo then designated and ever since known as the Pueblo of San Diego; that the location and site of said Mexican Pueblo of San Diego at the time the same was founded, was, ever since has been, and now is, situated and located upon the banks of a certain unnavigable river or stream, then, ever since and now known as the San Diego River; that said

stream at the time of the organization of said Pueblo of San Diego and at all times thereafter during its existence flowed into and through said pueblo, and the banks and bed of said stream from the mouth to the easterly territorial limits of said pueblo a distance of approximately five miles, were located and lay entirely within the territorial limits and formed a part of the lands and waters of said Pueblo of San Diego.

"That said Pueblo of San Diego and the inhabitants thereof from its organization during the entire time of its existence, enjoyed, asserted and exercised a preference or prior right to the use of the waters of said San Diego River for the benefit of said pueblo and the inhabitants thereof.

"That said preference or prior right of said pueblo and of the inhabitants thereof to the use of all the waters of said river necessary to supply the domestic wants of the inhabitants of said pueblo, to irrigate the lands thereof, and for other municipal purposes within the general limits of said pueblo, was a right, and the distribution of said waters for such purposes by the pueblo authorities was a trust created, imposed and recognized by the laws, orders and decrees of the government of the Kingdom of Spain and the Republic of Mexico.

"That the plaintiff herein, The City of San Diego, was incorporated on or about March 27, 1850, and thereupon became the successor and ever since has been the successor of said Mexican Pueblo of San Diego, and as such successor to said Mexican Pueblo succeeded to and acquired all the rights and privileges theretofore held or exercised by said Pueblo of San Diego and in particular as the successor of said Mexican Pueblo of San Diego said The City of San Diego succeeded to and acquired all the rights and privileges theretofore enjoyed, asserted and exercised by said Pueblo of San Diego in and to the waters of said San Diego River; that since said incorporation said The City of San Diego, as the successor to said Mexican Pueblo, has at all times enjoyed, asserted and exercised a right of priority in and to the use of all the waters of said San Diego River necessary or convenient for the use of said The City of San Diego and the inhabitants thereof, and has not in any manner, nor to any extent, surrendered, forfeited or abandoned said rights, save and except in the manner and to the extent herein-after found and declared.

"That the San Diego River is an unnavigable natural stream of water located wholly within the county of San Diego, state of California, and takes its rise in the Cuyamaca Mountains in said county on the southerly and westerly slopes thereof, and flows in a south-westerly direction approximately fifty miles from its source until it reaches the easterly boundary of The City of San Diego, formerly the easterly boundary of said Pueblo of San Diego, from which point said river flows west-

erly through said The City of San Diego a distance of approximately five miles, discharging its waters into the Pacific Ocean through Mission Bay in said city and county."

From the foregoing findings and judgment of the trial court, omitting therefrom the expressed exceptions, the defendants and interveners have taken and prosecuted their appeal, and they present exhaustively several most interesting propositions in support thereof. They argue as the first of these that the trial court was in error in holding as a matter of law that the Pueblo of San Diego by virtue of its organization as such became entitled, under the Spanish and Mexican laws, to any prior or preferential right to the waters of the San Diego river passing above and underground through the allotted leagues which were to constitute the area of the pueblo lands. In support of this argument counsel for said appellants would have us go back even prior to the Christian era and consider in our review the history of civilization in so far as the same relates to the slow, involved, and obscure development of the civil and religious institutions of ancient and medieval Spain. If for the first time in the history of our California jurisprudence such a review was being asked, or such an elaborate argument as these appellants now urge was being presented, we might be disposed to consider as persuasively as we have now read interestingly the pages upon pages of Spanish history collated in that behalf. But the difficulty with the situation which appellants' diligent counsel now seek to have us reconsider is that the same question has already and on several occasions, early and late, been presented to and passed upon by this court in decisions which are uniformly adverse to the appellants' present contention. While there were other and earlier cases in the courts of this state and even in the Supreme Court of the United States which touched upon the subject of the formation of pueblos under the laws, institutions, and regulations of Spain applicable to the settlement and development of lands in what had become known as "New Spain and the Indies," the great leading case upon the subject applying these laws, institutions, and regulations particularly to those pueblos which had come into existence in California under both the Spanish and Mexican dominions, is the case of *Hart v. Burnett*, 15 Cal. 530 to page 624, wherein Mr. Justice Baldwin, Mr. Chief Justice Stephen J. Field concurring, discussed at great length and with much learning the nature and extent of the rights which inhered in such pueblos by virtue of their foundation in those lands which lay within their immediate vicinage and beyond this to the extent of the additional four leagues of surrounding lands allotted to such pueblos as a result of their formal establishment as civil governments or quasi municipalities. It is not necessary to further refer

to this leading case in other terms than those to which it has been referred to and commented upon by later decisions of the courts of this state and of the United States. In the case of *Townsend v. Greely*, 5 Wall. 326, 336, 18 L. Ed. 547, the effect of that earlier decision was briefly but clearly stated by Mr. Justice Field, who wrote the latter decision; and his language as used therein was quoted approvingly by this court in the case of *Hale v. Akers*, 69 Cal. 160, 166, 10 P. 385, which was presently to hand down its decision in the case of *Lux v. Haggin* in the following month of the same year and which is reported in 69 Cal. 255, 454, 4 P. 919, 10 P. 674. In this latter decision, which is the longest and most exhaustively treated cause in the history of California jurisprudence, Mr. Justice McKinstry, who wrote the opinion, went over the entire ground of the land and water rights of the owners of each in California whose title thereto looked for their derivation to the laws, institutions, and regulations of Spain and Mexico. In the course of his most learned and comprehensive dissertation he referred approvingly to the decision in *Hart v. Burnett*, supra, as to the right and title which the pueblo had to land within its general limits. The court then proceeded to say: "By analogy and in conformity with the principles of that decision, we hold the pueblos had a species of property in the flowing waters within their limits, or 'a certain right or title' in their use, in trust to be distributed to the common lands, and to the lands originally set apart to the settlers, or subsequently granted by the municipal authorities. It may be conceded that such authorities were not authorized to make concessions to individuals of the perpetual and exclusive use of portions of the waters, without reference to the needs of the other inhabitants; or that such concessions would be an abuse of the trust. But they had a species of right or title in the waters and their use, subject to the public trust of continuously distributing the use in just proportion. * * * Each pueblo was quasi a public corporation. By the scheme of the Mexican law it was treated as an entity, or person, having a right as such, and by reason of its title to the four leagues of land, to the use of the waters of the river on which it was situated, while as a political body, it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred." After quoting certain passages from Eschriche, an eminent Spanish authority upon the subject, the court further proceeded to say: "From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on a stream should have given to the waters; and *semble* that the pueblos had a preference or prior right to

consume the waters even as against an upper riparian proprietor." The court, however, suggested that it "is not necessary here to decide that the pueblos had the preference above suggested. Nor is it necessary here to speak of the relative rights of two or more municipalities on the same stream." In the next and later case of *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237, 251, 39 P. 762, the question directly arose. In that case the Vernon irrigation district, a corporation, owning a tract of land riparian to the upper reaches of the Los Angeles river, commenced its action to enjoin the city of Los Angeles, which was and is the successor of the pueblo of Los Angeles, and certain other defendants, from so diverting the waters of the Los Angeles river as to interfere with the plaintiff's riparian right therein. The city of Los Angeles by its answer put forth the claim that by virtue of its succession to the rights of the pueblo of Los Angeles, founded in 1786, it possessed the prior and preferential right to take all of the waters of the Los Angeles river. The trial was prolonged and the findings of the trial court voluminous, in the course of which it was found and decreed that the city of Los Angeles, by virtue of its succession to the rights of said pueblo, was the absolute owner of all of the water flowing in the Los Angeles river for the use of its inhabitants and for all other municipal purposes. From the judgment in its favor based upon this finding, the plaintiff took an appeal and thus presented to this tribunal for determination the correctness of the aforesaid finding of the trial court. This court, Mr. Justice Temple writing the opinion, gave its most careful and exhaustive consideration to the determination of this question, in the course of which he quoted exhaustively from the Spanish and Mexican law, approving the principles enunciated in the case of *Hart v. Burnett*, supra, and which were adopted by this court in *Lux v. Haggin*, supra, and quoted also with approval the language of the latter case above referred to and wherein it had been suggested, though not in that case found necessary to be decided, that the pueblos had a preferred right to the waters of rivers flowing through their lands, which could be asserted to the extent needed to supply the wants of their inhabitants. There were other questions presented in that case not necessary to be here considered, but it must be conceded that the question as to the prior and preferential right of a pueblo to the waters of a river passing through it to the extent above indicated was therein squarely presented and fully upheld by the terms and scope of that decision, and that the later formed municipality organized as the successor of the pueblo fully succeeded to these rights to which the pueblo had become entitled by virtue of its creation under the Spanish and Mexican laws.

The next case wherein this question arose was that of *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 650, 57 P. 585, which was an action in which the city of Los Angeles undertook to condemn certain lands lying in the San Fernando valley along the Los Angeles river and to which stream said lands were riparian, for the purpose of utilizing the same, collecting and conserving the waters of said stream for delivery to the main supply pipe and distributing system of said city. The plaintiff based its claim of right to condemn the land in question for the utilization of its asserted right to the waters of said river, in part at least, upon the averments of its amended complaint to the effect that the city, as the successor of the pueblo, was the exclusive owner of all of the waters of said river for the purpose of supplying its inhabitants with water for domestic uses and also of supplying water for the irrigation of the irrigable lands embraced in the four square leagues of the pueblo, and for other municipal uses. These averments were traversed by the defendants. The cause was tried before a jury, to which the court gave the following instruction: "The city of Los Angeles is situated on the river below these lands, and is the owner of the right to take from the Los Angeles river all the water that is reasonably necessary to give an ample supply for the use of its inhabitants and for all municipal uses and purposes for which the city may require water. This right is measured by the necessity, and if the needs increase in the future the right will expand to include all that the needs require. This right of the city is paramount and superior to the rights of the defendants in the waters of the river." This court, upon appeal, Mr. Chief Justice Beatty writing the opinion, fully sustained said instruction in so far as it correctly stated the paramount and superior rights of the city to whatever expanding uses of the waters of said river the pueblo by virtue of its formation possessed, and in so doing expressly approved in principle the case of *Vernon Irr. Co. v. Los Angeles*, supra; the court, however, held that the instruction was erroneous in according to the city of Los Angeles greater rights to the waters of said river than those which, as the successor of the pueblo, it had received from it. The next case in which the same question controversially arose was that of *City of Los Angeles v. Los Angeles Farming & Milling Co.*, 152 Cal. 645, 93 P. 869, 1135, wherein the city of Los Angeles asserted its prior and paramount ownership of the use of the waters of the Los Angeles river from its source to the city and from the surface to bedrock in so far as it was necessary to supply water for the use of its inhabitants, by virtue of its successorship to the pueblo and against the asserted riparian rights of the defendant, based upon its ownership of riparian lands lying along said river some

ten miles above said city. The trial court accorded the plaintiff such right, and upon appeal this court, Mr. Justice McFarland writing the opinion, after stating that the only question in the case was as to whether "under the general law of the locality the old pueblo of Los Angeles, and the respondent herein, as its successor, had and has as against appellant the prior and paramount ownership of the use of so much of the water of the Los Angeles river as is necessary for its inhabitants and for general municipal purposes," proceeded to state that "this question need not be discussed as an original one, for it has been answered in the affirmative by former decisions of this court." The cases which are above referred to are there reviewed at length and expressly approved, and after such review and approval it is said: "The foregoing decisions are determinative of the prior and paramount right of the pueblo, and of plaintiff as its successor, to the use of the water of the river necessary for its inhabitants and for ordinary municipal purposes. The question as to what extent this right goes, a question somewhat considered in the *Pomeroy Case*—that is, for the use of the inhabitants of what territory, and for what municipal purposes can the water be taken as against a riparian owner—does not arise and need not be considered in the case at bar." Neither, it may be said, does this latter question arise in the present case. The law and the attitude of this court toward the law upon this subject stood as above stated during the twenty years which preceded the presentation of the same question to this court in the case of *Cuyamaca Water Co. v. Superior Court*, supra, which was a prior appeal in the instant case, and in which the issues primarily involved were those quoted from in that decision in the earlier stages of the present opinion.

[1, 2] The appellants herein contended in the trial court, and here contend, that they were and are entitled to have reconsidered and relitigated the question as to whether or not a Spanish or Mexican pueblo organized in California under the laws, institutions, and regulations of Spain or Mexico during their successive governments thereof, became possessed by virtue of such laws, institutions and regulations of a prior and paramount right to the use of the waters of rivers or streams passing through and over or under the surface of their allotted lands so far as may be or become necessary for the pueblo and its inhabitants, and as to whether or not a municipality organized under American rule as the successor of such pueblo succeeded to such pueblo rights. We are of the opinion that by virtue of the foregoing long line of cases, and particularly of the decision of this court in the case of the *City of Los Angeles v. Los Angeles Farming & Milling Co.*, supra, wherein the cases preceding it were specifically reviewed and held to be determinative of this

question, the subject is no longer an open one for further consideration and review before this court, and that by said decisions, so long and uniformly followed and adhered to, the proposition that the prior and paramount right of such pueblos and their successors to the use of the waters of such rivers and streams necessary for their inhabitants and for ordinary municipal purposes, has long since become a rule of property in this state, which at this late date in the history and development of those municipalities which became the successors of such pueblos we are not permitted, under the rule of *stare decisis*, to disturb. In so deciding we are not unmindful of the fact that counsel for the appellants herein have strenuously asserted throughout that the pueblo of San Diego was never so organized and established as such so as to have become entitled to a prior or paramount or any right or rights whatever in the waters of the San Diego river. In so far as this question was raised and presented by the pleadings in the trial court as a question of fact, we are satisfied from an examination of the extensive record herein that the evidence touching this subject was, to say the utmost of it, conflicting in such of its material and substantial aspects as to render the conclusions of the trial court in that aspect of the case binding upon this tribunal. We are also not unmindful of the contention elaborately presented and argued by counsel for appellants that the pueblo of San Diego, even if conceded to have been regularly established as such in the year 1834, never became entitled to any prior, preferential, or other rights in or to the waters of the San Diego river, for the reason that long prior to the alleged establishment of said pueblo the entire and exclusive right to the use and benefit of the waters of said river had been granted by the viceroy of Spain to the Mission of San Diego. In support of this contention the appellants introduced in evidence before the trial court and have here presented for our inspection and interpretation a photostatic copy of such purported grant. It bears the date, according to the translation thereof with which we have been kindly furnished, of the 17th of December, 1773, and the signature, by secretary, of Bucarely, the then viceroy of the King of Spain over Mexico. It purports to approve the removal of the Mission of San Diego from its former location near the Presidio on the shore of the bay of San Diego to a new site several miles up the arroyo, and in order to facilitate such removal and the development of the then small and in a sense still speculative and quite problematical success of the first mission established in Alta California, it proceeded to suggest the cultivation of its surrounding lands through the use of water from the stream, and for that purpose directs the "Reverend Fathers of the Mission to acquire

and administer this concession and Royal grant (*privilegio*) to the waters of this arroyo referred to for the common benefit of all the nation, whether Gentile or converted, who dwell today or in the future in the province of the Mission of San Diego de Acala. This concession and the fruits also shall be held (*ser tener*) as to these children and their children and successors forever." The document proceeds to state in immediate connection with the foregoing that: "Although a Presidio is thus placed near to the entrance of this stream near to the Port of San Diego there can be no prejudice in this respect because there is always sufficient water for the service of the soldiers, and in the topography and report of Sr. Don Miguel Castro there is evident to the south of this place a worthy river and a torrent smaller in flow and some smaller arroyos from which to drain (*disaguas*) the Rancho del Rey where their cattle may wander under the vigilant eye of the herdsman." We are loath to believe that the viceroy of Mexico, framing this document in the then far distant capital of New Spain, ever intended by its terms to confer upon this primitive and as yet largely experimental mission settlement any such enlarged, prior, paramount, or exclusive rights in and to the waters of the San Diego river as the appellants herein claim for it. Its language does not so import and it may be said to be doubtful, to say the least of it, whether even the viceroy of the Kingdom of Spain in making such a concession would not have done violence to those laws, institutions, and regulations of Spain which provided for the establishment of civil governments of the sort known as pueblos in new lands so as to take away from these the whole of those water rights in rivers traversing their allotment of land which would be essential to the cultivation of such lands when occupied by civil settlement.

[3, 4] We learn from public history, of which we take judicial notice, that the civil settlement of Alta California was coequally contemplated by those who were officially in charge of the primary expedition which only four years before this purported grant had been put forth and provisioned for the discovery and occupancy of Alta California through the joint effort of Padre Junipero Serra and of Jose de Galvez, visitor general of New Spain. In the broad and detailed plans and express decrees of the latter, precise provision was made for the foundation and development of presidios, pueblos, and missions in the as yet unknown region, and these three forms of occupation were expected, as nearly as possible, to proceed simultaneously as a result of the joint military, civil, and religious expedition then about to set forth. It may be fairly assumed that these joint settlements designed to be established simultaneously were also intended to function harmoniously

and not to become involved in disputes over the respective jurisdiction and property rights of each. That such did not prove to be the consequence in all cases is beside the mark, since we do not in this case find it necessary to finally determine the scope and intent of Bucarely's concession to the Mission San Diego in respect to its new location. The reason we are not called upon to do so is that according to evidence educed herein the Mission of San Diego was in or about the year 1834 secularized by Governor Figueroa of Alta California and his official coadjutors purporting or pretending to act in so doing under decrees of the Mexican government enacted in the preceding year. It is not necessary for us to herein determine whether or not the secularization of the Mission San Diego, put into effective operation in that and the following year or two, was in all or any of its aspects lawful. It is sufficient to note that by the consensus of both the civil and ecclesiastical historians of the time and event it was successful and that within a very few years at most the spoliation of the mission was so far completed that its productive activities had ceased, its Indians and its priesthood had departed, the former to relapse into their aboriginal condition and the latter to seek and find other fields of labor. The mission life in fact was destroyed and the mission lands which by virtue of its secularization were to become part of the public domain were within a decade thereafter conveyed by private land grant executed by Governor Pico to one Santiago Arguello, whose grant of the same was subsequently confirmed by the board of commissioners for the settlement of private land claims created by the United States government in 1851, and a patent therefor issued to said grantee a few years later. It has not been seriously, as it could not be successfully, contended herein that any of the original rights of the mission or of its founders or their successors derived from Bucarely's concession either survived the secularization of the mission or passed to Arguello or his successors by virtue of his private land grant and the confirmation thereof by the government of the United States. It follows necessarily that upon the establishment of the pueblo of San Diego in the year 1834 as found by the trial court it became invested with whatever land and water rights it was entitled to under the laws, institutions, and regulations of Spain and Mexico and that in the possession and continued exercise of those rights it was nowise impeded or impaired by the existence of any similar or even superior rights in the Mission of San Diego which either had ceased or would presently cease to be. There is therefore no merit in the contention of the defendants herein that they or any of them by virtue of their occupancy of the former mission lands are to be held the successors of

whatever rights the mission had, since the entire right and title of the present occupants of such lands relates as to its origin solely to the Arguello grant.

We have thus, we think, disposed of every vital question presented by the defendants as appellants from that portion of the judgment of the trial court as to which the plaintiff herein is the respondent, and it only remains for us to consider and dispose of those portions of said judgment as to which all of the parties herein have prosecuted their separate appeals. In that portion of the findings of the trial court which are quoted in the earlier passages of this opinion, it will be seen that the prior and preferential rights of the city of San Diego as the successor of the pueblo were made subject to certain exceptions to be in said findings subsequently set forth. In these, its later findings, the trial court deals with those special defenses of said defendants and also of said interveners wherein it is pleaded and sought to be proven that, whatever prior or preferential rights in and to the waters of the San Diego river the city of San Diego had or acquired by virtue of its succession to the pueblo of San Diego, it has subsequently and either wholly or partly lost by prescription or by laches or has become estopped to assert as against these defendants and interveners through certain alleged affirmative action on the part of itself or its authorized officials.

On the threshold of the discussion as to the nature of these several defenses and, if available at all to the defendants, the extent to which they or any of them should be given application in the instant case, it will be well to recur to the statement made by this court upon the former appeal in *Cuyamaca Water Co. v. Superior Court*, 193 Cal. 584, 588, 226 P. 604, 33 A. L. R. 1316, and which is quoted in the early pages of the present opinion, and from which it will appear that the plaintiff herein is not seeking by this action to have it determined that it is entitled to any particular quantity of water, based upon its prior or present use of the waters of the San Diego river, to the extent of its asserted prior and paramount rights therein. The plaintiff in its pleadings asserts no such use of said waters in the past by either its predecessor the pueblo or itself, further than such use thereof under such claim of right as was from time to time necessary for the needs of the pueblo and its successor the city. On the other hand, the defendants and interveners herein have both by their pleadings, their proofs, and their argument, asserted and shown that neither the pueblo nor the city of San Diego ever did, prior to the institution of the present action, make actual use of any considerable amount of the waters of the San Diego river for any public or municipal or other purpose whatever, and that during the entire history of both pueblo and city the larger part of the

waters of the San Diego river, except for the uses thereof undertaken by the defendants and interveners herein, would have flowed through and past said plaintiff and gone unused to the sea. In the findings of the trial court no finding is made and no estimate given as to the quantity of the waters of said river which the plaintiff or its predecessor had made use of, nor is there to be found either in the findings of the court or in the evidence in the case anything tending to establish that whatever actual uses or diversions of the waters of said river the defendants and interveners herein, or any of them, are shown to have made, ever resulted in a diminution in any appreciable degree of the amount of flow of the waters of said river which the plaintiff herein or its inhabitants were from time to time putting to actual use under or in pursuance of the exercise of the city's aforesaid prior and preferential right to the waters of said river. It is important to thus bear in mind the purposes of this action and the pleadings and proofs therein in any consideration of the merits of the defenses of prescription, laches and estoppel urged by the defendants and interveners herein. In dealing with these defenses it is also important to bear in mind the nature of each and the differences, if any, between them.

[5, 6] The nature of the right claimed to have been acquired in the waters of a flowing stream by prescription rests as a prime essential upon an adverse use thereof by the claimant under a claim of right which has, to the extent thereof and for the required term of years, been acquiesced in by the person or persons otherwise entitled to the ownership and enjoyment of the waters thus adversely abstracted from said stream and to enforce these rights by appropriate action. It is needless to cite authorities to a proposition thus deeply grounded in the law of waters; but there are certain instructive cases which bear directly upon the situation of the parties to this action as disclosed by the record herein. The first of these is the case of *Anaheim Water Co. et al. v. Semi-Tropic Water Co.*, 64 Cal. 185, 30 P. 623. This was a case which involved certain alleged conflicting riparian rights to the diversion of the waters of the Santa Ana river, which formed the dividing line between two ranchos, from the owners of one of which the plaintiffs had derived by grant the right to use a certain definite amount of the waters of said river, to which the lands of the grantor were riparian, and of the other of which the defendant was the owner and was entitled to all of the riparian rights incident to such owner unless the same or some portion thereof had been lost by prescription. The trial court found that the plaintiff for many years had openly, notoriously, and continuously appropriated and used the waters of said river to the full capacity of their ditch, claiming the right so to do ad-

versely to all the world; but the court also found that prior to a year or so before the commencement of the action such diversion and use on the part of the plaintiffs, even though thus claimed to have been done adversely, had never interfered with the use which the defendant during the same time was making of said waters, and that with the exception of the aforesaid brief time before the commencement of the action there had at all other times been sufficient water flowing in the river to supply the wants and demands of all of the parties to the action. In dealing with that situation this court (page 192 of 64 Cal. [30 P. 625]) said: "In the face of such facts as these, how can we be expected to hold that as against the owners of the Santiago Rancho the plaintiffs have established any prescriptive right? In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the right of the party against whom it is set up. The enjoyment relied upon must be of such a character as to afford ground for an action by the other party. This is thoroughly settled. Now it is very clear that while there was sufficient water flowing in the river to supply the wants and demands of all the parties, its use by one could not be an invasion of any right of any other; and as the court below found, as a fact, that until within a year or two prior to the commencement of the action, there was sufficient water flowing in the river to supply the wants and demands of all the parties, it is plain that the plaintiffs as against the owners of the Santiago Rancho have acquired no right by prescription." The next case to which we would refer is that of *Faulkner v. Rondoni*, 104 Cal. 147, 37 P. 883, wherein (without stating the facts of the case) we find that the doctrine above announced was expressly approved; the trial court having found that during the period claimed to have given rise to the prescription there had been sufficient water in the stream for the uses of all of the parties to the action and that therefore there had been no such invasion of the rights of one which could form the basis of a prescriptive right in the other. In the quite recent case of *Pabst v. Finmand*, 190 Cal. 128, 211 P. 11, the doctrine above quoted from *Anaheim Water Co. v. Semi-Tropic Water Co.*, supra, was again approved; the court saying that the use by the adverse claimant "was not hostile unless there was an actual clash between the rights of the respective owners. While there was sufficient water flowing down the stream to supply the wants of all parties, its use by one was not an invasion of the rights of the other." The principle enunciated in the foregoing cases has direct application to the situation presented in the case at bar. The city of San Diego, by virtue of that prior and preferential right which it derived from the pueblo "to the use of all of the waters of the San Diego river necessary to sup-

ply the domestic wants of the inhabitants of said pueblo, to irrigate the lands thereof and for other municipal purposes within the general limits of said pueblo," has never thus far in its history possessed and is not now asserting any right of action to prevent the actual diversion of any quantity of the waters along the upper reaches of the San Diego river or its tributaries, whether undertaken by the defendants and interveners herein or their predecessors, or any other persons whatever, which has not at any particular time interfered with such exercise of its aforesaid rights in the waters of said river as from time to time in the course of its growth and history as a municipality it became possessed of. The right of said city was thus always "uncertain and conjectural," depending upon the particular needs of the city or its inhabitants at each particular stage in its development as a municipality, and it would be the height of unreason to hold that the pueblo in its primitive beginnings and the city in the infancy of its corporate life should have been bound to be continually taking arms against users of the upper waters of the stream to an extent which constituted no interference with its present use or right to use such waters at the time of such diversion. It follows that for this reason also no right by prescription exists or has ever existed in favor of these defendants and interveners or either or any of them arising out of their asserted adverse use of the waters of the San Diego river. The city is not in this action asserting a present right to any such remedy, but, on the contrary, and in the language of our earlier opinion, "the subject of the action is the establishment of the priority of right and not the quantity of water to be taken." It thus appears that the present action is not in any sense remedial but is purely declaratory in its nature and in the relief which, in so far as the plaintiff is concerned, is sought thereby.

[7, 8] With respect to the defense of laches which the defendants and interveners present and urge little need be said, since what has been immediately heretofore stated fully applies to such defense. The city of San Diego and its officials could not in reason be charged with laches in the assertion of something with respect to which no right of assertion existed and with respect to which no adverse invasion has thus far occurred. There would seem to be another and all-sufficient reason why the defense of prescription and of laches ought not to be available to the defendants as against the plaintiff in the present action. The right which the pueblo of San Diego and the plaintiff herein as its successor acquired in the waters of the San Diego river by virtue of the pueblo foundation was essentially a public right and, to employ the language of the findings of the trial court, "was a right and the distribution of such waters by the pueblo authorities was a trust created, imposed and recognized by the laws, orders and

decrees of the Kingdom of Spain and the Republic of Mexico." In the case of Cuyamaca Water Co. v. Superior Court, *supra*, this court adopted the language upon this subject used in *Lux v. Haggin*, *supra*, wherein it was stated that: "The occupants of lands within the city, the pueblo's successor, are beneficiaries only to the extent that they are entitled to the use of such water and at such times as accords with the laws regulating the public and municipal trust." In the case of *Vernon Irrigation Co. v. Los Angeles*, *supra*, it was stated, with special reference to the rights to the waters of the Los Angeles river which the city had derived from the pueblo of Los Angeles, that "the waters of all rivers were, under the Spanish and Mexican rule, public property * * * for the use of the inhabitants." If this be true, it follows necessarily that the public right and public trust which the pueblo and its successor, the city of San Diego, had in these waters in no respect differed from those other public rights and properties which the state and its various subdivisions and agencies possess and administer; and it has been uniformly held that such public rights cannot be lost nor the public trust as to their administration and exercise be destroyed either by adverse possession or by laches or other negligence on the part of the agents of the state or municipality who may from time to time be invested with the duty of their protection and administration. *People v. Kerber*, 152 Cal. 731-733, 93 P. 878, 125 Am. St. Rep. 93, and cases cited. The case of *Ames v. City of San Diego*, 101 Cal. 390-392, 35 P. 1005, will, when carefully examined, be found to fully uphold this view. We are therefore of the opinion that for the above additional reason the defenses of prescription and laches urged by the defendants and interveners herein cannot be upheld.

[9-11] The defense of estoppel, however, rests upon an entirely different foundation in both law and fact from that underlying the foregoing two defenses. The defense of estoppel rests upon the doctrine that a right conceded for the purposes of such defense to exist in a party, he shall not be permitted to assert against another to the latter's injury because of the existence and proof of certain facts and conditions which would render its assertion inequitable. The question as to the application of this well-defined legal proposition as between the parties to an action must in the nature of things depend upon the facts of each particular case. Whether the facts of this particular case are such as to permit the application of this doctrine to the plaintiff in its capacity as a municipal corporation and with respect to the latter's "prior and preferential right to the waters of the San Diego river," as above defined, is the problem to which we must finally devote our attention. The essential facts as developed in the evidence adduced herein, bearing upon this problem, are not, with certain exceptions to be

noted, the subject of material dispute. The original defendants in this action were Cuyamaca Water Company, a copartnership, and certain parties alleged to be surviving members or the legal representatives of certain deceased members thereof; also Cuyamaca Water Company, a corporation, which does not seem to have much to do with the case. The evidence in the case, stated as concisely as possible, discloses that in the year 1885 the San Diego Flume Company was organized for the purpose of developing the water supply along the upper reaches of the San Diego river and its tributaries which had theretofore been undeveloped and largely unused, with a view to conserving and utilizing the same upon the region lying between the city of San Diego and the mountains, wherein that stream and its tributaries had their source, and the lands of which region prior to said time being semiarid, had been but thinly populated and little used. In the course of this development and during the next few years the San Diego Flume Company expended large sums of money, estimated by the trial court to have been in excess of \$1,000,000 in the creation of dams, diversion works, pumping plants, ditches, and flumes for the diversion and distribution of said waters to an extent hereinafter to be stated. The Cuyamaca Water Company, a copartnership, ere long succeeded to the rights and property of the San Diego Flume Company, and during the intervening years between 1889 and the date of the institution of this action has augmented the expenditures, continued and extended the activities, and administered the resources thus derived from its predecessor with the resultant effect that within the wide region reached and benefited by the aforesaid development and distribution of the waters of said river, to the extent hereafter to be noted, an extensive productivity has been attained; orchards, vineyards, farms, and homes have been created, and cities and towns have been established, such as the city of La Mesa, the city of Lemon Grove, the city of El Cajon, and other growing communities containing as a whole several thousand inhabitants and constituting prosperous centers of civic and community life, and all of which have during all the years of their creation and growth received their water supply from the waters of said river as thus developed and distributed by or through the Cuyamaca Water Company. Of recent years certain irrigation districts have been formed and are being operated within said region and one of these, to wit, the La Mesa, Lemon Grove, and Spring Valley irrigation district, has recently secured an option district, has recently secured an option upon, if not actually acquired, all of the rights and properties of the Cuyamaca Water Company, and has thus become the principal party in interest in the eventuality of the present action in so far as the defendants and interveners are concerned. The legal founda-

tion of the San Diego Flume Company and also of its successor, the Cuyamaca Water Company, rested originally in certain formal appropriations located in due course of the laws permitting the same along the course of said river and its tributaries and to an amount in the volume of water claimed to be as herein-after stated. In pursuance of these appropriations certain quantities of said waters have been diverted and distributed to an extent also hereinafter to be designated. It would seem also that certain of the defendants put forth certain claims of right herein, depending upon their alleged ownership of certain lands riparian to said stream. During all of the earlier years of the activities of the San Diego Flume Company and of the Cuyamaca Water Company in the appropriation to the extent thereof of the waters of said river and also of the diversion and distribution thereof to the volume and extent thereof, and during all of the earlier years of the settlement, development, and growth of the region and of the several corporate communities therein as a direct result of the application of said waters to said otherwise semiarid region, the city of San Diego regarded quiescently, and in fact it may be said approvingly, the foregoing development of its "back country" through the aforesaid appropriation, diversion, and use of the waters of the San Diego river. It had every reason so to do and it had no reason to do otherwise, since its own advancement, progress, and prosperity in both business and population were being greatly enhanced thereby, and since also its own actual uses of the waters of said river were being in no wise diminished or impaired. It is true, as averred by the defendants and interveners herein and as found by the trial court, that the city of San Diego on various occasions in its municipal history and through its successive legislative bodies has granted certain rights and privileges to private persons and corporations to develop water by wells and works of various kinds within the limits of the former pueblo lands, and has even contracted to purchase such works when constructed and such water when developed for the use and benefit of the inhabitants of said city; but it is also true as found by the trial court that none of these arrangements was made with any predecessor of the defendants or interveners herein so as to entitle the latter to claim that acts and efforts on the part of the city to have developed its own water supply within its limits and for the use of its inhabitants amounted to such an admission of the validity of the appropriation and uses which the defendants and interveners were undertaking upon the upper reaches of the San Diego river as would operate to constitute an estoppel. The essential elements of an estoppel, even as between private persons, were thus far and up to at least the year 1914 entirely lacking. The defendants and their predecessors, the San Diego Flume

Company, in entering upon and prosecuting their plans for the appropriation and diversion of the waters along the upper reaches of the San Diego river and its tributaries, cannot lay claim to having been misled as to their rights as a matter of law to thus appropriate and use the waters of said river, since they must be held to have known as a matter of law of the existence in the city of San Diego of the aforesaid prior and preferential right of the city to such waters and to the assertion thereof whenever the expanding needs of the city or its inhabitants required such assertion. Neither, as we have seen, were the defendants or interveners at any time, at least prior to 1914, in a position to claim that as a matter of fact they or any of them were misled to their injury by any mere acquiescence on the part of the city of San Diego in their acts of diversion and use of the waters of the San Diego river to the extent thereof, since whatever the extent of such diversion and use of such waters these had in no wise interfered with any of the uses which the city of San Diego was thus far making of the waters of the river. There was, in a word, during all of said times ample water for the uses of both the city and these upper appropriators thereof. An instructive case upon this subject is that of *Anaheim Water Co. v. Semi-Tropic Water Co.*, supra, to which reference has been made with relation to rights to be gained by prescription, and wherein also the subject of estoppel is considered; the court proceeding to say: "With respect to the estoppel relied on by the plaintiffs it is sufficient to say that, as the findings of the court below show that there was sufficient water flowing in the river in 1857 and for nearly twenty years thereafter to supply the wants and demands of the owners of each of the ranchos bordering on the stream, the owners of the Santiago Rancho were neither called upon to object to the diversion and appropriation by the predecessors of the plaintiffs, nor had they any right to object thereto. No right of theirs was interfered with. Nor does it appear that there was any fraud, misrepresentation, or concealment of any kind practiced upon the predecessors of the plaintiffs by the owners of the Rancho Santiago." In certain recent cases, hereinafter to be noted, and also in the case just cited, we have had occasion to quote with approval what was held in the case of *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 368: "There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title—the effect of the estoppel being to forfeit his property and transfer its enjoyment to another." It is to be noted in this immediate connection that the claim of estoppel which the upper appropriator of the waters of a stream undertakes to assert against a lower claimant thereto, based upon the latter's acquiescence, must be founded, not upon the amplitude of the former's claim as set

forth in his recorded appropriation of such waters, nor by the carrying capacity of his ditches or flumes, but upon the actual diversion and use of said waters and only to the extent thereof. *Pabst v. Finmand*, 190 Cal. 124, 133, 211 P. 11; *Haight v. Constanich*, 184 Cal. 426, 194 P. 26; *Northern Cal. P. Co. v. Flood*, 186 Cal. 301, 199 P. 315. We understand the foregoing authorities to state the settled law as declared in this state touching this subject, notwithstanding the array of authorities presented by the appellants and interveners herein from other jurisdictions apparently laying down a different rule.

[12] Even, however, if it were to be conceded that a right based upon estoppel could arise by virtue of mere acquiescence in its assertion as between private persons, we are satisfied that no such claim of right could come into being as against a municipal corporation, founded upon its mere acquiescence or that of its officials in the diversion by any number of upper appropriators or even of upper riparian owners of the waters of a stream to the use of the waters of which such public or municipal corporation was entitled as a portion of its public rights and properties held in perpetual trust for public use. The general rule upon this subject is stated in 10 *California Jurisprudence*, p. 650, and cases cited, as well as certain limited exceptions to the rule. The defendants and interveners, appellants herein, have referred us to no case wherein the mere passive acquiescence of a public corporation or its officials in the invasion of its rights of property, however long continued, has been held to operate as an estoppel against its assertion of those rights. They have, however, called our attention to certain cases which are claimed to constitute exceptions to the operation of the general rule, and to which we shall presently refer. It is sufficient at this point in the discussion to state that in so far as, prior to the year 1914, the plaintiff herein may have passively acquiesced in the acts of the defendants and interveners in the diversion and use of the upper waters of the San Diego river, no estoppel in pais can be predicated thereon to any extent whatever in favor of the defendants and interveners herein for the several reasons above set forth. The cases above referred to are *City of Los Angeles v. Cohn*, 101 Cal. 373, 35 P. 1002, wherein the principle of estoppel in pais was given application to an action brought by the city of Los Angeles to recover possession of a small tract of land lying at the intersection of Spring and Main streets in said city, and which was claimed by it to be a part of a public street. That, however, as the court stated in its decision, was an exceptional case from the fact not only that the defendants had been in possession of the property in question adversely and exclusively for almost forty years, during which time they had erected substantial buildings thereon, but that the city, through its officers, had

affirmatively and at the time of the erection of such buildings misled the defendants into the belief that the city laid no claim to the premises in question, and that, acting upon such belief and assurance, the defendants had erected their structures upon the property and occupied the same undisturbed for many years. This case bears no similitude to the case at bar. Counsel also direct our attention to the case of *Ames v. City of San Diego*, 101 Cal. 390, 35 P. 1005; but a reading of that case discloses that a clear distinction was drawn therein between the two classes of pueblo lands which the city of San Diego holds in succession from the former pueblo, namely, those held in trust for a specific public use, such as a park, which cannot be alienated and the title to which cannot be lost by adverse possession; and those lands, such as house lots, which the city, as successor to the pueblo, held and which might be alienated by it, and which it was held for that reason might be lost by adverse possession. There is no comfort for the defendants herein in the decision of this court in that case. Counsel for the defendants and interveners further insist that under the Spanish and Mexican laws pueblo lands might be lost by prescription. It is needless to follow this argument or the authorities cited therein further than to state that the United States in taking over the territory known as Alta California under the treaty of Guadalupe-Hidalgo, agreeing therein to recognize the existence and protect the ownership of certain land titles within said territory, did not also take over and agree to adopt the statutes of limitation of either Spain or Mexico as applicable to lands or waters devoted to a public use.

[13] With respect to the events transpiring between the years 1914 and the date of the institution of the present action, inclusive, in so far as these affected the relations and respective rights and claims of the original parties to this action in and to the use of the waters of San Diego river, the record herein discloses that in the early part of the year 1914 the city attorney of the city of San Diego, acting in obedience to a resolution theretofore adopted by the common council thereof requesting him to make an investigation of the rights of the city in and to the waters of the San Diego river and submit an opinion thereon, presented to that body a formal report upon that subject, going with much of detail into the history of the pueblo foundation, and citing and quoting at length from the decisions of the state and federal courts touching the nature and extent of the water rights of pueblos in and to the waters of streams passing through them, and making particular application of these decisions to the nature and extent of the water rights of the pueblo and city of San Diego in and to the waters of the San Diego river. This opinion was published in pamphlet form at or shortly after the date of its presentation, and

was admittedly brought to the attention of both the defendants and interveners herein about that time. It would seem to follow of necessity that if the asserted rights of the defendants and interveners to whatever extent, if any, we may find them to have been assertable, had not up to that time ripened into rights resting in the doctrine of estoppel, no later assertion of these rights and no later acts in the way of a further appropriation or diversion of said waters could be made the basis for a claim of right which did not then exist, unless they could be held to find their support in some very definite withdrawal of the claim of the city to that prior and preferential right to the use of such waters which was thus definitely set forth by the foregoing report the city attorney made in the month of January, 1914, and then or shortly thereafter brought to the notice and knowledge of the defendants and interveners herein. In the year 1917, however, the city of San Diego took a very definite step in the direction of making available to itself certain of the waters of the San Diego river not as yet conserved or appropriated to any beneficial use. In that year a bill was introduced in the United States Congress at the instance of the city of San Diego purporting by its title "to grant rights of way over government lands for reservoir purposes for the conservation and storage of water to be used by the City of San Diego, California, and adjacent communities." The text of the measure thus presented in Congress had reference to a proposed reservoir to be constructed along the upper reaches of the San Diego river and upon lands which formed a portion of an Indian reservation, the title to which was in the United States. While this measure was pending before certain committees of Congress during that and the following year, the passage thereof was strenuously opposed by certain representatives of the defendants and interveners herein; their contention being that the grant of such reservoir rights, with the resultant construction of the proposed reservoir, would constitute a serious interference with the already vested rights of the defendants and interveners to the beneficial use of the waters of the San Diego river. In furtherance of the urge of these opponents and in an effort to so far limit the scope and purpose of said grant and the exercise of whatever reservoir rights and uses were to be asserted thereunder, it was sought to have the city of San Diego, through its officials then in charge of its municipal affairs, adopt certain resolutions disclaiming any intent on the part of said city to interfere with the uses then being made of the waters of the San Diego river by the defendants and interveners herein, and in pursuance thereof certain resolutions were adopted by the then governing body of said city touching this subject. A considerable portion of the record consists of details of this proceeding in Congress and

there is considerable discussion in the brief of counsel with respect to the attitude thus taken by the city of San Diego with relation thereto. It would seem, however, that the trial court adequately and correctly considered and epitomized this entire episode in its findings of fact herein, and that with particular reference to the resolutions adopted by the governing body of the city of San Diego having reference to the aforesaid controversy correctly stated therein that: "It is not true that by said resolutions, or by any resolution, or act of said common council the plaintiff herein, acting by or through its legislative body, has expressly or impliedly admitted the ownership by the defendants, or any of them, of the right to use and develop the waters or any of the waters of the San Diego river prior, superior or paramount to the rights of the plaintiff." With respect to the action of the Congress of the United States as to the form and scope of said proposed legislation, in view of the developed opposition of the defendants and interveners herein to the passage thereof, the trial court found that: "It is not true that the Public Lands Committee of Congress or any other Congressional body, or any member of Congress, upon receiving or noting the protest of defendants, or any of them, or of any city or communities served by Cuyamaca Water Company, or for any other reason, refused to adopt said proposed bill or house resolution unless or excepting this plaintiff admitted either expressly or impliedly an ownership and estate of these defendants, or any of them, in or to the waters or the use of the waters of the San Diego river. On the contrary, it is true that the Congress of the United States and the Public Lands Committee of the Senate, and the House of Representatives, and each of them, and the members thereof, explicitly and unequivocally set forth in said bill, and insisted in setting forth in said bill a provision declaring that nothing therein contained should be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses or any vested rights acquired therein, and that the Secretary of the Interior and The City of San Diego in carrying out the provisions of said Act should proceed in conformity with the laws of said State of California." The foregoing findings of the trial court, based as they are on much probative evidence which fully supports them, would seem to set at rest the question as to whether the plaintiff had lost, by its affirmative action or by way of estoppel, whatever rights we have found it to be possessed of prior to the year 1914, to the assertion of its paramount use whenever required of the waters of the San Diego river. There is, however, a further finding of the trial court which would seem to be conclusive as to the existence of

any right whatever resting in estoppel on the part of the defendants and interveners herein to a superior right to that of the plaintiff in the use of the waters of the San Diego river. Such finding, which in our opinion the evidence fully supports, reads as follows: "It is not true that the plaintiff has been guilty of any carelessness or any culpable negligence resulting in the defendants, or any of them, being misled as to the state of the plaintiff's title as set forth in its amended complaint. Neither is it true that the defendants were at all times ignorant, or were at any time ignorant of the claim of the plaintiff to the prior and paramount right to the use of the water of the San Diego river. Neither is it true that the defendant had no convenient or ready means of acquiring knowledge respecting the prior and paramount right of the plaintiff in and to the waters of the San Diego river, but, on the contrary, it is true that the defendants and their predecessors in interest at all times had convenient and ready means of acquiring knowledge respecting such right, and at all times knew of plaintiff's claim to such right. It is not true that such acts, omissions and declarations of the plaintiff as are herein found to have been performed were said or done through fraud, and it is not true that any act or omission or declaration of the plaintiff constituted a fraud upon the defendants, or any of them, and it is not true that any act or omission or declaration herein found to have been done or declared by the plaintiff has injured the defendants, or any of them, or justified the defendants, or any of them, in believing that the plaintiff did not own or claim to own an estate in the waters of the San Diego river as alleged in said amended complaint; neither is it true that the defendants nor any of them relying or acting upon any belief fraudulently induced by the plaintiff have expended any money in the development of the waters of the San Diego river. Neither is it true that the defendants nor any of them, or their predecessors in interest, relying or acting upon the belief that the City of San Diego did not own the prior and paramount right to the use of the waters of the San Diego river, expended large or any sums of money in developing said waters and acquiring an estate therein."

When we come to consider the essential and elementary basis of the doctrine and plea of estoppel in the light of the foregoing findings of the trial court, the conclusion would seem to be inevitable that the elements of estoppel are entirely lacking in this case. These elements of estoppel are all embraced in the definition thereof found in subdivision 3 of section 1962 of the Code of Civil Procedure, which reads as follows: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omis-

sion, be permitted to falsify it." This court has frequently been called upon to interpret and apply the foregoing provision of the Code. It is necessary to cite but two of the most recent cases in which it has done so. One of these is *Mercantile Trust Co. v. Sunset, etc., Co.*, 176 Cal. 461, 472, 168 P. 1037, 1041, wherein this court said: "It is of the essence of an estoppel in pais that the party asserting such estoppel should not only have been ignorant of the true state of facts, but that he should have relied upon the representation or admission of the adverse party." The other case is that of *Staniford v. Trombly*, 181 Cal. 372, 378, 186 P. 599, 601, wherein it was said with reference to the facts of that case: "There was an absence of the essential elements of estoppel, namely, false statements or concealments, or conduct amounting to false statements or concealments, with reference to the boundary made by one having knowledge, actual or virtual, of the facts, to one ignorant of the truth with the intention, resulting in consummation, that he should act upon such false statements or concealments or equivalent conduct."

[14] In the presence of the foregoing findings of fact as made by the trial court, and in the light of the indispensable elements as thus stated by this court essential to be proven in order to the formation of a basis for the defense of estoppel, it is as difficult to understand as it is impossible to uphold the further findings and conclusions of the trial court to the effect that the defendants and interveners are entitled to the benefit of their plea of estoppel to the extent of their diversion and use of the waters of the San Diego river in the amount of twenty-seven cubic feet per second, or in any amount, and that as against such right resting solely in such use the city of San Diego is estopped to assert its prior and paramount right to the use of the waters of the San Diego river. That this conclusion may be fraught with certain disturbing and even disastrous consequences, affecting chiefly the interveners herein, and which have been insistently and even passionately urged by their counsel in the presentation of this prolonged controversy, can be held to furnish no reason for a deprivation of the plaintiff herein of its ancient, prior, and paramount right to the use of the waters of the San Diego river as defined by this court upon the former appeal. If it be true, as the trial court expressly found it to be, that the San Diego Flume Company and its successor, the Cuyamaca Water Company, entered upon and prosecuted their plan for the diversion of the waters of the San Diego river with full knowledge as a matter of law, and with full means of knowledge as a matter of fact, as to the existence of the prior and paramount right of the plaintiff as the successor of the pueblo to the use of the waters of the San Diego river as such right is set forth and defined in our former opinion, and if it be further true, as it

must be conceded to be, that the interveners are entitled to assert and insist upon no further rights or equities in respect to the use of said waters than those which were possessed by their predecessor in interest, the Cuyamaca Water Company, we are unable to perceive upon what principle of equitable application the public trust in which the city of San Diego holds its prior and paramount right to the use of the waters of said river to the full extent which the needs of the expanding city from time to time require is to be subverted for the simple and only reason that other persons or other communities along the upper reaches of the river, with full knowledge of the aforesaid prior and paramount rights of the plaintiff, may have undertaken, at a considerable expenditure of money, to make a beneficial and profitable use of such waters.

[15] The only remaining question for our determination upon these appeals relates to that portion of the judgment of the trial court wherein it purported to enjoin the defendants and interveners from the doing of certain constructive work in connection with their conservation and diversion of the waters of the San Diego river except in subordination to the prior and paramount rights of the plaintiff therein, and also purporting to restrain the defendants and interveners from the assertion of any claims of right or title in or to the waters of the San Diego river except in subordination to the paramount rights of the plaintiff therein, and save and except in the amounts and to the extent in said judgment specified. In respect to the aforesaid portions of the judgment it is clear that the trial court has gone beyond the scope and issues of the instant action. This, as we have seen and as this court has already decided upon the former appeal, is an action purely declaratory in character and is one wherein the plaintiff has neither pleaded nor attempted to prove any facts which would entitle it to any other or affirmative relief beyond that of having its prior and paramount right to the use of the waters of the San Diego river established. This being so, the trial court was in error in attempting to give to its determination of this matter any other or further effect than that of a declaratory judgment.

It follows from the foregoing conclusions that the judgment herein must be and is hereby affirmed in so far as it purports to establish the prior and paramount right of the plaintiff to the use of the waters of the San Diego river as the same was defined in our former opinion herein; that the judgment herein is reversed in so far as it purports to determine that the defendants and interveners have become possessed either by prescription or by estoppel of any rights in and to the waters of said river, or any portion thereof, in diminution to any extent whatever of the prior and paramount rights of the plaintiff therein; that said judgment is reversed as to that portion thereof wherein it purports to decree

that the plaintiff is entitled to any other or further relief herein other than that afforded by the remedy of a declaratory judgment; each of the parties hereto to pay its own costs upon these appeals.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

207 Cal. 386

MISSION FILM CORPORATION v. CHADWICK PICTURES CORPORATION.
(L. A. 9580.)

Supreme Court of California. June 21, 1929.

1. Continuance ⇨19—Order denying continuance held not abuse of discretion because of necessary absence of party.

Unavoidable absence of a party *held* not to render order denying continuance erroneous as abuse of discretion.

2. Motions ⇨43—Motion denied cannot without leave of court denying motion be renewed before other court or officer, except higher tribunal (Code Civ. Proc. § 182).

Under Code Civ. Proc. § 182, a motion once made and denied, except for informality in the papers or proceedings cannot be renewed before any other court or officer, except a higher tribunal, save where leave to renew application is given by the court or officer refusing the motion.

3. Continuance ⇨8—Refusal of continuance after other judge had denied continuance on same grounds held not abuse of discretion under circumstances.

Where one judge had denied application for continuance on ground of necessary absence of party, there was no error in denying application to other judge presenting no additional grounds, particularly where lengthy excerpts from such party's deposition were received in evidence.

4. Witnesses ⇨205—Client's communication to attorney to be privileged must have been communicated in confidence.

Communications of client to attorney to be privileged as confidential must have been confidentially communicated or at least so regarded by client at time of communication.

5. Witnesses ⇨205—Client's statements to attorney to be communicated to adversary are not privileged.

Statements by client to his attorney as to statement of account or business transaction to be communicated to his adversary are not privileged.

In Bank.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by the Mission Film Corporation, a corporation, against the Chadwick Pictures

Corporation, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Allan Frankel and A. V. Kaufman, both of Los Angeles, for appellant.

Joe Crail and Harold C. Morton, both of Los Angeles, for respondent.

WASTE, C. J. Judgment went for the plaintiff in this action to enforce the collection of moneys claimed to be due under a contract, and the defendant has appealed. The appeal was submitted upon an order to show cause, no brief for respondent being presented or on file.

The respondent entered into a contract with the appellant by the terms of which the former was to produce a motion picture which the appellant undertook to sell and distribute. Certain sums of money were to be advanced by the appellant distributor during the filming of the picture, and, upon delivery to it of the master print and two negatives in saleable condition, the distributor agreed to advance to the producer, in cash, one-half of the balance of the actual negative cost, not to exceed \$30,000. The distributor further agreed to pay to the producer one-half of the proceeds derived from the sale, exhibition, and distribution of the picture, guaranteeing, in any event, the entire negative cost up to \$30,000 within six months after date of the delivery of the master print and negatives. Payments were made up to the one required upon delivery of the print and negatives, and plaintiff brought this action to recover the balance due under the contract. Defendant denied the delivery of the negatives in accordance with the contract. The court found that the negatives and print were delivered, and that defendant had collected large sums of money from the sale and exhibition of the picture. It therefore gave judgment in favor of plaintiff as prayed for.

When the cause came on for trial, counsel for the defendant moved for a continuance on the ground that it was essential to have the testimony of the president of the defendant corporation, who was practically the sole stockholder, and who had conducted all the negotiations with reference to the contract; that he was at that time detained in New York by reason of pending business; and that counsel were not possessed of sufficient facts to enable them to properly defend the action. The motion was denied on the ground that a similar motion, based on the same affidavit, had been previously made that morning before the judge of another department of the court, and by him denied.

[1-3] Appellant first contends that the court erred in denying the motion for a continuance, and that such denial was an abuse of discretion. There is nothing in the record indicating the reasons for the denial of the motion by the judge to whom it was first submitted.

In the absence of a showing to the contrary, we must assume that due consideration was given to the fact that a considerable amount of money was involved, and that the requested continuance was for a period of approximately only 30 days. While the circumstance that the witness who is unable to attend is, at the same time, one of the parties should no doubt be regarded as strengthening the showing in favor of a continuance, it has never been held in this court that the unavoidable absence of a party necessarily compels the court to grant a continuance. *Sheldon v. Landwehr*, 159 Cal. 778, 781, 116 P. 44. "It is for the trial court in all cases, except where otherwise expressly provided by statute, to determine whether or not the circumstances shown upon an application for a continuance are such as to make it proper that a continuance should be granted, and its conclusion thereon will not be disturbed unless there has been a plain abuse of discretion." *Lynch v. Superior Court*, 150 Cal. 123, 88 P. 708. It does not appear that the defendant was given leave to renew the motion before the judge trying the cause. A motion once made and denied, except for informality in the papers or proceedings, cannot be renewed before any other court or officer, except a higher tribunal, save where liberty is given by the court or officer refusing the motion to renew the same. *Hitchcock v. McElrath*, 69 Cal. 634, 11 P. 487; *Code Civ. Proc.* § 182. The granting of the motion, after the same has once been denied, is a matter addressed to the discretion of the court. *Estate of Riviere*, 8 Cal. App. 773, 775, 98 P. 46. Had such permission been granted to the defendant, the failure to support the motion with new evidence might have afforded sufficient reason for the refusal of the court to again entertain it. *Gay v. Gay*, 146 Cal. 237, 241, 79 P. 885. As the second motion presented no grounds which were not before the court on the first motion, the court did not abuse its discretion in refusing to consider it. Particularly is this true in view of the fact that the appellant was permitted to introduce in evidence lengthy excerpts from the deposition of Mr. Chadwick (the witness whose absence was the basis for the motion for a continuance), taken in Los Angeles some months earlier, and which appears to deal quite fully with the material phases of the controversy.

[4, 5] In the course of Mr. Chadwick's deposition he was asked whether the motion picture involved in this action had "produced

gross about \$26,000." He replied: "That is my judgment. I would rather submit actual figures on that when I get back to New York." During the trial, one of defendant's counsel, called as a witness for the plaintiff, was asked whether a statement submitted by him to counsel for the plaintiff was not the statement from Mr. Chadwick showing the earnings of the picture. On answering that he "couldn't say that," the further question was put to him: "That was what Mr. Chadwick told you it was, wasn't it?" Defendant objected to this question on the ground that what Mr. Chadwick told the witness—his attorney—was privileged. The objection was overruled, and appellant assigns this ruling of the court as error, citing subdivision 2 of section 1881 of *Code Civ. Proc.* While "on principles of public policy, communications from a client to his attorney, touching the subject matter under investigation are privileged, and will not be allowed to be disclosed by the attorney" (*People v. Atkinson*, 40 Cal. 284), the communication must be confidential, and so regarded, at least by the client, at the time. If it clearly appears that the same was not intended by the client to have been confidential, it is not privileged. *Sharon v. Sharon*, 79 Cal. 663, 678, 22 P. 26, 131. It is clearly manifest that the statement here in question was not privileged and confidential, for it was the intention of the client that it should be disclosed (*Estate of Nelson*, 132 Cal. 182, 188, 64 P. 294), it having been furnished by Mr. Chadwick on his own suggestion for submission to counsel for the plaintiff.

Appellant asserts that the findings allege that "the plaintiff is entitled to the sum of \$16,501.70, with interest thereon since December 15, 1924, and further interest on \$13,925.13 since June 15, 1925." Appellant has misread finding 3. It states that there is due from defendant to plaintiff the sum of \$16,401.70, with interest on \$2,476.57 of said sum since December 15, 1924, and interest on \$13,925.13 from June 15, 1925—December 15, 1924, being the date of delivery of the negatives, as found by the court, and June 15, 1925, representing the six months' time within which, under the contract, the entire negative cost was to be paid to the plaintiff.

We find no merit in the other contentions raised by the appellant.

The judgment is affirmed.

We concur: SHENK, J.; RICHARDS, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

207 Cal. 366

PEOPLE v. CARROW. (Cr. 3188.)

Supreme Court of California. June 18, 1929.

1. Receiving stolen goods ⇨8(3)—Evidence held to warrant conviction of receiving stolen property.

Evidence held to warrant conviction of receiving stolen property.

2. Criminal law ⇨1202(3)—Testimony of accused on witness stand that he has been convicted of felony goes only to credibility, and cannot be considered as proof of prior offense, increasing penalty (Pen. Code, §§ 667, 668).

Testimony of accused on witness stand that he has been convicted of a felony goes only to his credibility, and may not be considered on the issue of prior conviction, as increasing penalty, under Pen. Code, §§ 667, 668.

3. Criminal law ⇨1202(3)—Extrajudicial admission of defendant of prior conviction of felony held insufficient to warrant conviction as second offender (Pen. Code, §§ 667, 668).

Extrajudicial admission of accused that he had previously been convicted of felony is insufficient to warrant conviction and increased punishment, under Pen. Code, §§ 667, 668, as second offender, despite Code Civ. Proc. § 1844.

4. Criminal law ⇨1202(3)—Punishment as second offender should not be imposed, unless proper proof is made by state (Pen. Code, §§ 667, 668).

Pen. Code, §§ 667, 668, greatly increasing term of imprisonment of persons convicted, who theretofore had been convicted of offenses punishable by imprisonment in state prison, and who have served time therefor in any penal institution, should not be applied, unless proper proof has been made by state.

5. Criminal law ⇨1188—On reversal of conviction for insufficient evidence of prior felony, court may remand cause to permit sentence as for first offense.

Where accused was sentenced as second offender under evidence insufficient to show commission of prior felony, the Supreme Court, on reversing the judgment, may remand the cause to the trial court for new trial, unless that portion of indictment charging prior conviction be dismissed, and sentence be imposed as for first offense.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Charles W. Carrow was convicted of receiving stolen property, and he appeals. Reversed and remanded with directions.

Superseding opinion in 270 P. 379.

Joel Terrell, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn and James S. Howie, Deputy Attys. Gen., for the People.

LANGDON, J. Defendant was convicted of the crime of receiving stolen property. The information also charged that in the state of Kansas, prior to the commission of said offense, defendant had been convicted of a felony. The jury found the defendant guilty as charged, and also that he had suffered a prior conviction. In accordance with the provisions of the statute (section 1168, Pen. Code), defendant was sentenced to imprisonment in the state prison for the term prescribed by law.

[1] Upon appeal, defendant contends that the evidence is insufficient to support the verdict. It is conceded that defendant was in possession of the property in question and that it had been stolen. The general conduct of defendant, including his admission that he knew it was "hot" (meaning that he knew the property had been stolen), together with the fact that the property was found under a clod of dirt in the front yard of defendant's residence, where he admitted that he had concealed it, were sufficient indications of knowledge of the fact on the part of defendant that the property had been stolen.

[2] It is also contended that the evidence was insufficient to support the verdict as to the charge of prior conviction of defendant. Defendant denied the charge in the indictment of prior conviction of a felony. Upon that issue the record contains the testimony of a police officer that the defendant, after his arrest, stated that he had served a term in the state penitentiary of Kansas for grand larceny; that he was convicted because of the theft of automobile tires. When the defendant was on the witness stand, he was asked if he had ever been convicted of a felony, and he stated that he had been so convicted. He contends upon appeal, however, that this latter question and answer should have gone only to the credibility of the witness, and that it was incompetent upon any other issue, and that the jury should have been so instructed. On the other hand, the respondent contends that the admission of defendant, testified to by the officer, is sufficient for the finding of the jury upon the prior conviction under the provisions of section 1844, Code of Civil Procedure, to the effect that the direct evidence of one witness, who is entitled to full credit, is sufficient for proof of any fact except perjury and treason. It is argued that, while the defendant may not have been entitled to full credit upon every subject, he is entitled to credit upon this matter which is against his interest.

[3, 4] However, the case of *People v. Johnson*, 57 Cal. 571, holds that, while a defendant taking the witness stand may be asked if he has been convicted of a felony, that question goes only to his credibility, and this rule would exclude the testimony of defendant in this case so far as the issue of prior conviction is concerned. This leaves the rec-

ord with only the extrajudicial statement of the defendant, and it has been held repeatedly that a material element of a charge may not be proven by the extrajudicial statement of the defendant alone. *People v. Chadwick*, 4 Cal. App. 63, 87 P. 384, 389, and cases therein cited. In *People v. Chadwick*, supra, it was said that the allegation of previous conviction of a felony is a distinct element of the charge and must be proven by competent evidence. The provisions of the law (sections 667 and 668, Pen. Code) increasing greatly the term of imprisonment of a person found guilty of a crime who theretofore has been convicted of an offense punishable according to the laws of this state by imprisonment in the state prison, and who has served a term therefor in any penal institution, should not be applied unless proper proof has been made by the state.

[5] The procedure followed in the case of *People v. Chadwick*, supra, seems appropriate here, for, although the portion of the verdict relating to a prior conviction was unauthorized, it does not follow that a new trial must be granted. The verdict that the defendant had suffered a prior conviction is severable from that portion finding him guilty of receiving stolen property.

The judgment is reversed, and the cause remanded to the trial court, with direction to that court that if, within 20 days after the filing therein of the remittitur from this court, the district attorney shall apply for an order dismissing that portion of the indictment which charges the defendant with having been convicted of a felony prior to the commission of the offense of receiving stolen property charged therein, and said application shall be granted, and the court, in the exercise of its discretion upon the facts and circumstances of the case, shall pronounce judgment and sentence upon the defendant as provided in section 496, Penal Code, thereupon such judgment shall stand affirmed. If the district attorney shall not within said period of 20 days make said application, the superior court is directed to grant a new trial.

We concur: PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

207 Cal. 279

MONTANEZ v. BEARD et al. (L. A. 10566.)

Supreme Court of California. June 19, 1929.

1. Death ☞77—Supreme Court will not hold that plaintiff suffered no pecuniary loss, evidence showing decedent gave earnings and partly paid for home.

Where evidence in action for death showed that deceased had resided for several years in

home of plaintiff and her husband, had given all earnings to them, gave sum of \$200 to plaintiff and paid practically one-half of purchase price of house and lot so that enough evidence was set out to show that plaintiff and her husband had stood in loco parentis to decedent for many years, Supreme Court, in absence of any contrary showing, will not hold that plaintiff suffered no pecuniary loss at death of brother; it being unnecessary to set out all evidence on subject and sufficient, if enough appears, to show question should have been left to jury.

2. Appeal and error ☞854(5)—Showing substance of record referring to transcript for verification held sufficient as against motion to affirm nonsuit based on one of several grounds (Supreme Court Rule 8).

Though it is true that motion for nonsuit made on more than one ground, if good on any ground, will be sustained, defendants in action by plaintiff for death of brother on motion to affirm judgment held not aided thereby, though they moved for nonsuit upon grounds of absence of showing of negligence and absence of showing of pecuniary loss to plaintiff, since, under Supreme Court Rule 8, it is sufficient to show substance of record, parenthetically referring to line and page of typewritten transcript for verification which plaintiff, as appellant, did.

In Bank.

Action by Jesus Hernandez Montanez against Elizabeth Morton Beard and another. Judgment of nonsuit for defendants. Motion to affirm judgment for failure to print pertinent portions of transcript. Motion denied.

Theodore Gottsdanker, of Los Angeles, for appellant.

Culver & Nourse, of Los Angeles, and Estudillo & Schwinn, of Riverside, for respondents.

PRESTON, J. Motion to affirm judgment for failure to print pertinent portions of transcript. The action is for negligence.

Sixto Hernandez met his death in 1926, having been struck by an automobile driven by the defendant, Elizabeth Morton Beard, who was, at that time, on business of her father, defendant George H. Morton. The plaintiff is the adult sister and sole heir at law of the deceased and brings the action under section 377, Code of Civil Procedure.

At the conclusion of the plaintiff's case a motion for nonsuit was made upon two grounds: First, the absence of a showing of negligence; second, the absence of a showing of pecuniary loss suffered by the plaintiff. The motion was denied on the first ground, but granted on the second, and judgment passed for defendants. The appellant has filed a 10-page brief, setting up generally the facts of the case, the making of the motion for nonsuit, the grounds therefor, and the action of the court thereon, with appropriate references to the transcript. It then sets up a portion of the evidence upon which plaintiff relies to show that a pecuniary loss was

suffered by her in the death of the decedent. The brief, concededly, does not purport to show all the evidence on this subject, but declares the evidence so set up sufficient to show the judgment erroneous. Instead of filing a reply brief the respondents confidently move to affirm the judgment.

[1] The evidence set out in the brief by question and answer shows that the deceased was some 24 years of age at the time of his death and had resided for more than 17 years in the home of the plaintiff and her husband as a member of their family; that all of his earnings had been given to them; that at the time of his death he was earning from 40 to 50 dollars, twice a month, which it seems he likewise paid over to the plaintiff and her husband. The evidence shows one incident of a gift of \$200 by decedent to plaintiff, also that he paid practically one-half of the purchase price on a house and lot for her, which cost a total of \$1,200. In other words, enough of the evidence is set out to show that the plaintiff and her husband had stood in loco parentis to the decedent for many years. In the absence of any contrary showing we are not prepared at this time to hold that the plaintiff suffered no pecuniary loss at the death of her brother. It was not necessary to set out all the evidence on this subject, if enough appears to show that this question should have been left to the jury, and we are not prepared at this time to say that such a showing was not in fact made.

[2] It is true that a motion for nonsuit made on more than one ground, if good on any ground stated, will be sustained. But this observation does not aid respondents here. Under rule 8 of this court, as now existing, it is sufficient to show the substance of the record, "parenthetically referring to the line and page of the typewritten transcript for verification." This was done. We, therefore, think that the showing of the appellant is sufficient as against this motion and it is denied.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.

207 Cal. 370

STERLING CORPORATION v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (L. A. 11186.)

Supreme Court of California. June 18, 1929.

1. Appeal and error $\S$ 607(1)—Period allowed to request transcript begins to run from written notice of termination of new trial proceedings, unless written notice is waived (Code Civ. Proc. $\S$ 953a; $\S$ 953d, as added by St. 1927, p. 86).

Under Code Civ. Proc. $\S$ 953a, requiring party appealing to file with clerk request for

transcript within 10 days after notice of decision denying new trial, 10-day period does not begin to run until written notice of termination of new trial proceedings have been served, unless written notice thereof has been waived in writing or by oral stipulation in open court and entered in minutes, in view of section 953d, as added by St. 1927, p. 86, although notice of appeal from judgment was filed after motion for new trial had been denied; notice of appeal in such case not furnishing record evidence of termination of new trial proceedings.

2. Appeal and error $\S$ 571—Petitioner for mandamus to require settlement of reporter's transcript not proving essential facts necessary to relief held not entitled to writ (Code Civ. Proc. $\S$ 953d, as added by St. 1927, p. 86).

Where petition for mandamus requiring superior judge to settle reporter's transcript alleged that no notice of termination of new trial proceedings, as required by Code Civ. Proc. $\S$ 953d, as added by St. 1927, p. 86, was ever served on petitioner, which allegation was controverted in reply and return to writ showing that notice of denial of motion was served, and petitioner introduced no evidence in support of allegation of nonservice when matter came on for hearing but submitted matter on pleadings and papers on file, petitioner was not entitled to mandamus, since burden was upon petitioner in such proceeding to prove every fact that lies at foundation of his proceeding, except such allegations of petition as are admitted by answer, and, where answer to alternative writ states a defense to petition, peremptory writ will not be issued unless issues of fact have been disposed of.

In Bank.

Application by the Sterling Corporation for writ of mandamus prayed to be directed to the Superior Court of Los Angeles County, Elias V. Rosenkranz, Judge, requiring him to settle reporter's transcript. Writ discharged.

McGee & Sumner, of Los Angeles, for petitioner.

Arthur E. Koepsel, of Orange, for respondents.

SEAWELL, J. Petitioner, Sterling Corporation, seeks by mandamus to compel Hon. Elias V. Rosenkranz, as judge pro tempore of the superior court of the county of Los Angeles, to settle and allow a stenographic reporter's transcript, as provided in section 953a of the Code of Civil Procedure, for use upon appeal in an action wherein the said court rendered judgment against it as defendant and thereafter denied its motion for a new trial. Petitioner alleges that the trial judge refused to certify the transcript because he was of the view that petitioner had failed to comply with the provision of section 953a, which requires a party appealing to file with the clerk a request for the transcript within 10 days after notice of decision denying the motion for a new trial.

[1] Petitioner alleges that at the time it filed the request for the transcript with the

clerk no written notice of the order denying the new trial had been served upon it, and that by virtue of section 953d, Code of Civil Procedure, enacted in 1927 (St. 1927, p. 86), the 10-day period allowed by section 953a would not begin to run until *written* notice of the termination of the new trial proceedings had been served upon it, unless written notice thereof had been waived in writing or by oral stipulation made in open court and entered in the minutes, which was not the case here. Since the filing of the petition herein, this precise point has been determined in petitioner's favor by this court in *Griffin v. Kent* (Cal. Sup.) 274 P. 56, followed by the District Court of Appeal in *Smith v. Wall*, 275 P. 983. Prior to the decision of this court another division of the District Court of Appeal had reached a similar conclusion in *Attkisson v. Reynolds*, 270 P. 686.

Riggs v. Guedemann (Cal. App.) 270 P. 1001, cited by respondent, was decided without reference to the provisions of section 953d, and on the authority of decisions rendered prior to the enactment of said section, in which decisions it was held that the filing of a notice of appeal from a judgment or order denying a new trial furnishes record evidence of actual notice of the judgment or order, and in such a case the 10-day period to request a transcript commences to run from the date of the filing of the notice of appeal, although no written notice of the entry of judgment or order has been served on the party appealing. *Estate of Keating*, 158 Cal. 109, 110 P. 109; *Fiske v. Gosbey*, 168 Cal. 334, 143 P. 611; *Spear v. Monroe*, 181 Cal. 728, 186 P. 149. Section 953d has abrogated the rule of law announced in said decisions. *Griffin v. Kent*, *supra*; *Attkisson v. Reynolds*, *supra*; *Smith v. Wall*, *supra*. Furthermore, if this were not the case, the rule of said decisions relied on by respondent is not applicable in the instant case, for the notice of appeal, as quoted in the reply to the petition, does not afford record evidence of actual notice of the order denying a new trial. Petitioner had 10 days from the date of notice of the termination of the new trial proceedings to file a request for a transcript. The notice of appeal from the judgment was filed after the motion for a new trial had been denied, but it makes no reference to the new trial proceedings. It furnishes record evidence of actual knowledge of the entry of judgment, but not of the termination of the new trial proceedings.

[2] We conclude that the petition states facts which justified the issuance of the alternative writ, and that petitioner would now be entitled to the issuance of the peremptory

writ if it had substantiated by proof the allegation of the petition that no written notice of the order denying the new trial had been served upon it. This it has failed to do. It alleges that "no notice as required by said section (953d) was ever served on petitioner, and there was no waiver of notice by either of the methods mentioned in said section." In the reply and return to the writ this allegation is controverted by an allegation that "notice of denial of motion for new trial was served on September 25, 1928," which was six days after the motion had been denied, according to the allegations of the reply. In this event, the 10-day period commenced to run on September 25, and had expired when petitioner filed its request for a transcript on November 17, 1928. The reply to the writ admits that an affidavit of service of said notice of denial of motion for a new trial was not filed with the clerk until December 1, 1928, which was after petitioner had filed its request for a transcript. But if the notice had in fact been served, the absence from the clerk's files of an affidavit would not enlarge the rights of petitioner. Petitioner introduced no evidence in support of its allegation of non-service when the matter came on for hearing in this court, nor did it stipulate with respondent as to the facts, but instead it joined with respondent in submitting the matter on the pleadings and papers on file. The burden is upon the petitioner in a mandate proceeding to prove every fact that lies at the foundation of his proceeding (*Cothran v. Cook*, 146 Cal. 468, 80 P. 699; *Hippen v. Ford*, 129 Cal. 315, 61 P. 929), excepting such allegations of the petition as are admitted by the answer, and where the answer to the alternative writ states a defense to the petition, the peremptory writ will not be issued until the issues of fact have been disposed of.

Attkisson v. Reynolds, *supra*, relied on by petitioner, in which it was held that the burden was upon the appellee, rather than the appellant, to show that written notice had been given, as required by section 953d, involved a motion to dismiss made by the appellee, upon whom the burden rested, as moving party, to present facts justifying a dismissal of the appeal. Here the appellant has initiated a proceeding to compel the trial judge to settle the transcript in order that it may better prosecute its appeal, and the burden was upon it to establish the facts entitling it to the relief claimed.

Writ discharged.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

207 Cal. 355

FISKE v. NIAGARA FIRE INS. CO. OF
NEW YORK. (L. A. 10643.)

David D. Stuart, of Los Angeles, for respondent.

Supreme Court of California. June 17, 1929.

1. Insurance Ⓒ425—Automobile theft policy held not to cover theft by conditional vendee (Civ. Code, § 1641).

Policy insuring against theft, robbery, or pilferage of automobile, except by persons in assured's household or service, whether during hours of service or not, and excepting wrongful conversion, embezzlement, or secretion by mortgagor or vendee in possession under mortgage, conditional sale, or lease agreement, held to exclude theft by vendee, in whose hands owner voluntarily placed automobile pursuant to conditional sale contract, in view of Civ. Code, § 1641, requiring that every part of contract be given effect, if reasonably practicable.

2. Insurance Ⓒ635—Complaint alleging that conditional vendee obtained possession of insured automobile by falsely representing that he had amount of check on deposit at bank did not allege larceny by trick or device covered by theft policy.

Complaint alleging that purchaser of automobile, covered by theft policy sued on, under conditional sale contract, obtained possession thereof by falsely representing that he had amount of check for down payment on deposit with certain bank, did not allege larceny by trick or device, but simply obtaining of possession by false representation, which was not risk covered.

3. Insurance Ⓒ146(3)—Insurance contract need not be given strained construction, to create obligation against insurer.

While a contract of insurance must be construed most favorably to assured, court need not indulge in a strained and forced construction to harmonize incongruous elements, so as to create obligation against insurer, when it is reasonably probable that parties did not contemplate such result.

4. Insurance Ⓒ631—Insurance contract, made part of complaint in action thereon by special reference, must be examined to determine whether cause of action is stated.

Contract of insurance, forming part of complaint in action thereon by special reference, must be examined by court to determine whether a cause of action is stated therein.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Willard O. Fiske against the Niagara Fire Insurance Company of New York. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with direction.

Superseding opinion in 266 P. 853.

David R. Faries, John R. Berryman, Jr., and Edwin Heizman, all of Los Angeles, for appellant.

SEAWELL, J. This action was brought by the plaintiff to recover on an assigned contract of insurance, based upon the following enumerated perils insured against and the exceptions thereto:

"(c) Theft, robbery or pilferage, excepting by any person or persons in the assured's household or in the assured's service or employment, whether the theft, robbery or pilferage occur during the hours of such service or employment or not and excepting the wrongful conversion, embezzlement, or secretion by a mortgagor or vendee in possession under mortgage, conditional sale or lease agreement, and excepting in any case, other than in case of the theft of the entire automobile described herein, the theft, robbery or pilferage of tools and repair equipment." (Italics ours.)

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The lower court overruled the demurrer and, defendant having declined to answer, judgment was entered in the sum prayed for. The defendant prosecutes this appeal therefrom on the judgment roll.

The plaintiff's assignor and one Spainhower on February 21, 1923, entered into a conditional contract of sale, by the terms of which plaintiff agreed to sell the automobile to Spainhower for \$400, payable \$140 upon the execution of the contract and the balance at the rate of \$30 per month. Subsequent to the execution of the contract, which was also subsequent to the delivery of the check for \$140, but prior to the delivery of the automobile, the insurance policy was issued by the appellant, insuring the plaintiff and Spainhower "jointly and severally" against loss occurring by reason of "theft, robbery or pilferage," subject to the exceptions above enumerated in said paragraph (c) of said contract of insurance. Spainhower disappeared with the automobile, and neither he nor the automobile was thereafter located. The sole question to be solved is whether it was the intent of the parties to the insurance policy to insure against the loss of said automobile in the manner above described. In other words, what did the parties contemplate by the use of the words and phrases and exceptions employed in said paragraph?

[1] This transaction transpired long prior to the act of the Legislature which expanded and defined the meaning of the word "theft" in its application to larceny. If it be conceded solely for the purpose of argument that the legal definition of the word "theft" as used in the contract of insurance included the act of obtaining possession of said automobile in the manner described in the complaint, nevertheless plaintiff could not recover there-

on, for the reason that it is clear that the parties thereto intended to exclude (and certainly not to include) as a risk or peril insured against, the kind of dishonest acts which the vendor of said automobile charges against the person whom he voluntarily selected as a conditional purchaser of said automobile. Paragraph (c) of the contract, upon which plaintiff relied to sustain his action, does unquestionably by necessary implication, if not by express terms, "exclude the acts which form the gist of this action as constituting risks insured against. If the rule of *ejusdem generis* as applied to the first four words of said paragraph (c), to wit, "theft, robbery or pilferage" as those words are commonly, if not universally, understood by the public, is not absolutely conclusive of the point that the parties meant thereby those ordinary acts of dishonesty accomplished by stealth or force, in which the owner of the property is not a voluntary participant, certainly the remaining portion of the sentence, to wit, "excepting by any person or persons in the assured's household or in the assured's service or employment, whether the *theft, robbery or pilferage* occur during the hours of such service or employment or not, * * * removes all doubt and makes it absolutely certain as to the kind of acts committed by third persons that were intended to be and were covered by the policy of insurance.

It will be noted that the parties did not have in mind such an unusual and absurd proposition of the vendee committing *theft, robbery or pilferage* against the owner who had voluntarily placed his property in the hands of the vendee. If the first portion of said paragraph may be said to be uncertain as to what the parties intended, the latter portion, which excepts *wrongful conversion, embezzlement or secretion by a mortgagor or vendee in possession under mortgage, conditional sale or lease agreement*, would seem to be sufficient to remove any doubt as to the intent of the parties. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641. In arriving at the intention of the parties to said contract, it must be kept in mind that they were engaged in drawing a policy of insurance guaranteeing protection against risks or perils to which the owners of automobiles are commonly subjected, to wit, *theft* committed as *theft* is ordinarily committed, and were not concerned with the purpose that the Legislature had in mind in the framing of penal statutes for the prevention or punishment of crime. The question is: What did the parties have in mind and intend, and not what the Legislature may have had in mind in adopting the policy of enlarging or extending common-law definitions of crime so as to include acts not formerly within the statute?

[2] The complaint alleges that the party whom the owner of the automobile made its conditional vendee, obtained possession of said automobile by falsely representing to the owner that he had on deposit with the National Bank of Kansas City, Mo., \$140, when, as a matter of fact, he had no such sum or any part thereof on deposit with said bank. The most that can be said of this transaction, as shown upon the face of the complaint, is that it constituted a very ordinary case of false representation, and it is so pleaded in the complaint. The complaint contains no statement of facts which would constitute larceny by trick or device. The transaction constitutes a simple case of obtaining the possession of property by false representations, and neither party intended to nor had in mind any thought of covering any such risk or abuse of confidence which thereafter developed, by the policy of insurance.

[3] The automobile was sold by its owner to a vendee selected by it upon a contract of sale and the insurance company cannot be required, in the light of the facts of this case, to assume the obligation of the vendee. We think there is nothing in *Buxton v. International Indemnity Co.*, 47 Cal. App. 583, 191 P. 84, which lays down a rule in conflict with our construction of the contract in the instant case. That was an action brought to reform a contract of insurance and to recover or enforce the same as revised and reformed. The decision was rested largely upon a letter which the agent of the insurance company wrote to the assured prior to the issuance of the policy as follows: "I wish to advise you that the International Indemnity Company will from this date extend policies on all cars in which you may have an equity to cover any claims arising under the following conditions: * * * Third. If the conditional buyer of an automobile or any member of his immediate family should steal any automobile insured under our policies and thereby commit a felony, upon warrant being secured for the arrest of such party or parties the company hereby agrees that your equity in any automobile insured by this company will be fully protected."

The above letter, having been written prior to the issuance of the policy, was held to constitute a part of the contract, and clearly, this being so, there was a waiver in that contract of the exceptions which are operative in the instant case. Placing ourselves in the position of the parties to the contract, we are satisfied that it was not the intention of the parties to insure against the risk or peril which is made the basis of this action. It is true that a contract of insurance must be construed most favorably to the assured. But this does not mean that a court must indulge in a strained and forced construction to harmonize incongruous elements, to the end that an obligation may be created against the

insurer, when it is reasonably probable that the contracting parties did not contemplate such a result.

Numerous cases are cited by respondent as illustrative of the applicability of the word "theft" to the facts of the instant case. While we are of the view that the contract excepts as a peril insured against the deprivation of the owner of his property parted with in the manner described in the complaint, it nevertheless may be stated in passing that the facts in said cited cases which are held to constitute larceny or theft are widely different from the facts pleaded in the instant case. For example, *People v. Shaughnessy*, 110 Cal. 598, 43 P. 2, was a case in which the prosecuting witness was tricked of his money in a lottery scheme, which is referred to in the opinion as a "bunco game." *People v. Rae*, 66 Cal. 423, 6 P. 1, 56 Am. Rep. 102, was a case of a conspiracy to obtain possession of property by the employing of the artifice commonly called the "confidence game." The case strongly relied upon by respondent, and which seems to form the basis of a number of other decisions cited, *Hill-Howard Motor Co. v. North River Ins. Co.*, 111 Kan. 225, 207 P. 205, 24 A. L. R. 736, was a false impersonation case.

It will be found upon an examination of the authorities cited that most all of the cases upon which respondent relies are cases where property was obtained by trick or device or by the employment of artifice, or impersonating another, or cheating by the use of cards or mechanical devices, or by deceiving the senses of the person imposed upon by unfair means, or by conspiring with others to cheat, or by resorting to those sharp practice acts which are usually hurriedly pressed upon the unwary and commonly known as "swindling." The outstanding well-considered decision directly and squarely combating respondent's theory is *Delafield v. London, etc., Co.*, 177 App. Div. 477, 164 N. Y. S. 221. It may be observed that a number of the cases relied upon by respondent are not in point. However, we do not deem it necessary to pursue this branch of the case further, as the decision is not rested upon the grounds last discussed.

In their brief and on oral argument counsel for appellant have stated that the only question involved on the appeal is whether a policy insuring against theft, robbery, and pilferage insures against a larceny committed by means of trick and device. The attitude of counsel evidences a desire to have this question settled on this appeal and by the statement that it is the only question presented to compel its determination. However desirable that result might be, we cannot be forced into that position in the face of the plain terms of the policy which removes that question from the case.

[4] The contract of insurance forming a

part of the complaint by special reference must be examined in order to determine whether a cause of action is stated therein. Upon so examining it, we are of the opinion that it does not state a cause of action and the demurrer should have been sustained.

The judgment is therefore reversed, and the cause remanded to the superior court, with direction to sustain said demurrer.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; RICHARDS, J.

207 Cal. 373

CONGDON v. G. M. H. WAGNER & SONS.
(L. A. 9982.)

Supreme Court of California. June 19, 1929.

1. Records 9(1)—Land Title Law relates to land titles only and to lien instruments affecting title to land (Torrens Land Title Law).

The Torrens Land Title Law (St. 1915, p. 1932) has relation to land titles only and such transaction by way of mortgage lease, contract to sell, or other instrument intended to create such a lien, incumbrance, or charge on land as shall affect title thereto.

2. Chattel mortgages 134—Crops 1—Crops are "personalty," and crop mortgages do not constitute lien or charge on land (Civ. Code, § 2955 et seq.).

Growing crops are personal property, and crop mortgages executed and recorded under provisions of Civ. Code, § 2955 et seq., do not affect title to land on which crops covered by mortgage are being grown, and do not constitute lien or charge on land.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Personal Property.]

3. Chattel mortgages 12—Growing fruit crop is "personalty" subject to chattel mortgage.

A growing crop of fruit occupies same relation to the land as growing crop of grain, and as fructus industriales is personal property which might properly be subjected to chattel mortgage.

4. Records 9(13¼)—Purchaser under Land Title Law held not to take land free of lien of chattel mortgage on growing fruit crop (Civ. Code, § 2955 et seq.; Torrens Land Title Law).

Chattel mortgage on growing crop of fruit executed and recorded under Civ. Code, § 2955 et seq., is not such a lien, incumbrance, or charge on title to land as would require or permit its registration under the Torrens Land Title Law (St. 1915, p. 1932), and purchaser of land under such law would not take land free and clear of the lien of such chattel mortgage on the crops.

In Bank.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action for damages for conversion by Ruth Congdon against G. M. H. Wagner & Sons. Judgment for plaintiff, and defendant appeals. Reversed.

Ward Chapman, of Los Angeles, and Hickcox & Trude, of El Centro, for appellant.

C. L. Brown, of El Centro, for respondent.

RICHARDS, J. This action was commenced by plaintiff to recover damages for an alleged conversion of a crop of grapes of which the defendant had taken possession and harvested and marketed under a claim of right so to do by virtue of the provisions of a chattel mortgage covering said personal property. The plaintiff recovered judgment for the damages which she sought by reason of such conversion. This appeal is upon the judgment roll, and the sole question thus presented is as to whether the findings support the conclusions of law and judgment of the trial court. The facts as disclosed by the findings are these: On August 15, 1923, and for some time prior thereto, two persons whose names were D. Van Tol and J. Trainor were the owners and tenants in common of a tract of land in Imperial county, containing approximately 40 acres, and upon which or a portion thereof there was then growing a crop of grapes. Upon said date these owners of said land made, executed, and delivered to the defendant in this action, a corporation, a chattel mortgage upon said growing crop of grapes as security for certain moneys advanced and to be advanced to said mortgagors and which were to be applied to the cultivation, irrigation, growing, harvesting, and marketing of said grapes, the proceeds whereof were to be applied to the payment of said advancement. The mortgage by its terms provided that it should also cover future crops of grapes to be grown upon said land through a series of years, to and including the year 1925, and further provided that in the event the indebtedness thus to be incurred was not repaid within a specified time the mortgagee would have a right to enter upon said premises and take possession of whatever of said crop was growing thereon and proceed to harvest the same, applying the proceeds thereof to the payment of said indebtedness. Said crop mortgage was found by the trial court to have been duly executed and duly recorded in the office of the county recorder of Imperial county and was in full force and effect from the date of its execution to and including a portion of the latter year. The trial court further found that prior to March 7, 1925, the owners of said property had caused the same and the title thereto to be registered under that certain initiative law known as the Torrens Land Title Law, or, perhaps more correctly, as defined in the title thereof, as

the "Land Title Law" and which was adopted by the people at the general election on November 3, 1914, and which went into effect on December 19, 1914. (Stats. 1915, p. 1932.) The court further found that the aforesaid crop mortgage had not been registered under said Land Title Law, and that the same and the record thereof had not been made to appear upon the certificates of title provided for under said law, but that the same was simply recorded in the record of chattel mortgages of the county of Imperial and so appeared upon the records of said county on March 7, 1925. The court further found that on March 7, 1925, the aforesaid owners of the land sold and transferred the same under and in accordance with the provisions of said Land Title Law to the plaintiff herein for a valuable consideration, and that at the time of the sale and transfer the plaintiff had no actual knowledge of the existence of said chattel mortgage, but took the land by virtue of the sale in good faith and in the ordinary course of business; that at the time of the purchase of the land by the plaintiff a crop of grapes was growing thereon which became ripe, and ready for harvesting on or about July 1, 1925; that on said last-named date the former owners of the land were indebted to the defendant in a sum exceeding \$7,000 and were in default in the payment thereof, and that thereupon the defendant entered upon the premises under the terms and provisions of its crop mortgage and proceeded to harvest and market said crop of grapes, receiving therefor a net sum of \$1,064.32, which sum it appropriated to its own use. The plaintiff having expended the sum of \$750 in the growth and care of said grapes in the belief that the same was her property commenced this action against the defendant for the recovery of damages for the alleged conversion of said grapes. Upon the foregoing findings of fact the trial court based its conclusion of law to the effect that the plaintiff was entitled to recover judgment for such damages, which conclusion was predicated upon the theory that the plaintiff having purchased the premises under and by virtue of the provisions of the Torrens Land Title Law, and that said crop mortgage not having been registered under the provisions of said Torrens Land Title Law, she took the title to the premises and crops then growing thereon free and clear of said chattel mortgage, and hence that the defendant as the holder of the mortgage was not, after the date of the plaintiff's purchase of the land, entitled to enforce the same against the crop of grapes growing upon the land at the time of her acquisition thereof. The trial court gave its judgment in the plaintiff's favor, and from said judgment the defendant prosecutes this appeal.

[1-4] The Torrens Land Title Law upon which the respondent relies to support the judgment is none other than that which the

official title to said act defines it to be not than what the body and substance of the act discloses it to be, namely, a law which has relation to land titles and which provides a method of its own for their registration and transfer. It purports to provide a method by which the owner or owners of an estate or interest in a particular tract of land may bring the land and the title thereto under the operation of the act by filing a verified petition in the superior court of the county wherein the land is situated, setting forth the estate or interest which the applicant has or claims therein, and whether the same is community property or is subject to a homestead, or to any easement, lien or incumbrance affecting the title to the land, and, if so, the names and addresses of the holders of such easement, lien, or incumbrance. Upon the filing of the application in said court it shall cause to be set in motion a procedure having for its object and purpose the bringing before said court of all such persons as may have any interest in the title to said land or any particular estate or estates therein, including those who may be the holders of mortgages, easements, liens, attachments, or other incumbrances, to which the said land or the owners of estates therein is subject. Having by the prescribed procedure brought all such persons before said court, it shall proceed to a hearing and to the entry of a decree defining and certifying the title to such land and any lien or other charge affecting such title, which decree shall be in the nature of a decree in rem and shall forever quiet the title to said land and shall be final and conclusive as against the rights of all persons, known and unknown, to assert any estate, interest, claim, lien, or demand of any kind or nature whatsoever against the said land. Upon the filing with the county recorder of a certified copy of said decree, the latter shall, in his capacity of registrar as defined in said act, proceed to register the title in accordance with the directions of said decree and to issue a certificate or certificates of said title to the person or persons entitled thereto, which certificates shall set forth, in the order of their priority, "the particulars of all estates, mortgages, liens, encumbrances, and charges to which the owner's title is subject." The act proceeds to provide for the registration of all later transactions affecting the title to said land, and finally provides that, "No unregistered estate, interest, power, right, claim, contract, or trust, shall prevail against the title of a registered owner * * * or of any person bona fide claiming through or under him." The foregoing constitutes a sufficient epitome of the provisions of said Land Title Law to show that the act has relation to land titles only and to such transactions by way of mortgage, lease, contract to sell, or other instrument intended to create such a lien, incumbrance, or charge

upon land as shall affect the title thereto. It has, however, been held consistently by this court that growing crops are personal property (*Marshall v. Ferguson*, 23 Cal. 65; *Davis v. McFarlane*, 37 Cal. 636, 99 Am. Dec. 340), and that crop mortgages made, executed, and recorded under the provisions of section 2955 et seq. of the Civil Code do not affect in any degree the title to the land upon which the crops covered by said crop mortgage are being grown and that the same do not constitute a lien or charge upon the land. (*Simpson v. Ferguson*, 112 Cal. 180, 40 P. 104, 44 P. 484, 53 Am. St. Rep. 201; *First Nat. Bank v. Brashear*, 200 Cal. 389, 253 P. 143. It was also early decided by this court that a growing crop of fruit occupied the same relation to the land as a growing crop of grain, and as *fructus industriales* was personal property which might properly be subjected to a chattel mortgage. This being so, it would seem to be clear that such a crop mortgage does not come within the designations which are set forth in the aforesaid Land Title Law as constituting such a lien, incumbrance, or charge upon the title to the land itself as would either require or permit its registration under the terms and provisions of said act, and hence that the purchaser of the title to said land would not be protected as against the operation and effect of a duly executed, duly recorded and existing chattel mortgage upon the growing crops upon such land as the purchaser thereof was acquiring title to under the terms and provisions of said Land Title Law. The holder of such crop mortgage, legally executed and duly recorded under the provisions of section 2955 et seq., Civil Code, has, by virtue of the provisions of said Code, given constructive notice to all the world as to the existence of said crop mortgage and as to the priority of his lien in so far as it affects the crops growing or to be grown upon said land, and by such constructive notice all persons dealing with the owner or owners of said land during the period that the crops affected by said mortgage are growing thereon must be held to be bound thereby, notwithstanding the fact that the owner or owners of the land may have seen fit to take advantage of the so-called Torrens Land Title Law in order to facilitate a transfer or other transaction affecting the title to the land. It follows that the trial court was in error in holding that the plaintiff as the purchaser of said land under the provisions of the so-called Torrens Land Title Law took the same free and clear of the incumbrance upon the crops being grown upon the land at the time of her acquisition of said title which were subject to the lien of the defendant's chattel mortgage thereon.

The judgment is reversed, with instructions to the trial court upon its findings of fact herein to make and enter its conclusions of law and judgment in favor of the defendant

in conformity with the views expressed in this opinion.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

99 Cal. App. 381

GINSBERG TILE CO. v. FARAONE et al.*
(Civ. 5870.)

District Court of Appeal, First District, Division 2, California. June 11, 1929.

Rehearing Denied July 11, 1929. Hearing Denied by Supreme Court Aug. 8, 1929.

1. Partnership ⇔ 199—Partnership cannot sue in firm name (Code Civ. Proc. § 388).

Code Civ. Proc. § 388, permitting partnership to be sued in its firm name, does not permit suit by partnership in firm name.

2. Parties ⇔ 76(7)—Demurrer and motion to dismiss, on ground that plaintiff in suit brought in name of partnership had not legal capacity to sue sufficiently, specified grounds of objection and did not waive objection that partnership could not sue in firm name (Code Civ. Proc. § 431).

Defendants' demurrer and motion to dismiss suit, brought in name of partnership as plaintiff, on ground that plaintiff had not legal capacity to sue sufficiently, specified grounds of objection as required by Code Civ. Proc. § 431, and is not waiver of objection that partnership may not sue in firm name as legal entity.

3. Parties ⇔ 95(5)—Dismissal of suit brought in name of partnership, without affording plaintiff opportunity to amend, held error.

In sustaining motion to dismiss suit brought by plaintiff in name of partnership on ground that plaintiff had not legal capacity to sue, court erred in not affording plaintiff an opportunity to amend; such complaint being amendable by substituting individual partners as parties plaintiff.

4. Appeal and error ⇔ 138—Appeal from order dismissing suit by partnership for want of capacity to sue will not be dismissed for want of capacity to prosecute appeal.

Appeal from order dismissing suit brought in name of partnership for want of capacity of plaintiff will not be dismissed on the ground that appellant for same reason has no capacity to prosecute appeal.

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by the Ginsberg Tile Company, a partnership, against Salvatore Faraone and others. From an order granting defendants' motion to dismiss, plaintiff appeals and defendants move to dismiss the appeal. Motion to dismiss appeal denied, and order reversed with directions.

Superseding opinion in 274 P. 549.

Russell W. Cantrell and I. M. Peckham, both of San Francisco, for appellant.

Devoto, Richardson & Devoto, of San Francisco, for respondents.

GOODELL, Justice pro tem. This appeal was taken on the judgment roll alone from an order granting the motion of the respondents to dismiss. The action was commenced in the name "Ginsberg Tile Company, a copartnership, plaintiff," and the appeal was taken in the same name.

The facts are that on May 25, 1926, a complaint was filed by "Ginsberg Tile Company, a copartnership," against Salvatore Faraone and Jennie Faraone, his wife, defendants, alleging that certain work had been done by the plaintiff upon the improved real property of the defendants, under an agreement between them whereby plaintiff was to be paid \$593.75 for his work, which amount was unpaid, and that a claim of lien had been filed for record on February 24, 1926. The complaint prayed for judgment for \$593.75 and for the foreclosure of the lien. There was no allegation in the complaint respecting the copartnership named in the caption, or showing who were its constituent members.

The defendants demurred upon the sole ground that plaintiff had no legal capacity to sue, and they moved to dismiss upon the same ground.

Before the demurrer and motion were heard, an amended complaint was filed in the name of the same "plaintiff" and with two personal defendants (G. M. Sourich and T. A. Sourich) and four fictitious defendants added, and containing an allegation that plaintiff, Ginsberg Tile Company, was at all times mentioned a copartnership composed of H. Ginsberg and S. Ginsberg, and that they had complied with the provisions of sections 2466 and 2468 of the Civil Code. The amended complaint amplified in many important respects the rather sketchy averments of the original pleading, added allegations not found in the original, and changed the theory of the action from one based upon a contract made directly with Faraone and wife to one based upon a subcontract between plaintiff and G. M. Sourich and T. A. Sourich, original contractors, for work upon property owned by the Faraones.

The respondents promptly demurred to the amended complaint, again upon the ground of plaintiff's lack of capacity to sue, and again moved to dismiss upon the same ground, and moved to strike the amended complaint from the files upon the ground that it changed the cause of action originally set forth. The trial court granted the motion to dismiss, but took no action upon the demurrer or motion to strike.

[1] "The principal and substantial question presented for decision," to adopt the ap-

pellant's own statement of it, "is whether the filing of a complaint by a copartnership in its firm name, instead of having the individual names of the copartners appear in the caption thereof, is such a fatal defect as to render the action a nullity, legally justifying its dismissal on this ground, or whether such a defect is merely an irregularity, which may be taken advantage of by special demurrer, for non-joinder of parties plaintiff, and if no objection is thus specifically taken to the complaint, the defect is waived."

Bliss, in his work on Code Pleading (3d Ed.), at section 145, says: "The full names of both plaintiffs and defendants should be given as plaintiffs and as defendants—not, as at common law and in equity, by describing them in the body of the pleading, but in the form of a title to the cause, and they may be afterwards referred to, without naming them, as 'the plaintiff' or 'the defendant.' In an action by or against a partnership, the full names of all the partners must be stated."

Section 388 of the Code of Civil Procedure provides that, "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name. * * * The Legislature, as early as 1854, thus modified the common-law rule which permits partners neither to sue nor be sued in their partnership name. But it will be noted that the rule was relaxed with respect to defendants only. Had the Legislature intended to authorize or sanction a procedure such as that attempted here, obviously it would have been necessary simply to have provided that "the associates may *sue or* be sued by such common name." On settled and familiar principles it is clear that by expressly permitting such practice in the case of defendants the Legislature manifested an intention to prohibit it in the case of plaintiffs.

"While a copartnership acting under a fictitious name may be sued in that name * * * the rule governing its prosecution of an action is that the full names of all the partners must be stated." *Holden v. Mensinger*, 175 Cal. 300, 165 P. 950. But it is settled that if plaintiffs do sue in their partnership name the defendants must interpose their objection at the very outset or they waive it (*Agricultural Extension Club of Nevada County v. M. Hirsch & Son*, 39 Cal. App. 433, 179 P. 430, and *Gilman v. Cosgrove*, 22 Cal. 356), and it is claimed that in the instant case there has been such waiver.

[2] The basis for this assertion of waiver is not that the defendants made no preliminary objection at all, but that they put it on the wrong ground. The defendants promptly demurred to both complaints, and twice moved to dismiss, upon the sole ground that the plaintiff had not legal capacity to sue. The appellant contends that this was ineffective, for two reasons: (1) Because the demurrers

did not "distinctly specify the grounds" upon which the objection was taken (Code Civ. Proc. § 431), and (2) because the demurrers should have been upon the ground of "a defect or misjoinder of parties plaintiff." It is difficult to find any real or substantial difference between the ground which was specified and that now urged as the only proper one. When it is borne in mind that waiver presupposes voluntary abandonment, and that the respondents asserted their point without any delay at all, the waiver argument loses its force. As between the two grounds, there is authority both ways. In the *Gilman Case*, supra, where the defendants answered without having first objected to the suit in the firm name, it was held that they had waived the objection and "should have demurred to the complaint for a defect of parties." On the other hand, in the *Agricultural Extension Club Case*, supra, where in similar circumstances the defendants likewise answered, it is said that "the defect is one which may be taken advantage of upon the plea that the plaintiff has not legal capacity to sue." Dicta to the same effect are indeed found in two cases relied upon by the appellant. Thus in *Los Angeles R. Co. v. Davis*, 146 Cal. 179, 79 P. 865, 106 Am. St. Rep. 20, the court said that: "The point that plaintiff was not a corporation goes only to its capacity to maintain an action, * * * and therefore it could be raised by demurrer to the complaint only under subdivision 2 of section 430 * * * which provides as a cause of demurrer 'that plaintiff has not legal capacity to sue.' * * *" And so in *Fruit-Cleaning Co. v. Fresno Co. (C. C.)* 94 F. 845, 847, it is said: "Nor is it a question of misjoinder or non-joinder of parties plaintiff, but it is the legal question whether there is an actual party plaintiff in the case."

H. Ginsberg and S. Ginsberg undoubtedly had legal capacity to sue. And had they incorporated their business, the corporation certainly would have had legal capacity to sue. But the suit was brought in the name of neither a natural nor an artificial person. The plaintiff admittedly did that which at common law cannot be done at all, and that which a *plaintiff* in this state cannot do.

As we see it, the ground that plaintiff had no legal capacity to sue was no less appropriate than the ground of defect or non-joinder. It called the attention of the pleader directly and pointedly to the fact that he was not suing in the name of a legal entity at all; that he was using as a so-called plaintiff a mere name, instead of suing in the names of natural persons who happened to use such name or symbol in transacting their business. The bare statement of the ground in the demurrer and motion, in the statutory language, was itself a "distinct specification of the ground" and could not fail to rivet the attention of counsel upon the fact that he had no plaintiff before the court. (Parenthetically

it should be said that counsel who now prosecutes this appeal was not in the case when these pleadings were drawn.) On the other hand, a demurrer for nonjoinder would concede that the plaintiff named was itself proper enough, but would suggest that *other* parties should be joined as plaintiffs, which was not, by any means, what the respondents wanted to point out. What they sought to do was to point out that there was no plaintiff at all before the court, and we think their demurrer and motion were designed fairly and effectively to accomplish this.

From the framework of both complaints it is apparent that the theory of the pleader was that a partnership, as such, is a legal entity, and, as in the case of a corporation or natural person, may sue and be sued, and not that the individuals making up the partnership are the parties plaintiff, irrespective of the name under which they operate.

The appellant contends that it is not indispensable that the copartnership relation of the plaintiffs be shown in the caption so long as, in the body of the complaint, such partnership relation is specifically averred. This, of course, is true, but it does not meet the difficulty here. The cases of *Wise et al. v. Williams*, 72 Cal. 544, 14 P. 204, and *Fruit-Cleaning Co. v. Fresno, etc., Co.* (C. C.) 94 F. 845, are cited, but neither is in point. In the first, John H. Wise and Thomas Denigan were plaintiffs, and were so named in the caption. In the caption, however, they were not described as copartners. The body of the complaint contained the allegation that they were copartners doing business under the firm name of Christy & Wise. All that the case holds is that language descriptive of the partnership relation need not be contained in the caption (the real parties, natural persons, being named therein), so long as the allegations in the body of the complaint show such relationship. The cases would be parallel if in the case at bar H. Ginsberg and S. Ginsberg appeared as plaintiffs. They do not so appear either in the caption or in the body of the complaint. The federal case falls into the class of the *Gilman* and *Agricultural Extension Club* Cases, *supra*, for the reason that objection to the defect there was not taken until seven months after a replication had been filed, at which time the respondents sought to file an amended answer setting up the defect. Moreover, the names of the parties were set out in the bill of complaint sufficiently to conform to the equity rule of the federal courts.

It is conceded by the appellant "that, under the old common law, an action brought in the name of an unincorporated association or partnership is, in strictness, not a misnomer of a party plaintiff, but rather the omission of a party plaintiff, *rendering the action a nullity*," (*Italics ours*.) But counsel adds that, "This harsh doctrine according to the trend

of present-day authority, even in England, has been moderated," etc.

With respect to the common-law rule, the Supreme Court, in the case of *Holden v. Mensinger*, 175 Cal. 300, 165 P. 950, says: "Partners cannot, at common law, sue or be sued by their partnership names; but by statute in some of the States, as in Ohio, Iowa, etc., this is allowed, and so far partnerships are treated as corporations. Elsewhere their demands are joint and personal, and must be enforced by them as individuals." (*Bliss on Code Pleading*, sec. 145; *Williams v. Southern Pac. R. R. Co.*, 110 Cal. 457, 42 P. 974; *Clement v. British American Assur. Co.*, 141 Mass. 303, 5 N. E. 847.)"

In California the Legislature, with power to moderate the common-law rule to the fullest extent, has relaxed it only in part (*Code Civ. Proc.* § 388). The courts, in the cases to which we have referred, have moderated it further by holding that, unless raised at the threshold, the objection is waived. But the only implication from those cases is that if the objection is interposed in a timely and proper manner it is perfectly good. The objection here certainly was timely, and we are satisfied that the manner of asserting it was proper.

[3] The statute and the authorities in this state fully warrant the conclusion at which the lower court arrived, namely, that "plaintiff" had no legal capacity to sue. Numerous cases from other jurisdictions have been brought to our attention, but with the law so well settled (*Holden v. Mensinger*, *supra*; *Gilman v. Cosgrove*, *supra*; *Agricultural Extension Club of Nevada County v. M. Hirsch & Son*, *supra*, and section 388, *Code Civ. Proc.*) resort need not be had to outside authorities, nor need they be discussed. However, the difficulty with the case arises from the fact that the lower court, granting the motion to dismiss, thereby cut off the opportunity to amend, coupled with the fact that in its brief herein the appellant stood, more or less steadfastly, upon the technical ground discussed above, that by demurring and moving on one ground, and not on the other, the defendants waived the admitted defect and irregularity. In that connection it should be observed that in its brief appellant asks for a reversal "with instructions to the lower court to overrule the demurrer interposed to the amended complaint, with leave to the defendants to answer." To reverse in the form requested or for that reason would run counter to the settled and unbroken line of authority in this state and to the provisions of section 388 of the *Code of Civil Procedure*. But while we are satisfied that the amended complaint was demurrable, still there is a serious question whether leave should not have been granted to amend. The authorities to which we have referred hold that if the objection is not raised at the threshold it is waived, which is

but another way of saying that the defect is not absolutely fatal. If therefore a cause of action exists, the complaint is amendable. The granting of the motion to dismiss was tantamount—so far as the question of amendment is concerned—to the sustaining of a demurrer without leave to amend. The record shows that the motion to strike out the amended complaint, the demurrer, and the motion to dismiss the action were all taken under submission on briefs and that thereafter a minute order was entered granting the motion to dismiss. On the same day a formal order was signed by the judge that plaintiff take nothing and that judgment be entered in favor of defendants for their costs. If the amended complaint was susceptible of amendment so as to show upon its face the real parties plaintiff—and we are satisfied it was—the case would seem to be squarely within *Metzger v. Vestal*, 76 Cal. App. 409, 417, 244 P. 942, wherein the lower court had sustained a demurrer without leave to amend and *on the same day* entered judgment against plaintiffs. It was there urged that counsel had had ample time, while the demurrer was under advisement, to ask leave to amend in anticipation of an adverse ruling; further, that after the ruling, application could have been made under section 473 of the Code of Civil Procedure, but upon the authority of *Schaake v. Eagle*, etc., Can Co., 135 Cal. 472, 480, 63 P. 1025, 67 P. 759, and *James v. P. B. Steifer Mining Co.*, 35 Cal. App. 778, 788, 171 P. 117, it was held that plaintiffs were not required, in order to have the point reviewed on appeal, to ask leave to amend in advance of the ruling, or to move to vacate the judgment for the purpose of permitting them to amend. The court said:

"The rule that a party, against whom an order has been entered sustaining a demurrer without leave to amend, must ask leave to amend in order to have the ruling reviewed on appeal presupposes that the complaining party had an opportunity to ask such leave prior to the time of entry of judgment on the order. * * *

"* * * While the demurrers were properly sustained, * * * the plaintiffs ought to be permitted to amend in order that the case may be decided upon the merits rather than upon technical rules of pleading. 'Unless it be clear to a trial court that a defective complaint cannot be amended so as to obviate the objections made thereto, a plaintiff desiring it should be allowed reasonable opportunity to so amend.' (*Payne v. Baehr*, 153 Cal. 441, 447, 95 P. 895, 897.)"

The motion to dismiss, the granting of which gave rise to this appeal, was made upon the ground that "plaintiff" had no legal capacity to sue. The motion to strike out the amended complaint was upon the ground that it wholly changed the cause of action set forth in the original complaint. This latter

point is discussed in the briefs, but it is not necessary to discuss it herein. Moreover, as stated above, it was not the ground of the motion to dismiss and no action was taken upon the motion to strike, by the lower court.

[4] The respondents, consistently with their position in the lower court that the "plaintiff" had no legal capacity to sue, have moved to dismiss this appeal upon the ground that the "appellant" cannot, for the same reason, prosecute an appeal, which motion should be denied.

For the reasons herein given the order appealed from is reversed, with directions to the trial court to allow the complaint to be again amended within 10 days after notice. Each side, however, to pay its own costs on appeal. The motion to dismiss the appeal is denied.

We concur: KOFORD, P. J.; NOURSE, J.

99 Cal. App. 398

WERNER v. BRYDEN. (Civ. 3805.)

District Court of Appeal, Third District, California. June 12, 1929.

1. Venue ⇨21—Defendant's right to trial in county of his residence cannot be set aside, unless conflicting with plaintiff's right to impartial trial.

Defendant's right to have case tried in county wherein he and his witnesses reside is a substantial one, not to be set aside unless it actually conflicts with plaintiff's higher right to impartial trial.

2. Appeal and error ⇨965—Venue ⇨42—Applications to change place of trial are addressed to sound discretion of trial court, whose action cannot be disturbed, unless discretion was clearly abused.

Applications for a change of place of trial are addressed to sound legal discretion of trial court, whose action cannot be disturbed on appeal, unless abuse of such discretion clearly appears.

3. Venue ⇨52(1) — Mere preponderance in number of witnesses will not necessarily determine order on motion to change place of trial.

A mere preponderance in number of witnesses either party expects to produce will not necessarily determine whether order for change of place of trial on ground of witness' convenience shall be made.

4. Venue ⇨70—Denial of plaintiff's motion to change place of trial for local prejudice and witnesses' convenience held not abuse of discretion under facts stated in affidavits.

Facts stated in parties' affidavits held to show that trial court did not abuse discretion in denying plaintiff's motion for change of place of trial on grounds that she could not have impartial trial in county of venue and that witnesses' convenience would be promoted by change.

Appeal from Superior Court, Yuba County; J. B. Landis, Judge.

Action by Augusta Werner against Charles J. Bryden. From an order denying plaintiff's motion for a change of the place of trial, she appeals. Affirmed.

See, also, 84 Cal. App. 472, 258 P. 138.

George A. Connolly and Jerome Politzer, both of San Francisco, for appellant.

W. P. Rich, of Marysville, for respondent.

FINCH, P. J. This is an appeal by the plaintiff from an order denying her motion for a change of the place of trial from the county of Yuba to the city and county of San Francisco, made on the following grounds: "1. That there is reason to believe that an impartial trial * * * cannot be had in the County of Yuba. * * * 2. That the convenience of witnesses and the ends of justice would be promoted by the change."

The case has already been tried twice. It appears from the affidavits used at the hearing of the motion that the jury in the first trial was unable to agree, standing six for the plaintiff and six for the defendant. In the second trial a verdict was returned in favor of the defendant. A new trial was granted on the ground of insufficiency of the evidence to justify the verdict. There appears to have been no difficulty in securing a jury at either trial. The plaintiff challenged but eight jurors for cause at the first trial and twelve at the second. The defendant owns property of the value of about \$100,000, while the plaintiff is dependent "upon her daily labor in the City and County of San Francisco." In plaintiff's affidavit it is stated that the grandmother of the defendant, Mary J. Bryden, has resided in the city of Marysville, Yuba county, for fifty years, and "is one of the best known and most highly respected residents of the County of Yuba"; that the defendant's father, James R. Bryden, died in the year 1922, and had lived all his life in Yuba county; that he was "very well and favorably known all throughout the County of Yuba. * * * The family of the defendant * * * has been for many years, and now is, highly respected and very well known all throughout the County of Yuba. The citizens and residents of the said County of Yuba, owing to their respect for the said Mrs. Mary J. Bryden and for the said James R. Bryden * * * all sympathize with the family of said defendant by reason of the matters disclosed by the filing of the complaint in the above entitled action, and by the trial of said action, as well as by the publicity given thereby by the press, and by reason thereof, affiant is informed and believes, and therefore al-

leges, that it is impossible for affiant to have a fair and impartial trial of the above entitled action in the said County of Yuba." There is nothing in the affidavit to show what, if any, publicity was given the proceedings at the trial by the press.

The defendant's affidavit "denies that plaintiff cannot have an impartial trial in * * * the County of Yuba; * * * denies that any prejudice exists in said County of Yuba against plaintiff, either personally or against her case; denies that there is anything existing in the public minds or otherwise, in said County of Yuba, to prevent plaintiff from having a fair and impartial trial; * * * denies that the reputations of (Mary J. Bryden and James R. Bryden) * * * in the former trials of this action in any way influenced or in any subsequent trial of this action in any way will influence the minds of the people of said County of Yuba, or any thereof." It appears that it would be more convenient for three of the plaintiff's witnesses to attend the trial of the case in San Francisco, and that it would be more convenient for two of the defendant's witnesses, one of whom is the court reporter of Yuba county, to attend such trial at Marysville.

[1-3] "The right of defendants to have their case tried in the county wherein they and their witnesses reside is a substantial one and is not to be set aside unless it actually conflicts with the higher right of a plaintiff to have an impartial trial." *Ross v. Kalin*, 53 Cal. App. 616, 619, 200 P. 745, 746. "Applications like this are addressed to the sound legal discretion of the trial court, and its action cannot be disturbed on appeal unless it clearly appears that there was an abuse of that discretion." *Stockton C. H. & A. W. v. Houser*, 103 Cal. 377, 380, 37 P. 179, 180; *J. I. Case T. Co. v. Copren Bros.*, 35 Cal. App. 70, 76, 169 P. 443; *Ross v. Kalin*, supra. "The determination of a motion of this character upon the ground of the convenience of witnesses rests largely in the sound discretion of the court to which it is addressed, and its order thereon will be disturbed only for an abuse of such discretion. * * * A mere preponderance in number of the witnesses which either party expects to produce will not necessarily determine the order to be made." *Scott v. Stuart*, 190 Cal. 526, 527, 213 P. 947, 948.

[4] It so clearly appears from the facts stated in the affidavits that the denial of the motion was not an abuse of discretion that no further discussion or citation of authorities is deemed necessary.

The order is affirmed.

We concur: PLUMMER, J.; ROLFE L. THOMPSON, J.

99 Cal. App. 323

WIBERG v. BARNUM et al. (Civ. 5228.)★

District Court of Appeal, Second District, Division 2, California. June 6, 1929.

Rehearing Denied July 5, 1929. Hearing Denied by Supreme Court Aug. 5, 1929.

1. Evidence ⇨434(11)—In action to rescind land contract, evidence of fraudulent representation to effect that vendor would resell at profit within 30 days, which induced purchaser to enter into contract, held improperly excluded.

In action by purchaser to rescind contract to purchase real estate, evidence to effect that vendors fraudulently represented that they would resell to a party whom they held in reserve at a profit to purchaser within 30 days, and that purchaser relied on such representation, which induced her to make contract, held erroneously excluded, since written instrument on which vendor sought to rely was incomplete.

2. Evidence ⇨434(8)—Parol evidence is admissible to show fraud, since it does not vary contract.

Parol evidence is admissible to show fraud, since it does not vary or contradict contract, but shows that no binding contract was legally made.

3. Contracts ⇨94(1)—Single material representation, knowingly made with intent to influence another into making contract, will, if believed and relied on, afford ground for rescission.

Single material representation, knowingly made with intent to influence another into entering into a contract, will, if believed and relied on by the other, afford complete ground for rescission.

4. Appeal and error ⇨607(1)—Where transcript was in fact prepared, certified, and transmitted, appellant's omission to request transcript in notice to clerk was cured.

Where transcript was in fact prepared and transmitted to appellate court, appellant's omission to request it in her notice to clerk was cured.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action to rescind contract for purchase of real estate by Nanna B. Wiberg against H. E. Barnum and another, doing business as the Barnum-Walters Company. From a judgment for defendants, plaintiff appeals. Reversed.

John J. McMahon, of Los Angeles, for appellant.

Victor T. Watkins, of Los Angeles, for respondents.

CRAIG, J. In December, 1923, appellant entered into a contract in writing by the terms and provisions of which she agreed to purchase from the defendants certain real property therein described, situated in Los Angeles county. Thereafter, and in June, 1924, she notified them of her rescission of

said contract, reciting in detail various grounds of fraud through which she alleged the contract to have been procured, and demanded a return of the amount theretofore paid on account of the agreed purchase. A suit for rescission was subsequently instituted, wherein judgment was rendered in favor of the defendants, and the plaintiff appeals therefrom. It is alleged in the complaint that the defendants stated and represented to the plaintiff that, if she would sign said contract agreeing to buy the property mentioned, and pay a first installment of \$387, she would not be expected or compelled to pay the second or any further installments; that they had then a buyer, and within 30 days the defendants would resell the same at a net profit to plaintiff of \$500. No resale was made, and on June 10, 1924, demand was made for the second installment, whereupon, and as soon as the plaintiff discovered the alleged fraud and the defendants' refusal to make a resale, she signed and served her notice of rescission.

The complaint alleges the facts recited above, and, further, that the representations so made by the defendants were false, fraudulent, and untrue; that they were known to the defendants to be false and fraudulent, and were made for the purpose of inducing the plaintiff to enter into said agreement, and to obtain from her said sum of \$387; that she believed and solely relied upon each and all of said statements and representations, but for which she would not have signed the agreement, or have paid to the defendants the first installment; that no resale of the property was made; and that, at the time of the execution of said contract, the defendants did not have a purchaser in view for such resale.

Upon the trial, objections of the defendants to the introduction of any evidence tending to show the alleged fraud by which the plaintiff claimed to have been induced to enter into the contract in suit were sustained. It was the theory of the defendants, and of the trial court, that as the agreement to resell in the future was an independent and separate contract and transaction, for which the plaintiff might have sought damages for a breach, but that it was not written into the initial contract, evidence thereof was irrelevant and incompetent, since the principal contract provided that no statement or representation not embraced therein should be binding upon either of the parties.

[1] The theory of the plaintiff, however, as plainly alleged in the complaint, was that the false, fraudulent, and deceptive statements of the defendants were advanced, not as affecting the property or its condition or value, or the terms of purchase, but as an inducement and part consideration which led the plaintiff to make the contract; that the agreement was one not, in fact, looking to-

ward the purchase of property by the plaintiff, but for the sole purpose of making a net profit of \$500 upon the investment of \$387 for a period not exceeding 30 days; that the purchase was one incidental to a resale, concerning which the defendants made the representations alleged facts, and not mere expressions of opinion. It is obvious that, had the transaction been consummated as alleged to have been promised by the defendants, the plaintiff would not have retained the real property, and the defendants would not have declined to return the amount of the investment with the agreed increase. It is likewise patent, assuming the allegations of the complaint as true, that the plaintiff was not interested in the property, or in its character or value, but that she relied upon the statements and promises of the defendants that they would resell to a party whom they held in reserve, who was ready, able, and willing to buy, and contracted with that end in view. Upon these facts, the sole consideration for the entire transaction was an agreed profit to the plaintiff, through the resale which she consented to assist in facilitating, but which the defendants did not carry out, nor at any time intend to fulfill, although the plaintiff fully performed all of the conditions of her agreement. From this the conclusion is inevitable that the written instrument upon which the defendants sought to rely at the time of trial was incomplete, and that evidence of the entire transaction was erroneously excluded.

[2, 3] As was said in *Brison v. Brison*, 75 Cal. 533, 17 P. 693, 7 Am. St. Rep. 189: "In cases of fraud, actual or constructive, no mere form of words, which the parties have made use of, can shut out inquiry as to the real facts. And this from the necessity of the case. For, as has been pertinently asked, if parol evidence be not admissible, how else can the fraud be shown?" The rule is settled in this state that parol evidence is admissible to show fraud, since it does not vary or contradict the contract, but shows that no binding contract was legally made. *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 P. 542, 544. Our Supreme Court, in applying the principles as repeatedly stated in numerous cases, held in *Davis v. Butler*, 154 Cal. 623, 98 P. 1047: "A single material 'misrepresentation' knowingly made, with intent to influence another into entering into a contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it had been accompanied by a multitude of other false representations."

The same rule is announced in *California*

Credit & Coll. Corp. v. Randall, 76 Cal. App. 321, 244 P. 958, wherein it was held that a provision that verbal agreements of agents contrary to the terms of the contract were unauthorized and could be disregarded did not preclude proof of fraudulent representations by which the defendant was induced to execute an agreement in writing and a promissory note.

[4] It is objected by respondents that appellant must be held to have waived the right to use the reporter's transcript upon this appeal, for the reason that in her notice to the clerk she did not request it. Sufficient of the examination of the witness and rulings of the trial court, however, are included in the briefs to present the question here involved, and, since the transcript was in fact prepared, certified, and transmitted to us, appellant's omission is cured. *White v. Hendley*, 35 Cal. App. 267, 169 P. 710.

The judgment is reversed.

We concur: **WORKS, P. J.; IRA F. THOMPSON, J.**

99 Cal. App. 794

Myrtle M. HEEFNER (a Single Woman), Plaintiff and Appellant, v. CITIZENS' TRUST & SAVINGS BANK (a Corporation), and H. E. Barnum and M. Walters, Doing Business as Barnum-Walters Company (a Corporation), Defendants and Respondents. (Civ. 5229.) ★

District Court of Appeal, Second District, Division 2, California. June 6, 1929.

Rehearing Denied July 5, 1929. Hearing Denied by Supreme Court Aug. 5, 1929.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

John J. McMahon, of Los Angeles, for appellant.

Victor T. Watkins, of Los Angeles, for respondents.

CRAIG, J. The facts are similar in this case to those stated in *Wiberg v. Barnum-Walters Co.* (Cal. App.) 278 P. 871, except that on the back of one of the contracts here involved the following appears:

"We agree to resell lots 14 in Block 48, & lots 2/42, for Mrs. Heefner, and that she will not have to make 2nd payments (6 mos. from now) on same. Resales to be as early as possible."

For the reasons stated in the decision of that case, this day filed, the judgment herein is reversed.

We concur: **WORKS, P. J.; IRA F. THOMPSON, J.**

99 Cal. App. 455

Ex parte GRIGORIS. (Cr. 1542.)

District Court of Appeal, First District, Division 1, California. June 17, 1929.

Contempt $\Rightarrow$ 54(4)—Affidavit not reciting defendant's knowledge of order requiring payment of alimony in proceedings to which defendant was party held sufficient.

Affidavit on which order committing petitioner for refusal to pay alimony is based is not insufficient for failing to charge that petitioner had knowledge or notice of order requiring payment of alimony, where petitioner was party to proceeding in which alimony order was made; only jurisdictional requirements in such case being affidavit of making of order and disobedience thereof.

Original habeas corpus by Peter Grigoris, also known as Peter Gregory, to obtain his release from custody of the Sheriff of the City and County of San Francisco from confinement under commitment for contempt for failure to pay alimony. Writ discharged, and petitioner remanded.

See, also, 276 P. 1059.

Joseph A. Brown, of San Francisco, for petitioner.

Lelia R. Leep, of San Francisco, for respondent.

TYLER, P. J. Habeas corpus. Petitioner seeks to be discharged from the custody of the sheriff of the city and county of San Francisco, by whom he is held in custody under an order of the superior court adjudging him guilty of contempt in failing and refusing to pay certain sums of alimony in a divorce proceeding. It is claimed on his behalf that the affidavit supporting the commitment is insufficient for the reason that it fails to charge that petitioner had any knowledge or notice of the order of court, the violation of which constitutes the ground for the adjudication upon which the commitment is predicated. We are cited to the case of *Frowley v. Superior Court*, 158 Cal. 220, 110 P. 817, as supporting this contention. It was there held that the petitioner could not be held guilty of contempt unless he had knowledge of the order, and, this being true, knowledge on his part was one of the essential facts to be stated in the affidavit. In that case, however, the petitioner was not a party to the proceeding in which the order violated was made. Here petitioner was a party to the proceeding in which the order was made, and the record in such proceedings shows that he appeared therein. Under these circumstances the only jurisdictional facts required to be stated in the affidavit are the making of the order and the disobedience of it. *Ex parte Von Gerzabek*, 63 Cal. App. 657, 661, 219 P. 479; *In re McCarty*, 154 Cal. 534, 98 P. 540. Both of

these jurisdictional facts are recited in the affidavit.

The writ is discharged, and the prisoner remanded.

We concur: KNIGHT, J.; CASHIN, J.

McLACHLAN v. McLACHLAN. (Civ. 6223.)★

District Court of Appeal, Second District, Division 1, California. June 8, 1929.

Appeal and error $\Rightarrow$ 731(5)—Where bill of exceptions did not specify parts wherein evidence was insufficient, evidence could not be reviewed on appeal (Code Civ. Proc. § 648).

Where appeal was taken on bill of exceptions which purported to set out evidence adduced at trial, but bill failed to specify parts wherein evidence was insufficient, evidence could not be reviewed on appeal, under Code Civ. Proc. § 648.

Appeal from Superior Court, Imperial County; William Hazlett, Judge.

Action for divorce by Argyle McLachlan against Pauline Viola McLachlan. From an interlocutory decree against defendant, defendant appeals, and makes an attempted appeal from an order denying defendant's motion for a new trial. Decree affirmed. Appeal from order denying new trial dismissed.

See, also, 276 P. 627.

M. C. Atchison, of Calexico, for appellant. Ault & MacKinnon, of Calexico, for respondent.

YORK, J. This is an appeal from an interlocutory decree of divorce against defendant and an attempted appeal from an order denying defendant's motion for a new trial, based upon the ground that the decision is contrary to the evidence.

This appeal was taken upon a bill of exceptions, which purports to set out the evidence adduced at the trial, and, as the bill of exceptions fails to specify the particulars wherein the evidence is alleged to be insufficient, the evidence cannot be reviewed upon this appeal. Section 648, Code Civ. Proc.; *Schultz v. City of Venice*, 200 Cal. 50, 54, 251 P. 913.

However, there was sufficient evidence before the court to support the findings which the court made, and the findings made by the court were sufficient to support the judgment.

The judgment is affirmed. The appeal from the order denying motion for new trial is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

99 Cal. App. 417

**CRYSTAL ICE & COLD STORAGE CO. v.
RENSCHLER PRODUCE CO.
et al. (Civ. 3613.)**

District Court of Appeal, Third District, California. June 12, 1929.

1. Warehousemen ⇨24(1)—Company operating cold storage warehouse had duty to use ordinary care in maintaining temperature to preserve stored apples.

It was the duty of company conducting cold storage warehouse to use ordinary care in the maintenance of temperature that would preserve apples stored therein by another.

2. Evidence ⇨574—Court need not accept opinions in government bulletin indicating temperatures in warehouse storing apples was excessive as against warehouse foreman's opinion based on practical experience.

Though opinions relative to cold storage of apples expressed in government bulletin introduced in evidence in action to recover storage charges wherein defendants cross-complained for damages to apples from scald indicated that temperatures maintained in plaintiff's warehouse was too high to produce best results in preservation of apples, court was not required to accept opinions as against those of plaintiff's foreman based upon ten years' practical experience in cold storage of apples in plaintiff's plant.

3. Evidence ⇨8—Court need not judicially notice that temperature in warehouse higher than government advised caused deterioration of apples stored therein.

In action to recover for storage of apples in plaintiff's warehouse, wherein defendant cross-complained asking damages for scald to apples, court was not required to take judicial notice that high temperature maintained in warehouse was cause of deterioration of apples, though temperatures were higher than those indicated by government bulletin which would give best results.

4. Damages ⇨62(3)—Owner withdrawing apples from storage at intervals during several months of silence could not recover for deterioration from improper temperatures.

Where company storing apples with another withdrew apples from storage as early as December, 1925, and so continued to withdraw at frequent intervals until June, 1926, and did nothing to prevent or minimize damage alleged to have been caused to apples because of improper temperatures maintained in warehouse, owner of apples could not recover for damages where it remained silent while owner of warehouse had no knowledge of deterioration of apples.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Crystal Ice & Cold Storage Company against the Renschler Produce Company and others, wherein defendants fil-

ed cross-complaint. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles A. Bliss and A. R. Price, both of Sacramento, for appellants.

Butler, Van Dyke & Desmond, of Sacramento, for respondent.

FINCH, P. J. The plaintiff conducts a cold storage warehouse in Sacramento. The Renschler Produce Company, referred to herein as the defendant, is engaged in the wholesale produce business in the same city. During October, November, and December, 1925, and January, 1926, the defendant delivered to the plaintiff 4,825 boxes of apples to be kept in cold storage. Of these apples, 2,487 boxes of were stored on a seasonal basis, to remain until the end of the following June, unless sooner withdrawn by the defendant, and the remainder thereof "were stored on a monthly basis, the contract for the storage of which was renewed at the end of each month in cases where the apples were not sold." The defendant withdrew apples from storage as early as December, 1925, and continued to make withdrawals at frequent intervals until some time in June, 1926, when the last of them were withdrawn, and during all that time the defendant made no complaint as to the condition of the apples when withdrawn or that they were in any manner damaged while in storage. The plaintiff sent the defendant monthly bills for storage charges, and instructed its collectors to call on defendant and demand payment. On the defendant's continued failure to pay these bills, this action was commenced to recover the unpaid balance of \$761.28. "Just before the suit was begun," the defendant presented a claim to the plaintiff, dated September 28, 1926, for \$4,941.19 on account of alleged damages to the apples while in storage, and the defendant has filed a cross-complaint for that sum. The court found in favor of the plaintiff for the amount demanded in the complaint and against the defendant on the cross-complaint, and judgment was entered accordingly. The defendant has appealed from the judgment.

The cross-complaint alleges that the plaintiff "carelessly and negligently and without exercising any care, * * * permitted and allowed the rooms wherein said apples were stored to become overheated and kept said rooms at a temperature of at least 11 degrees Fahrenheit too high for the safe preservation of said apples, causing said apples to become unmarketable as good fruit." This allegation is denied in the answer to the cross-complaint. While the appellant's argument is set forth under several headings, the only question raised by the appeal is whether the respondent maintained the proper temperature for the preservation of the appellant's apples. In appellant's opening brief it is said: "We submit that the findings that plaintiff and

cross-defendant was not negligent in the care of defendant's fruit; and that defendant has not been damaged by the negligence or lack of ordinary care in the storage of defendant's apples, are not supported by the evidence."

[1] The appellant correctly says that it was the plaintiff's duty "to use ordinary care in the maintenance of such temperature as would preserve the apples." 27 R. C. L. 991. Whether the plaintiff performed this obligation must be determined by ascertaining what temperature was maintained and what temperature was required to preserve the fruit. Records of the temperature maintained, made at intervals of 4 hours, and continuous "automatic thermometer disc records," were introduced in evidence. It was stipulated at the trial that such records show the following:

The temperature in room 8, where the apples were on season storage, was maintained, during the greater portion of the time at 36 degrees Fahrenheit; but frequently the temperature was permitted to rise to 36½ degrees and 37 degrees for 4, 8, and 12 hour periods. October 22 and 23 it stood at 37 degrees for 12 hours, immediately followed by 40 degrees for 4 hours, 38 degrees for the next 8 hours, and then 39 degrees for 8 hours; October 27, at 39 degrees for 8 hours; November 21 and 22, at 37 degrees to 40 degrees for 16 hours; March 15 and 16, at 37 degrees to 38 degrees for 48 hours; April 5 and 6, at 37 degrees to 38 degrees for 24 hours; June 5 and 6, at 37 degrees to 38 degrees for 20 hours; June 9, at 38 degrees for 12 hours; June 18, 37 degrees to 37½ degrees for 24 hours; June 20, 21, and 22, at 36 degrees to 37½ degrees for 60 hours. Temperatures ranging from 36 degrees to 37 degrees are omitted in this summary of the facts stated in the stipulation. The temperatures maintained in the monthly storage rooms do not vary greatly from those given.

The evidence shows without contradiction that the damage to the defendant's apples was due to a disease known as scald. Leavitt W. Renschler, one of the defendants, testified that scald "is not a disease, it is caused by refrigeration"; that it "is the brown color that gets on the apples from the heat."

The defendant, however, introduced in evidence "Farmers' Bulletin No. 1380," issued by the United States Department of Agriculture. It is therein stated: "Apple scald is a non-parasitic or physiological disease. It * * * is due to certain unfavorable conditions to which apples are sometimes subjected. Seasonal and orchard conditions are involved, as well as those that prevail in transportation, in storage, and on the market." Experiments at Wenatchee, Washington, showed that "apples from the heavily irrigated trees developed about three times as much scald after removal from storage as those from the lightly irrigated trees. * * * Low temperature is the best means of prolonging the life of the

apple and is a most important agency in delaying the development of scald. * * *

An increase of 9 degrees in the storage temperature has resulted in two to three times as much scald upon removal from storage on a particular date. It will be seen from two sets of data on the 1916 Grimes Golden that the effect of low temperature is that of delaying rather than preventing it, the disease being as serious at 32 degrees F. at the end of 16 weeks as it was at 41 degrees F. at the end of 12 weeks. It is important that the apples be cooled as quickly as possible after picking. They should be delivered to the storage plant promptly, and the storage conditions should be such that there will be the least possible delay in bringing the fruit to the final storage temperature."

In "Department Bulletin No. 1406," also introduced in evidence by the defendant, it is said: "After being cooled, apples from most sections of the United States should be held at 30 degrees to 32 degrees F. An exception should be made to apples grown in Pajaro Valley of California, since storage of this fruit at 35 degrees to 38 degrees is necessary to prevent one type of internal browning or breakdown."

Most of the apples involved in this suit were grown at Hood River, Or., and the remainder at Yakima, Wash., and were shipped thence to Sacramento during the months of October, November, and December, 1925. Most of them had been in cold storage for periods ranging from three weeks to three months prior to shipment, but at least one carload was shipped "as received from the orchard." All of them were shipped in refrigerator cars. It thus appears that the important early cooling of the apples immediately after picking was in the hands of persons other than the plaintiff.

Renschler testified that some of the Spitzenburg apples were withdrawn 30 days after they were placed in storage with the plaintiff in November; that 10 to 15 per cent. of them showed scald; that the other apples showed scald, ranging from 8 per cent, in those first withdrawn to 25 per cent. "the latter part of the season"; and that he visited the storage plant "three, four or five times a week, when we were taking them out of storage"; but that during all that time he failed to call plaintiff's attention to the poor condition of the apples withdrawn.

While the foregoing evidence undoubtedly is sufficient to support a finding that the plaintiff did not exercise ordinary care in the storage of the defendant's apples, the important question is whether there is sufficient evidence to support the contrary finding made by the court. A. J. Nevis, who during the period of storage and for 10 years prior thereto was plaintiff's foreman, in charge of the cold storage plant, testified:

"We maintain a temperature in the warehouse for the cold storage of apples of 36 de-

grees; we have always found that is the correct temperature. * * * Q. And do you find that produces the best results? A. In Sacramento, yes. Very good results. Q. And you have never had any bad results? A. None whatever. Q. This is the first time this character of complaint has ever been presented to you or your company? A. To my knowledge, it is. * * * Q. Did you examine the contents of the boxes? A. Open the boxes? Q. Yes. A. No, we are not supposed to do that. * * * It has been my experience that fruit would be affected with a lower temperature; * * * that a temperature of 32 * * * might be good for some apples, and not for others; apples carrying a temperature at that degree are apt to contract what we call internal browning, which is prevalent with apples; apples carrying a much higher temperature, forty, and forty-two, would be susceptible to scald; and we consider a medium about thirty-six degrees about right. * * * Q. What is the least temperature at which scalding occurs? A. Scalding occurs around forty-two, forty-three or more. Q. Does it at forty? A. I have never had it scald at that temperature. * * * Q. Would it scald at forty-one? A. Possibly. Q. Now, if it would scald at forty-one, about how long would it have to remain at forty-one? * * * A. It would have to be—in my opinion the duration of the shortest—two days possibly, where there could be any damage done. * * * Q. Did you ever store apples for the Renschler Company? A. Ever since we have been in business except this year. Q. And maintained the temperature the same? A. Yes. * * * Q. Did you store any of the northwestern apples so called any time prior to 1925-1926? A. Yes sir. Q. Did you store any for Mr. Renschler? A. Yes, all his apples were northwestern apples."

[2, 3] The opinions relative to the cold storage of apples, expressed in the bulletin introduced in evidence, indicate that the temperature maintained in the plaintiff's plant was too high to produce the best results in the preservation of the defendant's apples, but the trial court was not required to accept such opinions as against those of the foreman, which were based upon 10 years' practical experience in the cold storage of apples in plaintiff's plant. The appellant suggests that the court should have taken judicial notice "that the high temperature was the cause of the deterioration of defendant's apples." As said in *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200, "the preservative effect of cold, and especially of dry cold, is well known and exemplified in the keeping of meat and fruit in icehouses"; but no authority is cited to the effect that a court may take judicial notice of the particular temperature which will best preserve a particular variety of fruit.

[4] The court found "that defendant with-

drew apples from storage as early as December, 1925, and so continued to withdraw at frequent intervals until June, 1926," and "that he did nothing to prevent or minimize, such alleged damage." As stated, Renschler testified that the deterioration of his apples ranged from 8 per cent. in the first withdrawals to 25 per cent. in the last. The defendant knew of this deterioration, and remained silent, while the plaintiff was without knowledge thereof. In *Farmers' Bulletin No. 1380*, it is said: "When scald begins to appear in commercial storage lots the dealer knows that the fruit cannot safely be held for more favorable prices, and it is usually moved to market and sold for what it will bring."

"It is a recognized rule of law that in a case where injury or damage to a plaintiff's property is threatened as the result of a tort or breach of contract by another, the duty rests upon the plaintiff to use reasonable care and diligence to protect his property against such threatened loss or injury, and if he fails to do so he will not be permitted to charge the defendant for that portion of his loss or injury which was due to plaintiff's own neglect in this behalf." *Vitagraph, Inc., v. Liberty Theatres Co.*, 197 Cal. 694, 242 P. 709; *Sargent v. North End Water Co.*, 190 Cal. 512, 213 P. 33; 8 Cal. Jur. 782.

The judgment is affirmed.

We concur: PLUMMER, J.; ROLFE L. THOMPSON, J.

99 Cal. App. 270

NIELSEN v. SWANBERG. (Civ. 6754.)★

District Court of Appeal, First District, Division 1, California. June 4, 1929.

Rehearing Denied July 3, 1929. Hearing Denied by Supreme Court Aug. 1, 1929.

1. Frauds, statute of $\S$ 128—Written notification of desire to have defendant repurchase stock was not required, where defendant bound himself in writing in original contract to repurchase.

Where defendant had bound himself in writing in original contract concerning sale of stock to perform his obligation to repurchase stock upon receiving notification from company holding it of its desire to exercise option for repurchase of stock by defendant, notification to defendant of desire for him to repurchase stock held not required to be in writing to take it out of statute of frauds.

2. Appeal and error $\S$ 173(6)—Objection that notification of desire to have stock repurchased was not in writing may not be made first on appeal.

Where no objection was interposed at trial nor motion for nonsuit made, objection that notification of plaintiff's desire to have defendant repurchase stock according to his obligation cannot be insisted upon on appeal to District Court of Appeals.

3. Corporations ☞121(2)—Defendant's inability to purchase stock as agreed, and statement that no tender would be necessary, rendered tender unnecessary to support action for price.

Inability of defendant to consummate purchase of stock according to his written agreement to repurchase it, and his statement to plaintiff giving plaintiff to understand that no tender of stock would be necessary, rendered tender thereof unnecessary to support action to recover purchase price of stock.

4. Corporations ☞121(2)—No tender of stock to defendant agreeing to repurchase and pledging it for payment was necessary, since restoration would extinguish plaintiff's lien (Civ. Code, § 2913).

Where agreement provided that stock was to be purchased on monthly payments and be pledged as security for payment of repurchase price by defendant, no tender of stock was necessary to support action to recover purchase price, since pledgor is not entitled to pledged property until debt is paid, and under Civ. Code, § 2913, restoration of stock to defendant would have extinguished plaintiff's lien.

5. Corporations ☞120—Defendant's promise as representative of second party consummating agreement for sale of stock to repurchase and pledge stock for price constituted agreement therefor.

Where defendant was party to agreement for sale of stock and was active representative of second party to agreement in consummating it, his promise to purchase back stock which was to be pledged for repurchase price constituted an agreement of repurchase by him.

6. Corporations ☞121(4)—It was unnecessary to allege damage, where it was alleged defendant promised to pay reasonable value for stock.

Where plaintiff, in action to recover purchase price of certain stock, alleged that defendant had promised to pay fair and reasonable value of stock in monthly installments and for which, when determined to be fair and reasonable, judgment was prayed, it was unnecessary to allege that plaintiff had been damaged in that sum by defendant's failure to purchase stock as he agreed.

7. Corporations ☞121(5)—It was unnecessary, in action for price of stock, to prove performance of lease referred to by agreement for purchase to fix term for trade restraint.

Where agreement concerning sale and repurchase of stock referred to contemporaneous lease for but one purpose of fixing term during which party should not engage in certain business, it was unnecessary for plaintiff in action for purchase price of stock to prove performance of conditions of lease, since where reference is made in contract to another writing for specified purpose that writing becomes part of contract for specific purpose only.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by A. T. Nielsen against C. O. Swanberg. Judgment for plaintiff, and defendant appeals. Affirmed.

Superseding former opinion in 275 P. 825.

Joseph C. Meyerstein, of San Francisco, for appellant.

Avery J. Howe, of Palo Alto, for respondent.

CAMPBELL, Justice pro tem. This action is for the purpose of recovering the purchase price of certain stock and is predicated upon a clause in a written agreement executed on June 25, 1923, between the Altomont Creamery, Inc. (respondent's assignor), as the party of the first part; Acme Ice Cream Company, as party of the second part; and C. O. Swanberg (appellant), as party of the third part—which is as follows: "The Third Party further agrees that at any time prior to July 1, 1926, should the first party not have exercised the option next hereinabove given it to exchange the said preferred stock for common stock, he, the Third Party, at the option and upon the request of the First Party, will purchase the said 130 shares of preferred stock at the price of \$100 per share, payable at the rate of \$1000 upon transfer of the said stock, and not less than \$1000 per month thereafter until the entire sum of \$13,000 is paid, provided, however, that in case the First Party shall desire to exercise either of the options herein granted, it shall so notify the Third Party not less than 30 days prior to the time when such option shall be exercised, said stock to be pledged as security for payment of the said repurchase price." Respondent A. T. Nielsen, the assignee of Altomont Creamery, Inc., was the owner of all of the stock of the Altomont Creamery, Inc., with the exception of two shares, one of which was owned by his wife and the other by one R. W. Johnstone, and while one Roseberg was the general manager of the Acme Ice Cream Company, appellant C. O. Swanberg appears to have been the controlling spirit of the corporation—at least he dictated its action with reference to the agreement under consideration in which he agreed to purchase the Acme Ice Cream Company stock from Altomont Creamery, Inc., respondent's assignor, which stock was to be pledged as security for the payment of the "repurchase price." Judgment was entered for plaintiff for \$3,000, as the monthly installments found to be due under the contract up to the filing of the complaint, and from such judgment defendant has appealed.

Appellant specifies the following errors: The court erred in finding that respondent elected to exercise the option contained in the agreement sued upon; that respondent tendered the stock to appellant; that the Altomont Creamery, Inc., or its assignee, performed all the terms and conditions of the

agreement sued upon on their part; that defendant did breach, break, and repudiate said agreement; and that there is now due, owing, and wholly unpaid, and was at the time of the commencement of this action due, owing, and wholly unpaid by appellant to respondent the sum of \$3,000. The first and main question presented is, did respondent exercise his option, for under the terms of the agreement sued upon it was incumbent upon him to notify appellant 30 days prior to July 1, 1926, that he elected to do so.

The testimony relative to the demand or notification that respondent desired to exercise his option is without dispute that respondent called upon appellant at the Granada Hotel in San Francisco in February, 1926, and said to him:

"I asked him if he bore in mind that I had 130 shares of stock that would be due and payable about June or July, and he said 'yes,' he was aware of that fact and that it would be taken care of.

"Q. Did he say anything as to what was meant by the expression 'taken care of'? The Court: You say you made a demand upon him? A. Yes.

"Q. Now, what was that demand? A. The demand that he pay me \$1000 a month on the preferred stock, which he had guaranteed to repurchase.

"Q. Did you say that to him in the same language you have used here, or substantially that language? A. I said to him exactly as I said before. I asked him if he was aware of the fact that that would be due and payable at that time, and he said yes, that he had that in mind, and that it would be taken care of."

In this conversation respondent requested that appellant purchase the stock, "that he pay me \$1000 a month on the preferred stock, which he had guaranteed to repurchase." Appellant contends that this statement that he demanded that appellant pay him \$1,000 a month on the preferred stock is qualified by respondent's answer to the question by the court: "I said to him exactly as I said before. I asked him if he was aware of the fact that that (\$1000 a month) would be due and payable at that time and he said yes, he had that in mind, and that it would be taken care of." We question appellant's claim that respondent intended to qualify his statement that he demanded that appellant pay him \$1,000 a month on the preferred stock. In any event, appellant must have understood that respondent was exercising his option and requesting him to purchase the preferred stock. This is shown by his answer: "Yes, he was aware of that fact and that it would be taken care of." This is further evidenced by appellant's statement to respondent when the latter called at the Granada Hotel in July, as testified to by respondent: "I know what you are here for and I have a long story to tell you. * * * He

was very sorry to have to tell me that he wasn't able to pay me for the stock right now, but if I would not get excited about it and go to court about it, he would make arrangements to pay me a little later on."

In *Flickinger v. Heck*, 187 Cal. 111, 114, 200 P. 1045, 1046, the court says: "The particular act or acts which constitute an election may be fixed by the terms of the option, as also the time when, the place where, and the persons to whom it shall be made." (James on Law of Option Contracts, secs. 801, 817). The language of the contract itself controls as to what act or acts constitute an election. Under the terms of one option, the election may consist of a tender of the property to be sold or purchase price to be paid; under the terms of another option, it may consist of a mere notice of election to purchase or sell, leaving payment of the price and delivery of the property as subsequent matters in performance of the executory contract raised by the election (*Breen v. Mayne*, 141 Iowa, 399, 118 N. W. 441). The contract in the present case provides that to exercise the option "it (Altomont Creamery, Inc., respondent's assignor) shall so notify the third party (appellant) not less than 30 days prior to the time when said option shall be exercised." There is no question but that the notification given was within the period provided in the contract, the only point raised being as to its sufficiency.

[1, 2] As to appellant's contention that the notification should be in writing to take it out of the statute of frauds, it may be said that appellant had bound himself in writing in the original contract to perform his obligation to purchase the stock upon Altomont Creamery, Inc., respondent's assignor, notifying appellant of its desire to exercise the option. Furthermore, as no objection was interposed at the trial nor motion for nonsuit made, the objection cannot now be insisted upon. *Nunez v. Morgan*, 77 Cal. 427, 19 P. 753; *Armstrong v. Barceloux*, 34 Cal. App. 437, 167 P. 895.

[3, 4] Appellant gave respondent to understand by his statement, "Yes, he was aware of the fact that it would be taken care of," that no tender would be necessary. In the early part of July, 1926, appellant said to respondent: "I am very sorry, Mr. Nielsen, that I am an old man, over 80 years old, and this is the first time I ever had to break my word, but I am simply unable to pay it." At this time he made no statement that had the stock been tendered before July 1st he could have completed the purchase according to the agreement, nor did he offer any evidence to that effect at the trial. While the complaint alleges a tender and the court so found and the evidence does not support such a finding, the inability of appellant to consummate the purchase and his giving respondent to understand that no tender would be necessary renders a tender unnecessary.

Hulen v. Stuart, 191 Cal. 562, 569, 217 P. 750. Where "defendant led plaintiff to believe that if he had agreed to repurchase the bonds he would keep his agreement, and defendant did not notify plaintiff to the contrary * * * until it was too late for plaintiff to make tender * * * plaintiff was therefore excused from making tender, and defendant is now estopped from claiming that there was no sufficient tender." Pierce v. Lukens, 144 Cal. 397, 402, 77 P. 996, 998. Further, the agreement here provides that the stock is to be purchased on monthly payments and "Said stock to be pledged as security for payment of said repurchase price." The stock being pledged, no tender was necessary—a pledgor is not entitled to possession of pledged property until the debt is paid. Puckhaber v. Henry, 152 Cal. 419, 93 P. 114, 125 Am. St. Rep. 75, 14 Ann. Cas. 844; Savings Union Bank & Trust Co. v. Crowley, 176 Cal. 546, 169 P. 67. Restoration of the stock to appellant would have extinguished respondent's lien. Civ. Code, § 2913.

A rehearing was granted in this case in view of appellant's contention that the original decision (Cal. App.) 275 P. 825, was in conflict with the rule announced in Levinson v. Silverman (Cal. App.) 264 P. 796, Gopcevic v. California Packing Corp., 64 Cal. App. 132, 220 P. 1078, and Cuthill v. Peabody, 19 Cal. App. 305, 125 P. 926, but after a careful review of these cases we are of the opinion that they are distinguishable from the present case, as here the stock was to be paid for in monthly payments and not in a lump sum and "said stock to be pledged as security for payment of the said repurchase price" and falls within the rule announced in Hulen v. Stuart, supra, in which case the facts show that after the breach by the defendant the plaintiff retained the shares of stock; that no attempt was made to sell them, and plaintiff—as in the present case—produced in court the certificates of stock. It was argued that plaintiff's sole remedy was either a resale of the stock and suit for the balance, or the difference between the market price and the contract price, that is, a suit for damages, or as announced in Cuthill v. Peabody, that the vendor would be compelled to recoup his loss, if any, solely by an action for damages founded upon a breach of the vendee's contract to accept and pay for the property under section 3311 of the Civil Code. The prayer of the complaint was not for damages, but for a specific sum, the contract price agreed to be paid by the defendant to the plaintiff. The court, speaking through Mr. Justice Waste—now chief justice—uses this language: "The complaint clearly states a cause of action for the return of the purchase price of the stock with interest in accordance with the terms of the agreement executed by the defendant to Hulen. (Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 P. 582, 44 L. R. A. [N.

S.] 156, Ann. Cas. 1914B, 1013; Dickinson v. Zubiate Mining Co., 11 Cal. App. 656, 662, 106 P. 123; Williamson v. Marshall, 54 Cal. App. 24, 28, 200 P. 1058.) On still another theory the complaint states a cause of action under section 3311 of the Civil Code, which provides: "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be the * * * excess, if any, of the amount due from the buyer, under the contract, over the value to the seller. * * *'" Having alleged that the stock had no value, and that the defendant promised to pay a specified amount, for which judgment is prayed, it was unnecessary to allege that plaintiff had been damaged in such sum. An allegation and proof, under the first theory, of the value of the stock was also immaterial for the reason that plaintiff's right to repayment did not depend upon its value; and as to the statement of a cause of action, it is likewise immaterial whether or not defendant accepted plaintiff's tender of a return of the stock. (Dickinson v. Zubiate Mining Co., 11 Cal. App. 663, 106 P. 123; Schulte v. Boulevard Gardens Land Co., 164 Cal. 471, 129 P. 582, 44 L. R. A. [N. S.] 156, Ann. Cas. 1914B, 1013.) Even though the plaintiff in stating her cause of action had mistaken the measure of the recovery which she sought, it would have made no difference. It is possible for a party to a contract, broken by the other party to it, to make such an election of remedies as to preclude him from thereafter seeking and obtaining the remedy of damages, but if he has not made such an election and is entitled to recover, the fact that he seeks damages according to a wrong measure is almost wholly inconsequential and does not preclude the court from according him the damages to which he is entitled according to their true measure. (Phillips v. Stark, 186 Cal. 369, 371, 199 P. 509; Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 223, 21 P. 743, 12 Am. St. Rep. 139.) The court further says: "The plaintiff, as executrix, still retains possession of the stock. The certificates were produced in court, and can be endorsed and delivered to the defendant, upon payment of the amount of the judgment, as was contemplated in Williamson v. Marshall, supra."

The case of Williamson v. Marshall, referred to as in accord, is found in 54 Cal. App. 24, 200 P. 1058. The suit was for the breach of a written agreement by the defendant to repurchase from plaintiff all of his 100 shares of the capital stock of a corporation at the fair value of such shares. The court there says: "The sole purpose of the present action, notwithstanding the form of the prayer of the complaint, is to recover from the defendants the sum of money agreed to be repaid, in accordance with the terms of the agreement. * * * The consideration had passed to the obligor, and the only duty

imposed upon the defendants was the obligation to repay the sum of money specified. (*Dickinson v. Zubiate Mining Co.*, 11 Cal. App. 656, 662, 106 P. 123; *Hellings v. Heydenfeldt*, 107 Cal. 577, 40 P. 1026.) The facts bring the case within the provision of section 3302 of the Civil Code, which provides that "the detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation with interest thereon." We do not think it matters, as urged by the respondents, that the plaintiff has not followed the usual and ordinary form of alleging his damage. Under our code there is but one form of action, and if the complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. (*Whitehead v. Sweet*, 126 Cal. 67, 73, 58 P. 376.) "When the plaintiff, as here, alleges facts to exist, which, if proved, would entitle him to recover the sum of money he demands from the defendant, he has shown, so far as the recitals of the complaint can, that he has sustained damages." (*Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 223, 21 P. 743, 12 Am. St. Rep. 139.) Having alleged that the defendants had promised to pay the fair and reasonable value of the stock, which is stated, and for which, when determined by the court to be fair and reasonable, judgment is prayed, it was unnecessary to allege that plaintiff had been damaged in such sum. (*Dickinson v. Zubiate Mining Co.*, 11 Cal. App. 656, 663, 106 P. 123.)

In *Hulen v. Stuart* the certificates were not indorsed over, and the court held that, the certificates being produced in court, the plaintiff should recover the full purchase price and indorse and deliver the stock to the defendant.

[5, 6] Furthermore, appellant was a party to the agreement; was the active representative of the Acme Ice Cream Company, the second party therein in consummating the agreement, and as such his promise to purchase back the stock which was to be pledged for the "repurchase price" constituted an agreement of repurchase as in *Hulen v. Stuart*. As is said in *Williamson v. Marshall*, supra, which we again quote: "The sole purpose of the present action, notwithstanding the form of the prayer of the complaint, is to recover from the defendants the sum of money agreed to be repaid, in accordance with the terms of the agreement. * * * The consideration had passed to the obligor, and the only duty imposed upon the defendants was the obligation to repay the sum of money specified. * * * Having alleged that the defendants had promised to pay the fair and reasonable value of the stock [here \$13,000 in monthly install-

ments of \$1,000] and for which, when determined by the court to be fair and reasonable, judgment is prayed, it is unnecessary to allege that plaintiff has been damaged in such sum."

[7] Appellant contends that respondent failed to prove the performance of the conditions of the lease which in paragraph 2 of the agreement was made a part thereof in this: "That the lessor (Altomont Creamery, Inc.), or its assignee, did furnish light, water, power or refrigeration, as provided in paragraph 4 of said lease." Paragraph 2 of the agreement refers only to the agreement not to engage in the business of selling ice cream within the limits of Palo Alto for a period contemporaneous with a certain lease entered into between the parties and "to which said lease reference is hereby specifically made." The agreement, it seems, refers to the lease for but one purpose—to fix the term during which respondent's assignor should not engage in the ice cream business in Palo Alto. Where reference is made in a contract to another writing for a specified purpose, such writing becomes a part of the contract for such purpose only (*Moreing v. Weber*, 3 Cal. App. 14, 84 P. 220).

This disposes of the questions raised by appellant's specifications of error, and from what has been said it follows that the judgment should be and it is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

99 Cal. App. 438

BRANDENSTEIN et al. v. JACKLING et al.*
(Civ. 6656.)

District Court of Appeal, First District, Division 2, California. June 15, 1929.

Rehearing Denied July 11, 1929. Hearing Denied by Supreme Court Aug. 12, 1929.

1. Sales $\S$ 72(5)—Inspector's certificate of quality of rice held not conclusive, so as to bar purchaser's remedy for inferior goods shipped, in absence of specific contract provision making certificate final.

In a contract for the purchase of rice of a specified quality, providing for certificate of inspector to be attached to draft drawn against letter of credit, but not specifically providing that such certificate should be final as to quality of rice, such certificate was not conclusive of quality, so as to bar purchaser's right of action for damages for inferior quality shipped.

2. Evidence $\S$ 397(1)—Terms of written contract cannot be changed by parol evidence.

Evidence is not admissible to change the terms of a written contract.

3. Customs and usages ☞17—Evidence of custom or usage inconsistent with written contract is not admissible to vary contract (Civ. Code, §§ 1655, 1656; Code Civ. Proc. § 1870, subd. 12).

Evidence of custom or usage inconsistent with written contract is not admissible, under Civ. Code, §§ 1655, 1656, and Code Civ. Proc. § 1870, subd. 12, to change terms of contract.

4. Sales ☞261(6)—Agreement to ship and deliver No. 1 rice is express warranty of quality, where No. 1 rice has definite, well-known trade meaning.

Agreement to ship and deliver No. 1 rice amounts to express warranty of quality, where No. 1 rice has definite and well-known meaning in trade.

5. Sales ☞261(4)—Rule that sale of goods by descriptive name amounts to express warranty, simply requires delivery of goods sold.

The rule that a sale of goods by descriptive name well known in the trade amounts to an express warranty simply means that seller is bound to deliver the goods which he contracted to deliver.

6. Sales ☞166(1)—Judgment for purchaser for damages for delivery of inferior rice held supportable on theory of breach of contract, irrespective of breach of warranty of quality.

Where seller, contracting to ship and deliver No. 1 Saigon rice, delivered a large quantity of rice, which under express terms of contract was not No. 1, judgment for purchaser for damages was supported on the theory of breach of contract, irrespective of breach of warranty of quality.

7. Sales ☞182(3)—Irrespective of warranty, question of purchaser's waiver by acceptance is question of fact.

Whether there was warranty or not, the question of purchaser's waiver by acceptance is a question of fact.

8. Sales ☞181(12)—Purchaser's objection that rice was not of quality sold, and correspondence held not to show waiver of breach notwithstanding acceptance of shipment.

Purchaser's prompt objection that rice shipped was not quality contracted for and correspondence in relation thereto held not to show waiver of breach notwithstanding purchaser's acceptance of shipment.

9. Evidence ☞413—Broker's letter of same date, but prior to executed contract of sale, was properly excluded, as superseded by written contract in purchaser's action for breach (Civ. Code, § 1625).

In purchaser's action for damages for seller's shipment of inferior rice, broker's letter to sellers confirming sale, written on same date, but prior to execution of contract, was properly excluded, under Civ. Code, § 1625, because superseded by written contract.

10. Sales ☞182(1)—Letter of credit, describing inspection certificate as one of quality, weight, and condition, held not conclusive as matter of law that certificate was finally determinative of quality of rice shipped.

In purchaser's action for breach of contract by delivery of rice inferior in qual-

ity, letter of credit, issued pursuant to contract which enumerated necessary documents to accompany drafts, and described certificate of inspection as one "as to quality, weight, and condition," if admissible, was not conclusive that such certificate was final and determinative of quality of rice shipped, since it did not, as matter of law, change express language of contract in respect of matters to which it related.

11. Sales ☞181(12)—Evidence held to support finding that rice shipped was of inferior quality.

Evidence held to support finding that rice shipped by seller was below standard of rice which seller agreed to ship.

12. Sales ☞285(4)—Lack of details in purchaser's claim for damage was excused, where seller disclaimed all responsibility for inferior quality of goods delivered.

Seller's denial of responsibility for inferior quality of rice shipped and delivered excused purchaser from rendering more detailed statement of damage in claim.

13. Appeal and error ☞221—Claim as to time and place for admeasuring damages, not made at trial, cannot be made on appeal.

Seller, not claiming at trial that time and place for measuring purchaser's damage for inferior rice shipped and delivered was at point of shipment, rather than point of delivery, cannot make such claim on appeal.

14. Sales ☞418(2)—Damages for breach of c. i. f. contract for shipment of rice from Orient to Cuba held properly admeasurable at time and place of arrival.

Under c. i. f. contract for shipment of rice from Orient to Cuba, which apprised sellers that no inspection as to quality would be made by purchasers at point of shipment, damages were properly measurable as of time and place of arrival at Cuba.

15. Sales ☞418(1)—Judgment for purchaser for breach of contract by delivery of rice of inferior quality properly included interest from date of commencement of action (Civ. Code, §§ 3287, 3313).

Under Civ. Code, §§ 3287, 3313, there was no error in including in judgment for purchaser for damages for breach of contract for sale and shipment of rice by delivery of rice of inferior quality interest from date of commencement of action.

Appeal from Superior Court, City and County of San Francisco; George H. Caniss, Judge.

Action by Max J. Brandenstein and others, copartners doing business under the firm name and style of M. J. Brandenstein & Co., against D. C. Jackling and others, copartners doing business under the firm name and style of the Pacific Rice Mills. Judgment for plaintiffs, and defendants appeal. Affirmed.

Chandler & Quayle, of San Francisco, for appellants.

H. U. Brandenstein, R. A. Carter, and H. R. Kalisher, all of San Francisco, for respondents.

KOFORD, P. J. Plaintiffs recovered judgment for \$15,680 for breach of warranty of quality made in the sale of rice, together with interest from the commencement of this action. Defendants appeal, claiming chiefly that there was no warranty made in the sale.

The contract of sale and warranty upon which the judgment appealed from is based was made between two San Francisco merchants for the sale and purchase of rice to be shipped from the Orient to Cuba and is in its essential parts as follows:

"San Francisco, March 9, 1920.

"_____.

"Pacific Rice Mills hereby agrees to sell and M. J. Brandenstein & Company, San Francisco, California, agrees to buy the following goods at the prices and on the terms mentioned below:

"Quantity: About two thousand (2,000) long tons of 2,240 pounds each.

"Packed: Double bags of 224 pounds gross each.

"Quality: No. 1 Saigon long grain rice, f. a. q. of the season.

"Price: \$11.80 per 100 lbs. gross, in bond CIF Havana, Cienfuegos or Santiago, buyers' option, to be declared on request of sellers.

"Shipment: March/April/May from Orient to Cuba.

"Terms: Draft at sixty days sight against confirmed bankers irrevocable letter of credit to be established immediately by buyers in favor of sellers; interest for sellers' account.

* * * * *

"This contract is made subject to terms of carriers B/L.

"The word 'about,' if used herein in designating quantity, shall mean that a variation of not more than five per cent. (either way) of shipping weights or quantity is permitted.

"Claims for damages or difference in quality must be presented within ten days after arrival of each portion of goods at destination.

"The goods are for buyer's account and risk as soon as landed from the carrier and order tendered.

"Wharfage, if any, to be paid by buyer.

"C. i. f. and c. & f. sales differ from f. o. b. sales only in that sellers guarantee insurance and freight as the case may be; no additional responsibility being involved.

"Oriental shipping weights final.

"Oriental surveyor's certificate, certifying rice to be f. a. q. of the season and free from worms, weevils, and other vermin at time of shipment to accompany documents and to be final.

* * * * *

"The terms of this contract are herein stated in their entirety and it is understood that there is no other contract or verbal agreement."

The trade terms used in said contract are explained in the court's findings as follows:

"Under general usages and customs of the trade of selling and buying rice to be imported from the Orient in the contracts involved in this action the terms 'quality No. 1 Saigon long grain rice, f. a. q. of the season' and 'oriental surveyor's certificate' had and were intended by the parties to said contracts to have the following meaning, viz.:

"'Long grain': Rice of the long grain type as distinguished from the round grain type;

"'Saigon': Rice grown in Indo-China and exported from the port of Saigon;

"'No. 1 Saigon': Rice grown in Indo-China and exported from Saigon of which the broken grains do not exceed twenty per cent. of the lots of rice involved. For the purpose of such determination the percentage of broken grains is by weight; all whole grains and all grains that are broken but remain more than half grains are considered unbroken grains; only half grains or less than half grains are considered broken grains;

"'F. A. Q.': Fair, average quality;

"'F. A. Q. of the season': Fairly equal to the average crop of Saigon Long Grain Rice produced during the rice growing season involved;

"'Oriental Surveyor's Certificate': The certificate of inspection of two disinterested inspectors at the point of shipment."

The findings continue:

"Such certificate of inspection for each lot of rice, together with bill of lading and proper insurance policies, is thereupon attached to the draft for the purchase price of rice shipped, drawn against letter of credit established with a California bank by the buyer in favor of the seller, and payable at such time after sight as may be agreed upon between the parties; and, in this case, agreed upon by the parties to the action by said contracts; that said draft, with said other documents, is then forwarded and presented to the California bank for payment; if the documents do not describe the rice to be such as called for by the contracts, payment may be but need not be refused by the buyer. If said documents do describe the rice to be such as called for by the contracts, and otherwise sufficient, said draft is thereupon paid in advance and irrespective of the fact of the actual arrival of the rice at its destination. And, further, said rice may be bought, sold and paid for several times on mere exchange of the documents before the arrival of the rice at the port of destination."

The rice was shipped. The shipper attached inspection certificates, bills of lading and proper insurance policies to a draft drawn upon the plaintiffs. The draft was honored and paid. When the rice thereafter arrived in Cuba the plaintiffs objected upon the ground that the rice was not No. 1 quality. This action is based upon that claim and judgment was given plaintiffs for breach of warranty of quality. Of a total of 20,779 bags

shipped under this contract, 4,000 bags, or about 20 per cent. were found by the court to fall below grade No. 1. In holding that the certificate was not the final and ultimate test of the quality meant by the expression "No. 1," and that it did not by itself make full and complete performance by the seller in respect to that quality, the court took notice or decided that the contract clause calling for the certificate did not require the certificate to certify whether the rice was No. 1, but only to certify that it was f. a. q. of the season and free from worms, weevils, and other vermin at time of shipment.

The importance of this point in this case is illustrated by the fact that there was a second cause of action upon a contract dated March 22, 1920, similar to that declared upon in the first cause, but upon which second cause of action plaintiff was denied relief, although 250 bags of rice shipped under that contract were found to fall below No. 1 grade. That cause of action was in most respects the same as the first, but the court held there was no warranty, the inspection certificate being held final as to all qualities. That contract had a different clause calling for an inspection certificate. It read:

"Hongkong Surveyors or Saigon Merchants certificate final as to quality, condition and weight at time of shipment."

[1] In the contract upon which the judgment appealed from is based, the inspection certificate was made final, but that certificate was not required to certify that the rice possessed those special qualifications meant by the expression "No. 1." The finality of the inspection certificate therefore related to those qualities only to which the certificate was by the contract required to certify. This case is therefore distinguishable from those cited by appellant, such as *California Sugar & White Pine Agency v. Penoyar*, 167 Cal. 274, 139 P. 671, and *Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. Cas. 609, 31 P. 367, 370, where the quality of goods sold was left to the determination of a third party. No doubt the parties could have expressly stipulated in the contract for a certificate of a third party that the rice was No. 1 quality, and could have stipulated that such certificate should be the final and ultimate test of that quality; but it seems plain that they clearly omitted doing so. Such a stipulation would make such certificate conclusive evidence that the warranty had been fulfilled in the absence of fraud.

There being no contract requirements for a certificate as to No. 1 quality, we need not consider the debated points whether the certificate did in fact so certify and whether, if it did not, such defect was waived by respondents in honoring a draft with such defective certificate. This action is not on the draft.

[2, 3] Appellants' argument is that no war-

ranty was intended. They claim that the contract called for a final certificate of all qualities agreed upon; that the contract was a "c. i. f." contract calling for performance by delivery of certain documents representing the shipped goods rather than the goods themselves; that the contract called not for quality but for a certificate of quality, including the qualities meant by the term No. 1; that evidence at the trial showed a general custom of having an inspection made by independent merchants at the point of shipment and of issuing certificates and other documents representing the shipped rice, which documents changed hands from time to time by sale from one merchant to another; that the custom was to rely upon the certificates and not to warrant; that even if the contract here contained a warranty of No. 1 quality, the certificate of inspection satisfied that warranty, it being claimed that the certificate would necessarily by indirection certify to the qualities embraced in the expression No. 1 while certifying to the other qualities of No. 1 rice.

The answer to each of these contentions is the same. Evidence is not admissible to change the terms of a written contract. If there is a warranty expressed in the contract, evidence of custom and usage is not admissible to show that no warranty was intended. *Miller v. Germain Seed, etc., Co.*, 193 Cal. 62, 222 P. 817, 32 A. L. R. 1215; *Buckner v. A. Leon & Co.* (Cal. Sup.) 267 P. 693; *Ferguson v. Koch* (Cal. Sup.) 268 P. 342, 58 A. L. R. 1176. Nor is evidence of a custom admissible which is inconsistent with the contract. "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention." Civ. Code, § 1655. "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded." Civ. Code, § 1656. Evidence may be given of "usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation." Code Civ. Proc. § 1870, subd. 12.

[4] Respondents answer the several contentions of appellants by asserting that the contract in this case contains an express rather than an implied warranty, and that, being an express warranty, none of the facts, circumstances, usages, or customs referred to by appellants can operate to take away from the contract that which is expressed therein. With this we agree. The agreement to ship and deliver No. 1 rice amounts to an express warranty of quality where, as here, No. 1 rice has a definite and well-known meaning in the trade. *Flint v. Lyon*, 4 Cal.

17; *Polhemus v. Heiman*, 45 Cal. 573; *Barrios v. Pacific States Trading Co.*, 41 Cal. App. 637, 183 P. 236; *Firth v. Richter*, 49 Cal. App. 545, 196 P. 277; *Newhall Co. v. Hogue-Kellogg Co.*, 56 Cal. App. 95, 204 P. 562; 24 R. C. L. 171; 22 Cal. Jur. 994. *Miller v. Germain Seed, etc., Co.*, 193 Cal. 62, 222 P. 817, 32 A. L. R. 1215, is not contrary. It was held that the warranty there considered partook both of the nature of an express and of an implied warranty. The seller did not expressly say that the seed sent was the kind ordered. Affirmation of quality or variety was implied from the mute act of the seller in sending seed in response to an order for a certain kind. Evidence of custom was there held admissible, not to change the terms of a written or express contract but in connection with that part of the contract which the court said was the implied part of the contract. The court said (page 66 of 193 Cal. [222 P. 818]): "It is, of course, conceded that if there had been a written warranty or an expressed oral warranty of the character of the seed, the custom of the dealer in other cases not to give such a warranty would have no bearing upon the terms of the express warranty."

[5, 6] The rule that a sale of goods by a descriptive name well known in the trade amounts to an express warranty simply holds one to deliver the goods which he has contracted to deliver. The appellants' express written agreement to deliver No. 1 Saigon long grain rice would not be performed by the delivery of round grain or No. 2 rice or any other thing not described in the contract. As about 20 per cent. of the bags delivered contained rice of less value than the rice agreed upon, the buyer was entitled to damages for breach of contract. Considering appellants' failure to deliver all No. 1 rice as a breach of contract, instead of a breach of warranty of quality, the judgment appealed from would be equally well supported. So treating it, there might be some difference in considering whether respondents had waived the breach by accepting the goods, since such a waiver is perhaps more easily shown when there is no warranty. It has been frequently held that acceptance of goods does not waive a breach of warranty. *North Alaska, etc., Co. v. Hobbs, Wall & Co.*, 159 Cal. 380, 113 P. 870, 120 P. 27, 35 L. R. A. (N. S.) 501.

[7, 8] But, be there a warranty or not, the question of waiver is a question of fact. The following quotation from *Williston on Sales*, § 488, is quoted with approval in *North Alaska, etc., Co. v. Hobbs, Wall & Co.*, 159 Cal. 380, at page 388, 113 P. 870, 873 (35 L. R. A. [N. S.] 501): "The hypothesis is, therefore, that the goods which the seller tenders in his performance of the contract might have been refused by the buyer on account of the seller's failure to fulfill his obligation. The obligation of the seller may have been stated either in adjective form as part of the de-

scription of the goods, or the broken promise may have been in the form of a collateral warranty, or it may have been a warranty implied by law. * * * It is doubtful if the intention of the parties varies with the form in which the promise is put, whether as part of the description of the goods, or as a strictly collateral warranty. No doubt it is possible, however, for the buyer not merely to accept title to the goods offered, but to accept the transfer of title as full satisfaction of all the seller's obligations under the contract. Whether the buyer thus agrees to waive deficiencies in performance is logically and should, it seems, be legally a question of fact in each case." In the instant case the acceptance of the rice by the respondents does not show a waiver of the breach. Immediately upon receipt of the shipment of rice, the respondents notified the appellants in writing that there was an excessive amount of broken grains and further stated "when we are in receipt of full particulars we will advise you further." To which appellants immediately replied to the effect that they disclaimed any further duty or responsibility as to quality than the furnishing of the merchant's certificate of inspection and added "however, would be glad to take the matter up with our suppliers should you put us in possession of the necessary facts." This correspondence in connection with the time and place of the discovery of the breach and the quantity and nature of the defects in quality does not show a waiver of the breach.

[9] Some points are made upon the admissibility of evidence. The broker's letter to appellants confirming the sale, written on the same date of but prior to the execution of the contract, was offered in evidence by appellants but was not admitted. It contained the following clause: "Remarks: Hongkong surveyors' or Saigon merchants' certificate final as to quality, condition and weights at time of shipment. Contract to follow." It was properly excluded under the rule of *Civil Code*, § 1625, because it was superseded by the written contract.

[10] Defendants' Exhibit No. 9 was a letter of credit issued to appellants by a San Francisco bank, containing the statement that it was issued at the instance of respondents. In enumerating the necessary documents to accompany drafts against the amount of credit specified in the letter, it described the required certificate as one "as to quality, weight, and condition." It was not rejected as at first stated by appellants, but received in evidence upon the offer of appellants. This evidence, if admissible, was not conclusive. It did not as a matter of law change the express language of the contract in respect of the matters to which it related.

[11] Evidence offered by respondents as to the percentage of broken grains of rice was sufficient to support a finding that the rice both when shipped and when unloaded at

Cuba was below the standard of No. 1 rice. The samples produced and testified to showed the condition of the rice after it arrived and had been stored in Cuba several months. Appellants cite authority to the effect that the presumption that a thing proven to exist continues to exist does not work backward, but respondents rely upon opinion testimony in the record to the effect that the broken grains were broken in the milling process, which would be before shipment. Questions about the dates of samples taken, the keeping of the samples and the honesty of the samples, all relate to the weight of the testimony. Respondents' testimony that the rice was below the standard of No. 1 quality, however, was uncontradicted by any counter showing by appellants.

[12] Respondents made the claim within ten days after arrival that the shipment contained an excessive amount of broken grains. Respondents did not, however, specify a direct and detailed claim for damages within that time. Appellants immediately replied to respondents that they had no responsibility other than furnishing the surveyor's certificate. Respondents' claim did not fail to measure up to the meager requirements of the contract for claims, and the sweeping denial of responsibility by appellants excused a more detailed statement of damage by respondents in their claim.

[13, 14] The time and place used at the trial in admeasuring the damages was the time of the arrival of the shipment and at Cuba. Appellants now claim that the time and place for measuring the amount of damages should be the time and place of shipment from Saigon. This point was not made by appellants at the trial and is not available to them on this appeal. Their objection to evidence of value at Cuba was confined to the claim that the parties were precluded by the inspection certificate. Moreover, it was proper to measure the damages as of the time and place of arrival of the rice at Cuba under the authority of *W. R. Grace & Co. v. Levy*, 30 Cal. App. 231, 156 P. 626. Appellants knew the rice was to be shipped to Cuba by the terms of the contract and the contract likewise apprised them that no inspection as to quality No. 1 would be made by respondents at point of shipment. See, also, 22 Cal. Jur. 1022, and cases cited, and *Porter v. Gestri*, 77 Cal. App. 578, 247 P. 247.

[15] The court did not err in including interest in the judgment from date of commencement of action. The rule of Civil Code, § 3287, entitles the plaintiff to interest when entitled on a particular day to recover damages which are certain or capable of being made certain by calculation. Damages which are fixed by market value or by the difference between two market values have been held to be certain by calculation within the meaning

of this rule. *Olcovich v. Grand Trunk Ry. Co.*, 179 Cal. 332, 336, 176 P. 459; 8 Cal. Jur. p. 791; 1 *Sutherland on Damages*, § 348, p. 1100. Civil Code, § 3313, prescribes the measure of damage for breach of warranty of quality of personal property as the excess in value of the property if it had been of the quality warranted over its actual value at the time to which the warranty referred. There was testimony of the market value of No. 1 Saigon long grain rice at the port of discharge in Cuba and testimony that Saigon long grain rice at that place which fell below No. 1 standard was of the value of \$1.75 to \$2 per hundredweight less than the No. 1 grade. The amount of damage awarded respondents was apparently figured at \$1.75 per hundredweight of the portion of the rice which fell below grade No. 1. The amount recovered by respondents was a part of the amount already paid appellants by them when they honored the draft before arrival of the shipment.

The judgment appealed from is therefore affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

99 Cal. App. 409

PEOPLE v. BARNETT. (Cr. 1082.)

District Court of Appeal, Third District,
California. June 12, 1929.

1. Indictment and information $\S$ 122(2)—Information charging lascivious conduct, as well as rape, held authorized, though complaint filed in justice court charged rape alone, where testimony on preliminary examination showed lascivious conduct (Pen. Code, § 809, as amended by St. 1927, p. 1045).

District attorney had authority to incorporate, in information charging rape, second count containing charge of lascivious conduct, under Pen. Code, § 809, as amended by St. 1927, p. 1045, though complaint filed in justice court merely charged defendant with rape, where testimony taken on preliminary examination afforded proper basis for charge of lascivious conduct.

2. Indictment and information $\S$ 122(2)—Defendant could not claim surprise because of inclusion in information of charge of lascivious conduct, not contained in complaint before magistrate charging rape, where defendant had opportunity to present his defenses.

Where it did not appear from the record that defendant was denied opportunity to present any defense which he had, and evidence taken on preliminary examination disclosed offenses of rape and lascivious conduct, defendant could not object that inclusion in information of charge of lascivious conduct not contained in original complaint amounted to surprise.

3. Indictment and information $\S$ 122(2)—That penalty for lascivious conduct may exceed that for rape did not deny defendant, charged with rape and lascivious conduct, and convicted only of lascivious conduct, of constitutional rights, though original complaint charged rape only (Pen. Code, $\S$ 264, 288).

That penalty for lascivious conduct under Pen. Code, $\S$ 288, may extend from one year to life imprisonment, while jury, on conviction for rape under section 264, have right to impose only jail sentence, did not result in denial of constitutional rights to defendant, acquitted of rape charge contained in first count of information, and convicted of lascivious conduct as charged in second count, though original complaint charged crime of rape only.

4. Infants $\S$ 20—Testimony of female, giving month of offense and circumstances relating thereto, sufficiently fixed date of lascivious conduct (Pen. Code, $\S$ 288).

In prosecution for lascivious conduct, under Pen. Code, $\S$ 288, testimony of female, giving month of occurrence of offense, together with circumstances relating thereto, by her statements given on trial and on preliminary examination sufficiently fixed date of offense.

5. Witnesses $\S$ 351—Testimony as to reputation of female in prosecution for lascivious conduct held properly excluded, where no foundation was laid (Pen. Code, $\S$ 288).

Testimony of witness as to reputation of girl, in prosecution of defendant for lascivious conduct, under Pen. Code, $\S$ 288, was properly excluded, where no foundation was laid.

6. Criminal law $\S$ 829(19)—Requested instruction that individual jurors should vote to acquit, if entertaining reasonable doubt, held sufficiently covered.

Requested instruction that, if jury or individual jurors entertained reasonable doubt as to defendant's guilt, the jury and individual jurors should vote acquittal, held sufficiently covered by instruction that all 12 jurors must concur in conclusion of guilt, and each be satisfied of guilt beyond reasonable doubt.

7. Criminal law $\S$ 785(6)—Elimination, from instruction relative to immaturity of prosecuting witness and jury's duty to give defendant benefit of reasonable doubt, of statement that witness was likely to be influenced and that jury should acquit, held not error.

In prosecution for lascivious conduct, modification of instruction that prosecuting witness was child of immature years and likely to be influenced very easily by older minds, and that jury should give defendant benefit of doubt and acquit him, if entertaining reasonable doubt as to truth of her testimony, by elimination of words "and acquit him" and "and likely to be influenced very easily by older minds" as unnecessary and argumentative, held not error.

8. Criminal law $\S$ 786(1)—Instruction as to weight to be given defendant's testimony was properly refused.

Where court instructed jury as to credibility of witnesses and that jury was exclusive judge of the facts, requested instruction as to weight and consideration to be given to defendant's testimony was properly refused.

9. Criminal law $\S$ 757(1)—Instruction cautioning jury to carefully scrutinize testimony of prosecuting witness in prosecution for lascivious conduct was improper.

Instruction of trial court, cautioning jury in weighing testimony of prosecuting witness in prosecution for lascivious conduct, held improper, as instruction on weight of evidence of particular witness.

10. Affidavits $\S$ 18—Affidavit of deceased witness was incompetent.

Court did not err in excluding affidavit of deceased witness as incompetent.

11. Witnesses $\S$ 243—Trial court could permit district attorney to ask leading questions of prosecuting witness under 14.

In prosecution of defendant for lascivious conduct with female under 14, it was not error to permit district attorney to ask leading questions of prosecuting witness; allowance of such questions being within trial court's discretion.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

P. G. Barnett was convicted of lewd and lascivious conduct with a female under 14, and he appeals. Affirmed.

E. L. Webber, of Napa, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The appellant was tried upon an information containing two counts; count No. 1 charging the defendant with the crime of rape, in that he had sexual relations with a female under the age of 14 years, not his wife, and count No. 2 charging the defendant with lewd and lascivious conduct with a female, not his wife, and under the age of 14 years, etc. Conviction was had upon the second count. The defendant's motion for a new trial being denied, an appeal has been taken to this court.

[1] Upon being arraigned upon the information referred to, the appellant interposed the following motion:

"Now comes the defendant above named and moves the court to set aside the second count of the information filed against him herein upon the following grounds, to wit: (1) That the complaint or deposition against this defendant filed in the justice's court of Hot Springs township, on or about the 20th day of December, 1928, charged the defendant with 'unlawfully and feloniously having an act of sexual intercourse with Roberta Salmon, a female, then under the age of eighteen years, and not the wife of said P. G. Barnett,' and did not charge the defendant with lewd and lascivious conduct as set forth in the second count of the information filed in this court, and that the testimony taken upon the preliminary examination was taken upon the charge set forth in the complaint or

deposition filed with the justice of the peace, namely the charge of rape.

"Wherefore defendant prays that said second count of said information be dismissed.

"[Signed]

E. L. Webber,

"Attorney for Defendant."

This motion was denied, and upon this appeal it is alleged that the court erred in so doing.

It will be observed that, in making the motion referred to, no attempt is made to comply with the provisions of section 995 of the Penal Code; that is, the motion is not, apparently, based upon any of the provisions therein contained. The appellant, apparently, relies upon the point that, as the complaint filed before the committing magistrate charged the defendant only with the crime of rape, and after an examination was had the defendant was bound over to answer the charge of rape, the district attorney had no legal authority to incorporate in the information filed against the appellant the charge of lascivious conduct.

The notice of motion to which we have referred makes no reference to the testimony taken upon the preliminary examination. However, the record shows that upon the hearing of the motion, by stipulation the testimony taken upon the preliminary examination of the defendant was presented to the trial court and used upon the hearing of the motion. An examination of this testimony shows beyond any controversy whatever a proper basis for charging the defendant with the offense set forth in the second count of the information, and upon which the defendant was convicted. We do not wish to tarnish the records of our official reports with a recital of the testimony, and content ourselves with the statement that a cursory reading thereof is sufficient to disclose a basis for the second charge contained in the information. This being true, section 809 of the Penal Code, as amended by St. 1927, p. 1045, is applicable, where it provides that after a person has been bound over, following a preliminary examination, the district attorney must within 15 days, file an information in which he may charge the offense named in the complaint filed before the committing magistrate, and upon which the defendant has been bound over, and may also, in the language of the section, "charge the offense, or offenses, named in the order of commitment, or any offense, or offenses, shown by the evidence taken before the magistrate to have been committed."

[2] The argument is made by appellant that he was taken by surprise, by reason of the second count in the information, but there is nothing in the record which shows that the defendant did not have ample opportunity to present any defense which he had. It may be here stated that the evi-

dence taken upon the preliminary examination disclosed to the defendant, the same as it did to the prosecuting officers, the different offenses, or the several offenses, with which the defendant might be charged, including the two offenses with which he was charged.

[3] As the defendant was acquitted of the crime of rape contained in the first count and found guilty of lewd and lascivious conduct, as charged in the second count, it is argued that the defendant has been deprived of his constitutional rights by reason of the fact that the original complaint charged him with the crime of rape; whereas, the information upon which he was tried charged him also with lascivious conduct, upon which he was convicted, and that the jury must have been misled, or labored under the impression that they were finding the defendant guilty of a lesser offense, and for which only a lesser punishment might be inflicted. It is true that under section 264 of the Penal Code, upon a charge of rape involving the circumstances here presented, a jury trying the case have the right to impose only a jail sentence; whereas, under section 288 of the Penal Code the jury is given no power in relation to the punishment to be imposed upon one found guilty of lascivious or lewd conduct, etc., and that the penalty provided by that section may extend from one year to life imprisonment. While the sections of the Code do present the anomaly of one convicted of the crime of rape being given a less severe punishment than one convicted of lewd and lascivious conduct, it is a matter with which courts have nothing to do. Whatever injustice or incongruity there may be between the two sections relating to punishment can be adjusted only by the Legislature, and there is the place for appellant to present his argument in relation thereto.

While the appellant makes some argument as to the sufficiency of the testimony to support conviction, such contention is not tenable, as clearly appears from a reading of the transcript of the evidence taken upon the appellant's trial. This evidence, like that taken at the preliminary examination, is of such a character that it ought not to be incorporated into the official reports of any court, and for that reason we content ourselves with the statement that there is ample testimony to justify the finding of the jury that the defendant was guilty not only of the offense with which he was charged in the second count, but that the jury might also well have found the defendant guilty of the crime of rape.

[4] Objection is also taken that the time of the offense was not sufficiently fixed. It appears from the record that the offense of which the defendant was found guilty was one occurrence, and that occurrence was during the month of July, 1928. The child

involved was not able to give the date, but did give the month and all and singular the circumstances relating thereto, and all of which was clearly disclosed, not simply by the testimony given upon the trial, but also in the testimony given at the preliminary examination, so that the defendant knew the acts and the circumstances surrounding their occurrence with sufficient definiteness as to time to meet the issue with a defense, if any defense thereto existed.

[5] Objection is also made to the exclusion of testimony of one witness called by the defendant to testify as to the reputation of the girl involved in this case. A reading of the testimony shows beyond controversy that no foundation was laid for the admission of this testimony, and the court's ruling was absolutely correct.

[6] It is finally urged that the court erred in refusing to give certain instructions requested by the appellant, and also in modifying certain instructions. The first error alleged is in modifying instruction No. 2, requested by the defendant. That instruction is as follows: "I instruct you that our courts have repeatedly mentioned the fact that a charge of this character is one easily made, and once made difficult to disprove, no matter how innocent a defendant may be, and that the jury should therefore weigh the testimony of the female with great caution, and be satisfied beyond all reasonable doubt as to the guilt of the defendant, from all the evidence introduced in the case."

The instruction to this extent was given. The requested instruction continued as follows: "And if the jury or any individual juror entertains a reasonable doubt as to the defendant's guilt, it will be the duty of the jury or such individual juror to vote the acquittal of the defendant."

Complaint is made as to the refusal of the court to give the latter portion of the instruction. However, an examination of the record discloses that the court elsewhere did give the following instruction: "In criminal cases the law requires a concurrence of 12 minds in the conclusion of guilt before a verdict of guilty can be legally rendered. Every member of the jury must be satisfied beyond a reasonable doubt of the guilt of the defendant." This instruction properly gives all that portion of the requested instruction which was eliminated by the trial court.

[7] Appellant's next objection is to the action of the court in striking from defendant's proposed instruction the following words: "And likely to be influenced very easily by older minds," and also the words "and acquit him." The instruction as requested reads: "I instruct you that the witness Roberta Salmon is a child of immature years, and likely to be influenced very easily by older minds, and that, if you entertain

any reasonable doubt as to the truth of her testimony, it will be your duty to give to the defendant the benefit of the doubt and acquit him."

[8] The words "and acquit him," as eliminated by the trial court, added nothing to the meaning of the instruction, and the words "and likely to be influenced very easily by older minds" were properly stricken from said instruction as being a mere argument addressed to the jury. The court having instructed the jury as to the credibility of witnesses, and also that the jury was the exclusive judge of the facts, appellant's requested instruction No. VII as to the weight and consideration to be given to the testimony of the defendant was properly refused. See *People v. Heath*, 79 Cal. App. 20, 248 P. 1027, *People v. Jeans*, 79 Cal. App. 464, 249 P. 1089, and *People v. Brown*, 62 Cal. App. 96, 216 P. 411.

[9] It is not necessary to discuss further the refusal of the court to give other instructions requested by the defendant, further than to say that a reading of the instructions given by the trial court shows that the jury was fully and completely instructed. It may also be added that the defendant had the benefit of instructions relative to cautioning the jury as to the testimony of the complaining witness to which the defendant was not entitled. The court in several instances cautioned the jury as to acting upon such testimony.

One of the instructions was in this language: "I instruct you that our courts have repeatedly mentioned the fact that a charge of this character is one easily made, and once made difficult to disprove, no matter how innocent a defendant may be, and that the jury should therefore weigh the testimony of the female with great caution, and be satisfied beyond all reasonable doubt as to the guilt of the defendant from all the evidence introduced in the case." And again the jury was cautioned by the following instruction: "You are instructed to carefully scan and scrutinize all of the evidence of the prosecutrix in this case, and, if you find that her evidence lacks corroboration in any material particular, it is your duty to act upon such evidence with great caution." A third instruction of like tenor was also given to the jury relative to the testimony of the prosecutrix.

After having instructed the jury in general terms that they were the sole judges of the fact and the credibility of the witnesses, it has frequently been held that it is improper to single out any particular witness and caution the jury as to how such testimony should be weighed. 8 Cal. Jur. 356, § 394; *People v. Brown*, *supra*, and cases there cited. In several instances the jury was instructed that the defendant could not be found guilty of the charge embraced in count No. 2, unless

they were satisfied beyond a reasonable doubt of the defendant's guilt. As the defendant was found not guilty on count No. 1, it is unnecessary to consider the appellant's objection in relation thereto, further than to say such instructions would have no bearing upon the charge upon which the defendant was found guilty.

[10, 11] Appellant likewise objects to the ruling of the court in excluding an affidavit of a deceased witness. We do not need to cite authorities to show the correctness of the court's ruling in this particular. Its correctness is self-evident. The same is true of the objection made by the appellant in relation to the court permitting the district attorney to ask leading questions of the prosecutrix. Under the circumstances disclosed in this case, it has been frequently held that the allowance of such questions is within the discretion of the court. *Moran v. Abbey*, 63 Cal. 56; *People v. Clary*, 72 Cal. 59, 13 P. 77. Other cases might be cited, but these are sufficient.

The order and the judgment of the trial court are affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

99 Cal. App. 352

McFARLAND v. CORDIERO. (Civ. 6811.)★

District Court of Appeal, First District, Division 2, California. June 7, 1929.

Rehearing Denied June 28, 1929. Hearing Denied by Supreme Court Aug. 5, 1929.

1. Limitation of actions ⇨31—One-year limitation held applicable to action for injuries against mother signing minor's application for license to operate automobile causing injuries (Code Civ. Proc. § 338, subd. 1; § 340, subd. 3; Deering's Gen. Laws 1923, Act 5128, § 62).

Code Civ. Proc. § 340, subd. 3, prescribing one-year limitation as applicable to actions for personal injury caused by neglect of another, held applicable to action for injuries against mother of minor signing his application for license to operate an automobile causing injuries, and not section 338, subd. 1, prescribing a three-year limitation upon a liability created by statute, since person by signing application assumes responsibility by his act of signing, and not by reason of Deering's Gen. Laws 1923, Act 5128, § 62.

2. Judgment ⇨312—Judgment would be modified to follow order sustaining demurrer to cause of action for personal injuries only.

Where complaint charged cause of action for personal injury and for injury to personal property, and demurrer alleged that cause of action for personal injury was barred, judgment should have followed order sustaining demurrer to cause of action for personal injury and would be modified so as to conform thereto.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Ada McFarland against Maria C. Cordiero. Judgment for defendant, and plaintiff appeals. Modified, and as modified affirmed.

Wallace L. Ware, Bryce Swartfager, and Thomas M. Brownscombe, all of Santa Rosa, for appellant.

Barry J. Colding and Theodore Hale, both of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages for injuries sustained in an automobile collision. Thereafter she filed a first amended complaint. To that pleading the defendant interposed a demurrer. The demurrer was sustained. Plaintiff failed to amend and judgment was entered in favor of the defendant. The plaintiff has appealed and has brought up the judgment roll.

The appeal presents the single question as to whether or not the plaintiff's action, at least in part, is barred by the statute of limitations. In her amended complaint the plaintiff alleged that on the 7th day of August, 1926, John Cordiero, the minor son of the defendant, operated the automobile in which he was riding in a careless and negligent manner causing his car to collide with a Studebaker automobile and thereby caused said Studebaker automobile to swerve and crash into plaintiff's automobile; and that plaintiff suffered bodily injuries to her damage in the sum of \$10,000. The pleading continues and sets forth that plaintiff's car was greatly injured and that she suffered a property loss in the further sum of \$475. It is alleged that the said John Cordiero held an operator's license issued by the division of motor vehicles which license was issued pursuant to an application in writing and that the application was signed by the defendant who, as above stated, was the mother of John and at said time had the custody of said minor.

The first ten paragraphs of the complaint contain the ordinary allegations in such an action and plead the plaintiff's bodily injury and damages. The remaining two paragraphs plead damage to property and then follows the prayer, verification, etc. The defendant's demurrer was addressed to the first amended complaint. It pleaded that the complaint did not state facts sufficient; that two causes of action are alleged and not separately stated; and "that said cause of action as set forth in paragraph I to X inclusive of said complaint is barred by the provisions of section 340 (subd. 3) of the Code of Civil Procedure of the State of California." On February 17, 1928, the trial court made an order, "This matter having been heretofore submitted it is by the court ordered that the demur-

rer be sustained on the ground that the action is barred by the statute of limitations." The record discloses no other filings, minutes, or orders until March 26, 1928. On that date the judgment was filed. That document is worded as follows: "An order having been entered in this action on the 17th day of February, 1928, sustaining the demurrer to the complaint herein on the ground that said action is barred by the statute of limitations and leave to amend not having been given and plaintiff having been regularly served with a copy of said order, now, therefore, it is ordered and adjudged, that the complaint herein be, and the same is hereby dismissed and that the defendant have and recover her costs of said plaintiff."

[1] Subdivision 3 of section 340 of the Code of Civil Procedure is the statute prescribing one year as applicable to actions for personal injury caused by the neglect of another. Both parties concede said statute would be applicable if the action were against John Cordiero; however, as to his mother, the signer of the application, the plaintiff contends that subdivision 1 of section 338, of the Code of Civil Procedure, is the controlling statute because it prescribes three years as the statute of limitations applicable to an action upon a liability created by statute, and therefore it is the statute applicable to the facts. In making this contention we think the plaintiff is in error. Commencing with the amendment in 1905, an action for personal injuries caused by the neglect of another is barred in one year. If the act of neglect was the act of a minor, as the law formerly stood the parents would not be liable. *Spence v. Fisher*, 184 Cal. 209, 193 P. 255, 14 A. L. R. 1083. That rule has been qualified by statute commencing with the amendment of 1917, Statutes, page 408. In no one of the amendments has the Legislature said or attempted to say that the parents are liable for the torts of a minor child. However, the Legislature has made the general requirement that all operators and chauffeurs must obtain licenses; that to obtain a license a written application must be made; what the contents of the application must be; and, if the application is by a minor, the application "shall not be granted unless such application is signed by * * * the parent * * * having the custody of such minor." Continuing the statute provides: "Any negligence of a minor so licensed in driving a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence." 1 Deering's Gen. Laws, p. 1867. In other words, by signing the application the person signing assumes the responsibility by his act of signing and not by reason of the imposition of the

statute. The primary liability for acts of negligence rests on the operator of the automobile whether he is a minor or adult. The statute of limitations applicable to him is section 340 of the Code of Civil Procedure, subdivision 3. If the operator is a minor and his parent is willing that he should operate an automobile and desires that he should receive a license authorizing him to do so, then and in that event the parent may sign the application and in doing so he places himself in the same position and under the same statute of limitations as the operator. The parent's liability is not, in principle, different from that of a bondsman. In the case of *County of Sonoma v. Hall*, 132 Cal. 589, 62 P. 257, 312, 65 P. 12, 459, a question closely allied was under consideration. Hall was the recorder of Sonoma county. He collected, or should have collected, certain fees prescribed by the statute and should have turned those fees into the county treasury. He did not do so. The plaintiff sued him on his official bond. The defendants pleaded the statute of limitations. Code Civ. Proc. § 338, subd. 1. The court held the defendants pleaded the proper statute; that the liability of Hall, the principal, was created by statute; and that the liability of the other defendants was the liability of the principal.

[2] On appeal, for the first time, the plaintiff claims that in any event the form of the judgment was incorrect. We think that point is well founded. The complaint charged a cause of action as for personal injury and also a cause of action as for injury to personal property. The demurrer was in legal effect as though it had been worded "that the cause of action for personal injury pleaded in said complaint is barred," etc. It was so understood by both counsel and the trial court. The order sustaining the demurrer was in accordance with that understanding, but the judgment was not in accordance with the order. If the form of the judgment had followed the form of the order, the plaintiff would still be entitled to a hearing on the cause of action as for injury to her automobile.

The judgment will be modified to read as follows: "An order having been entered in this action on the 17th day of February, 1928, sustaining the demurrer to the cause of action for personal injuries set forth in the complaint herein on the ground that said action is barred by the statute of limitations, and leave to amend not having been given, and plaintiff having been regularly served with a copy of said order, now, therefore, it is ordered and adjudged that the cause of action for personal injuries set forth in the complaint herein be and the same is hereby dismissed." Nothing should have been said regarding costs because perchance the plaintiff may hereafter be awarded costs.

The judgment will be modified as above in-

dictated. As so modified the judgment is affirmed. Neither party will recover costs on this appeal.

We concur: KOFORD, P. J.; NOURSE, J.

99 Cal. App. 436

HOFFMAN v. EASTMAN KODAK CO.
(Civ. 6449.)

District Court of Appeal, First District, Division 1, California. June 15, 1929.

1. Damages §105—Code limiting liability of depositary for negligence to value of property disclosed held limitation of rule of damages for property lost (Civ. Code, § 1840).

Civ. Code, § 1840, providing that liability of depositary for negligence cannot exceed amount which he is informed by depositor, or has reason to believe, property deposited to be worth, constitutes limitation of general rule of damages that value of property deposited, considering cost and nature thereof and character of use, is recoverable in action for loss of property.

2. Damages §105—Depositary of film, not knowing of its special value, held liable only for cost of film lost, not for expenses in taking pictures.

In action for damages for loss of motion picture film, defendant with whom film was deposited for development, not informed as to value of film and having no knowledge of value of film after pictures were taken, had right to assume film had no special value, and was liable only for cost of film, and not for expenses incurred in taking pictures.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by S. O. Hoffman against the Eastman Kodak Company. Judgment for plaintiff, and defendant appeals. Reversed.

F. Eldred Boland and Knight, Boland & Christin, all of San Francisco, for appellant.

Edmund Gerald Brown, of San Francisco (Lewis E. Lercara, of Oakland, of counsel), for respondent.

TYLER, P. J. Action for damages for the loss of a roll of film deposited by plaintiff with defendant for development.

The film consisted of a strip about 100 feet in length, which had been exposed by plaintiff in one of the small amateur moving picture cameras now on the market and left with defendant to be developed. This character of film is manufactured by defendant and sold by it at the price of \$6 through retail dealers with the understanding that the original price includes developing. The evidence shows that plaintiff purchased one of such films and thereafter, accompanied by his sister, took a trip to the Grand Canyon,

Ariz. He had with him his amateur moving picture camera and the film in question, his declared intention being to take, while at the canyon, some moving pictures of the scene, and particularly the color stratification of the walls of the canyon. Plaintiff admitted that, although he was at the canyon over a period of 10 days, he only exposed this particular film, except that he took some "snap shots" with a small pocket kodak. He spent three days on a trip with his sister to the bottom of the canyon and the remainder of the time on the rim thereof at the Tovar Hotel. They also took sight-seeing trips. Plaintiff testified that he took the trip primarily for the purpose of taking pictures with the film in question. Upon returning from his vacation he delivered the film to defendant for development. The film was lost, and the present action was brought to recover damages on account thereof. Plaintiff, for the purpose of proving the damages suffered by him, offered evidence of the cost of his trip. He testified that his total expenses in taking the trip amounted to the sum of \$302. Whether or not this amount included his sister's expenses, the record does not disclose. It is conceded that the lost property had no commercial value. Plaintiff claimed, however, that he was an amateur photographer and the pictures taken had a peculiar value to him. It was upon this theory that the court admitted evidence of the expense incurred in taking the same, as the proper measure of damages, and rendered judgment for the expenses of the trip amounting to the sum of \$302.

[1, 2] In cases of this character it has been held that the true rule is not to inquire as to the market value, since such articles have none, but to show the value to a plaintiff, taking into account the cost and nature thereof and also the character of the use to which the lost property might be put by him, and the like. Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 P. 286. Assuming that the rule here applied as to the proper measure of damages is correct, we are of the opinion that the judgment cannot stand. Section 1840 of the Civil Code provides that the liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to believe, the thing deposited is worth. This section, in our opinion, constitutes a limitation of the general rule of damages provided for in cases of this character. Here no claim is made that defendant was informed as to the value of the film, nor is there any evidence to show that it had any reason to suppose it had any special value. Defendant had the right to be informed upon this subject so that it might exercise the proper degree of care that the character of the property bailed would require. Without such information it had a right to assume that the property bailed had no spe-

cial value. This rule is a salutary one, for without it one might receive films for development which were exposed in remote and distant places, requiring large sums to visit, which fact, being unknown to the bailee, would incur a liability greatly disproportionate to any profit he might receive from their sale and development. Defendant, not having been informed, and having no knowledge of the value of the property bailed, its liability must be limited to the cost of the film, with the value of which it was familiar.

Judgment reversed.

I concur: KNIGHT, J.

99 Cal. App. 450

LONG v. SMITH. (Civ. 3768.)

District Court of Appeal, Third District, California. June 15, 1929.

1. Appeal and error ⇨1011(1)—Findings on conflicting evidence are conclusive.

The weight and credit to be given various witnesses' testimony is entirely within the province of the trial court, whose findings on conflicting evidence are conclusive.

2. Appeal and error ⇨931(1)—All reasonable inferences are indulged in support of trial court's findings on conflicting evidence.

All reasonable inferences are to be indulged in support of the trial court's findings on conflicting evidence.

3. Appeal and error ⇨1011(1)—Grantor's testimony held merely to raise conflict in evidence, precluding disturbance of trial court's finding that deed was delivered.

In action to quiet title, plaintiff's testimony that she signed deed to defendant's testatrix without knowing what she was doing, what was to be done with it, or what effect it would have, and without intending to convey property, merely raised conflict in evidence as to sufficiency of delivery to pass title, so as to preclude appellate court from disturbing trial court's finding, supported by substantial evidence, in favor of delivery of deed.

4. Quieting title ⇨47(2)—Court's finding on uncontradicted evidence, in action to quiet title, that defendant's testatrix conveyed land to plaintiff in trust, and that plaintiff reconveyed it to testatrix at latter's request, held determinative of case.

Court's finding on uncontradicted evidence, in action to quiet title, that deed from defendant's testatrix to plaintiff was made without consideration and intended only as conveyance in trust for grantor, and that plaintiff exercised no right of ownership, and reconveyed property to grantor at latter's request, in order that she might dispose of it by will, as she desired, held determinative of entire case.

Appeal from Superior Court, Imperial County; James L. Allen, Judge.

Action by Mabel Long against F. H. Smith, individually and as executor of the estate of Anita Calhoun, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Dorsey G. Whitelaw and S. P. Williams, both of El Centro, for appellant.

F. H. Smith, of El Centro, and Louis Lamy, of Los Angeles, for respondent.

PRESTON, Justice pro tem. Plaintiff, Mabel Long, brought this action to quiet title to four city lots situated in El Centro, Cal. Judgment was entered in favor of defendant, from which judgment she prosecutes this appeal.

This action involves the execution and delivery of a deed signed by the plaintiff Mabel Long, whose name was formerly Mabel Mendez, as grantor, to her sister, Anita Calhoun, as grantee.

Anita Calhoun was the original owner of the property in question, and for some time prior to her death was in ill health, suffering from tuberculosis and diabetes. She became badly involved financially and was greatly worried and harassed by her creditors. In order to prevent said property from being seized by her creditors, she (Anita Calhoun) did, on the 21st day of April, 1925, convey the property in question by a grant, bargain, and sale deed, but without consideration, to appellant. Thereafter, and on the 27th day of July, 1925, appellant, at the request of Anita Calhoun, signed and acknowledged a grant, bargain, and sale deed reconveying said real property to said Anita Calhoun. Appellant gave said last-mentioned deed to F. H. Smith, the respondent herein, who was at that time the attorney and agent of Anita Calhoun.

Anita Calhoun never parted with the management and control of said property when she made the deed to appellant in April, 1925, but remained in control of the same, and collected and retained for her own use and benefit all the rents and profits therefrom until her death, which occurred July 29, 1925, and after her death the rents and profits were collected by respondent as the executor of her estate until the commencement of this action. Appellant was never in control or possession of the property in question, and never demanded or received any rents or profits therefrom until this action was begun, which was some nine months after the death of Anita Calhoun.

Appellant, Mabel Long, first contends that there was no delivery of the deed which she made to Anita Calhoun on July 27, 1925.

The legal requirements to effect a valid delivery of a deed have often been stated by the Supreme Court of this state. In *Williams v. Kidd*, 170 Cal. 631-638, 151 P. 1, 3 (Ann. Cas. 1916E, 703), the Supreme Court states the rule as follows: "It is essential to the validity of a transfer of real property that

there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question." See, also, *Bury v. Young*, 98 Cal. 451, 33 P. 338, 35 Am. St. Rep. 186; *Kenniff v. Caulfield*, 140 Cal. 34, 73 P. 803; *Estate of Cornelius*, 151 Cal. 552, 91 P. 329; *Follmer v. Rohrer*, 158 Cal. 757, 112 P. 544; *Reed v. Smith*, 125 Cal. 491, 58 P. 139; *Black v. Sharkey*, 104 Cal. 279, 37 P. 939; *Hibberd v. Smith*, 67 Cal. 547, 4 P. 473, 8 P. 46, 56 Am. Rep. 726; *Denis v. Velati*, 96 Cal. 223, 31 P. 1; *Hotaling v. Hotaling*, 193 Cal. 382, 224 P. 455, 56 A. L. R. 734; *Blackledge v. McIntosh*, 85 Cal. App. 475, 259 P. 770.

The testimony of appellant as to what transpired and under what circumstances she signed the deed in question and gave it to respondent, as agent and attorney of Anita Calhoun, is in direct conflict with that given by respondent and the notary public who took appellant's acknowledgment to the deed; in fact, there is little or no corroboration of any of the testimony given by appellant. No good purpose would be served by discussing the evidence in detail.

The trial court, by its findings, accepted the evidence of respondent and his witnesses, and rejected that given by appellant. A careful examination of the entire record fully satisfies us that the trial court was amply justified in so doing.

[1, 2] The weight and credit to be given to the testimony of the various witnesses is a matter entirely within the province of the trial court, and its findings upon conflicting evidence are conclusive, and all reasonable inferences are to be indulged in support of the findings.

[3] We think the evidence in the case at bar, which the court accepted as true meets all the requirements of the law, and that it fully justifies the findings of the trial court that there was a sufficient delivery of the deed in question to pass title to Anita Calhoun, and that appellant "on the 27th day of July, 1925, at the request of Anita Calhoun, * * * reconveyed the said property by her grant deed, duly made, executed and delivered to said Anita Calhoun, and duly acknowledged by said appellant, in order that said Anita Calhoun might make her will and dispose of said property by will as she might desire."

Appellant lays great stress upon several alleged facts and circumstances testified to by

her to show that there was no intention on her part to deliver the deed so it would be immediately effective to transfer the title to the property. Among these facts and circumstances are: That at the time she signed the deed she did not know what she was signing; that she had no opportunity to read the deed; that she signed the paper not knowing what was to be done with it, or what effect it would have, and without any intention of conveying the property, etc. All these facts and circumstances did no more than raise a conflict in the evidence on the vital issue of the sufficiency of the delivery of the deed to pass title to Anita Calhoun, and, the trial court having resolved that conflict in favor of the delivery of the deed, such finding will not be disturbed by this court, where there is any substantial evidence to support it.

Appellant also contends "that there was undue influence practiced upon her, sufficient to invalidate the deed if it was otherwise good." There is no substantial evidence in the record to support this contention, and the trial court rightfully found against appellant upon this issue.

[4] The respondent alleged in his cross-complaint, and the court found upon uncontradicted evidence, "that on the 21st day of April, 1925, Anita Calhoun was the owner in fee simple of the property sued for and described in plaintiff's amended complaint, and on said date duly made and executed to said plaintiff a grant deed to said property, duly acknowledged; * * * that said deed purported upon its face to convey the fee simple title to said property to plaintiff, but in truth and in fact, was made without consideration to said Anita Calhoun from plaintiff, and was intended to be only a conveyance of said property to plaintiff, to be held by her in trust for said Anita Calhoun; that said Anita Calhoun remained in full possession of said premises and exercised full control and management thereof after the execution of said deed as aforesaid up to the time of her death on the 29th of July, 1925, and collected the rents and profits thereof, and the said plaintiff exercised no right or act of ownership over said property, and on the 27th day of July, 1925, at the request of said Anita Calhoun, reconveyed the said property by her grant deed of that date, duly made, executed and delivered, to said Anita Calhoun, and duly acknowledged by said plaintiff in order that the said Anita Calhoun might make her will and dispose of said property by will as she might desire." This finding alone seems to us to be determinative of the entire case. Appellant never owned the property, but only held it in trust for her sister, and, by the deed of July 27, 1925, she was merely discharging that trust.

We find no merit whatever in the appeal. The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 482

CHURCHILL CO. v. BEAL et al.★
(Civ. 3806.)

District Court of Appeal, Third District, California. June 18, 1929.

Rehearing Denied July 18, 1929. Hearing Denied by Supreme Court Aug. 15, 1929.

- 1. Deeds** ⇨112(2)—Contents of official plat of survey, according to which lands are granted or deeded, become integral and controlling part of grant or deed.

When lands are granted according to official plat of survey, plat itself with all its notes, lines, descriptions, and landmarks becomes part of grant or deed, and controls so far as limitations are concerned, as if such descriptive features were written in deed or grant itself.

- 2. Boundaries** ⇨10—Objects referred to in field notes were properly considered in determining location of disputed corner at place corresponding with calls and distances of survey.

Objects referred to in field notes of survey as being nearest to disputed corner were proper objects to be considered by trial court in determining location of disputed corner at place which would correspond precisely with calls and distances of survey.

- 3. Public lands** ⇨28—Survey cannot limit or change boundaries of public lands conveyed under prior survey.

When lands are sold by federal government with regard to survey that has already been made, no resurvey can affect, limit, or change boundaries of lands theretofore conveyed.

- 4. Boundaries** ⇨43—Objection that judgment fixing meander line as boundary is uncertain held untenable, where plaintiff's westerly line, sole subject of dispute, was definitely located by judgment.

Where only ground of dispute between adjoining owners was true location of westerly line of plaintiff's tract, objection that judgment is uncertain because it does not more definitely fix easterly meander line, which constitutes dividing line between lands belonging to plaintiff and defendants, is untenable, where judgment follows field notes of original survey.

- 5. Appeal and error** ⇨1047(3)—Failure to pass on motion to strike out testimony held not prejudicial, where lengthy cross-examination was permitted, and no surprise shown.

Defendants in boundary line dispute were not prejudiced by refusal of trial court to pass on motion to strike out testimony of witness who retraced lines of survey according to field notes of such survey, where defendants were permitted to cross-examine such witness at considerable length, and made no showing of surprise by reason of testimony of such witness.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Action by the Churchill Company, a corporation, against Ellen Beal, as special administratrix of the estate of Henry N. Beal,

deceased, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles L. Gilmore, of Sacramento, and Thomas Ashby, of San Francisco, for appellants.

Tapscott & Tapscott, of Yreka, for respondent.

PLUMMER J. Plaintiff had judgment in an action brought to quiet title to certain lands described in its complaint. From this judgment the defendants appeal. While the action is, in form, one to quiet title, the only issue really involved is the location of the west boundary line of township No. 47 north, range No. 2 east, Mt. Diablo base and meridian, in so far as it affects sections 18 and 19. If the boundary line claimed by the plaintiff, and adopted by the trial court as the true west boundary line of the lands belonging to the plaintiff, is the true boundary line, then the judgment of the trial court should be affirmed. If, on the other hand, as contended by the defendants, that the boundary line as run by a surveyor named George W. Wakefield, in 1906, is the true westerly boundary line of said sections, then and in that case the judgment should be reversed. The distance between the two lines just referred to includes a strip along said sections a trifle over 5 chains in width.

The record shows that in 1858 one Tracy surveyed the west boundary line of township 47, the field notes of which were put in evidence. The Tracy survey was on the township line only; he did not survey section or subdivision lines of the land. In October, 1872, while the land was still a part of the public domain of the United States, Alex McKay resurveyed certain township lines, and in the field notes of his survey refers to a number of natural objects along the line of the survey, such as the road from Yreka to Oregon, Cottonwood creek, and the rock fence; also a point where the line enters certain low swamp or wet land. McKay's survey included a survey of the sections and subdivision of the lands involved in this suit, including the meander lines through sections 18 and 19. The field notes of this survey were introduced in evidence. The McKay survey was approved February 3, 1880, and in this manner became the official survey of the land. A plat of this survey was filed in the Shasta land office on April 1, 1884. The lands in dispute were shown as surveyed lands on the plat just referred to. Following this survey the lands belonging to the plaintiff were conveyed by the United States either to the plaintiff or to the plaintiff's grantors by patents dated May 6, 1887, December 3, 1889, and August 20, 1902. The plaintiff's title to whatever lands were and are included in these patents is not disputed. The only question is as to where these lands are located, starting for a description thereof from the true boundary line to the west.

In 1906, in order to locate some unsurveyed lands lying to the east of the lands belonging to the plaintiff, a resurvey was made of township 47 north, range 2 east, M. D. B. & M., by a surveyor named George F. Wakefield. This survey was approved in 1909, and the plat thereof filed in the surveyor general's office in San Francisco. The Wakefield survey does not follow what the court found to be the true line of the McKay survey, and, so far as the record shows, the field notes thereof do not make mention of any corners or of natural or artificial objects mentioned and referred to in the McKay survey. As we read the record, we do not find that the Wakefield survey makes any mention of any monument or stake at the southwest corner of section 19, as located by McKay. The trial court found that the southwest corner of section 19, as located by McKay, and which constitutes the starting point for determining the lands belonging to the plaintiff and the lands granted by the United States to the plaintiff and the plaintiff's grantors, was at a point a trifle over 5 chains east from the line indicated and the point indicated by the Wakefield survey. That the trial court was correct in the location of the southwest corner of section 19 is supported by the field notes of the McKay survey. The first object referred to in the field notes as the west line of section 19 is extended north is the road running from Eureka to Oregon. This road runs in a diagonal direction from the southeast to the northwest, and is mentioned in the field notes of the McKay survey as being distant from the southeast corner 3.50 chains. On the Wakefield survey the line crosses this road at a distance from the southwest corner of section 19 of 6.80 chains. The next object referred to in the McKay survey is Cottonwood creek, which, on the McKay survey, is 12 chains north of the southwest corner of section 19. On the Wakefield survey it is north 13.30 chains; thence following the line northerly on the McKay survey, we find a rock fence distant from the southwest corner of section 19, 62.05 chains. This rock fence runs in a northwesterly and southeasterly direction, and is intercepted by the Wakefield line at a distance of 71.79 chains from the southwest corner of section 19, as shown by the Wakefield survey. Likewise, another object known as the "Emigrant Road," referred to in the McKay survey, crosses the westerly line of section 19 at a distance of 76.90 chains from the southwest corner of section 19.

Irrespective of oral testimony of some witnesses that they were familiar with the location of the southwest corner of section 19, as designated in the McKay survey, these objects and the calls and distances were and are sufficient to support the conclusion of the trial court as to the true location of the southwest corner of section 19. In other

words, the field notes and the objects referred to in the McKay survey cannot be superimposed upon the line run as the westerly line of sections 19 and 18 by Wakefield, which again supports the finding of the trial court as to the location of the southwest corner of section 19, as established by McKay, and the true westerly line of the sections involved in this action.

The record contains the testimony of two civil engineers or surveyors, one named Harvey J. Sarter, who for a number of years was the county surveyor of Shasta county, and also the testimony of the surveyor named Zumwalt. These witnesses testified to retracing the lines run by McKay, Sarter testifying that he found something to mark every section corner and quarter section corner of the survey run by McKay, and that he found the southwest corner of section 19 of the survey run by McKay, these resurveys or retracings of the lines extended back over a period of 20 years; that he was not making a new survey, but a location of the McKay corners on the ground, and that he followed, strictly, the McKay field notes; that he found the objects referred to in the McKay field notes at the distances therein stated from the southwest corner of section 19. A witness by the name of Churchill testified that he had known the southwest corner of section 19 since 1890. The surveyor Zumwalt testified to finding the objects referred to in the McKay field notes at substantially the same distance from the southwest corner of section 19, as stated in the field notes. The witness Sarter also testified that he was familiar with the location on the ground of the corners marking the west line of sections 18 and 19, according to the Wakefield survey, and that their position, with reference to the McKay corners, was a considerable distance west from the same corners set by McKay.

[1] The summary shows that there are two surveys involved in this action, one by McKay in 1873 and the other by Wakefield in 1906. The plaintiff claims title and location of land having its westerly boundary line according to the McKay survey. The appellants in this action contend that the Wakefield resurvey, made in 1906, and approved, in 1909, supersedes the earlier survey, and that the appellants' west line must be held coterminus with the Wakefield survey. In support of their contention that the rights of the parties to this action must be determined according to the Wakefield survey, a number of cases are cited to the effect that the United States land department has a right to make resurveys of the public domain and of the lands belonging to the general government, and that the resurveys or latest approved surveys must be held controlling. With this contention we agree, so long as the resurveys have to do only with the lands belonging to the general government. So long

as the lands are unpatented or unconveyed, or have not passed into private ownership, the right to make resurveys, as contended for by the appellants, undoubtedly exists. In this case, however, that question is not really involved. The question really is, Has the government a right to make a resurvey so as to change the lines of an original survey concerning lands to which it no longer holds title? In other words, Can a resurvey of lands which have already been granted, made for the purpose of running lines on adjacent public land, be so made as to change the location on the ground of lands to which the government has no ownership?

As a prelude to an answer to this question, we may state that the record shows that the patents issued to the plaintiff and the plaintiff's grantors were based upon the original plat and field notes of the survey made by McKay in 1873. Every one of the patents refer to such plat and field notes. In 22 Ruling Case Law, p. 283, the law in relation to patents referring to and based upon plats and field notes is thus stated: "It is a well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks become as much a part of the the grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out on the face of the deed or the grant itself. The survey, in other words, is to be taken as a part of the patents, and these must be construed together." The same rule is supported by a number of authorities, and is stated in 9 C. J. 180 as follows: "When maps, plats or field notes are referred to in a grant or conveyance, they are to be regarded as incorporated into the instrument, and are usually held to furnish the true description of the boundaries of the land." And in the same volume of C. J., on page 164, it is said: "Original corners, as established by the government surveyors, if they can be found, or places where they were originally established, if they can be definitely determined, are conclusive on all persons owning or holding with reference thereto, without regard to whether they were located correctly or not, and must remain the corners or monuments by which to determine the boundaries."

[2] In 4 Cal. Juris. p. 412, upon the subject of establishing corners, the rule, supported by authorities, is thus stated: "In a controversy involving a boundary the description of which commences and ends at a corner marked by a monument which had long since disappeared, it is the duty of the court to ascertain, if possible, the true position of the corner; accurately, if it can be done, or approximately within reasonable limits if the exact position cannot be ascertained with absolute certainty. If possible the court

should fix the place of the monument where it will best accord with natural objects described in the field notes as being about it, and found to exist on the ground, and which is least inconsistent with the distances mentioned in the notes and plat of the survey." And, in relation to the data to be considered by the court in fixing the place of a lost corner, it is further said: "In establishing a disputed corner, those objects intended to mark the corner, and referred to in the notes of the original survey as being nearest the corner, are, when satisfactorily established stronger evidence than objects more remote." Thus, in the case at bar, the objects referred to in the McKay field notes, being nearest to the disputed corner, were proper facts to be considered by the trial court in determining the location of the disputed corner at a place which would cause it to correspond precisely with the calls and distances of the McKay survey. Again, before citing the cases bearing upon the real question presented for determination as stated above, it may be said that this action is not a collateral attack upon any government survey. No attempt is made to invalidate the Wakefield survey of 1906. It is only an attempt to fix the line of the original McKay survey as made and located on the ground in 1873, so that none of the cases bearing upon collateral attack on surveys need be considered. The question of what objects and data may be considered by the trial court in determining the location of a boundary line or of a disputed corner has been passed upon so frequently that we deem it unnecessary to review the decisions bearing thereon further than to say that the objects mentioned and referred to in the McKay survey are shown by the authorities to constitute proper data for the trial court to consider in fixing the location of the southwest corner of section 19 as located in the McKay survey, and also the west boundary line of the lands involved in this action.

[3] We come now to the question urged by the appellants, that the resurvey by Wakefield, being a government survey, is controlling. The law, however, is well settled that, when lands are sold by the general government with regard to a survey that has already been made, no resurvey can be made so as to affect, limit, or change the boundaries of the lands which have theretofore been conveyed. In the case of *Washington Rock Co. v. Young*, 29 Utah, 108, 80 P. 382, 110 Am. St. Rep. 666, we find the following: "On a resurvey of a tract of land to establish lost boundaries, the original corners, as established by the government surveyors, if they can be found, or the places where they were originally established, if they can definitely be determined, are conclusive, without regard to whether they are located correctly." This case, as reported in 110 Am. St. Rep. *supra*, contains an extended note beginning on

page 677. A long list of authorities are there collected supporting this statement: "When public land has been surveyed by authority of the United States, and patented with reference to the boundaries as fixed by such surveys, the corners and lines so established, whether correct or not, are conclusive and cannot be altered or controlled by other surveys." In other words, as elsewhere stated in the note: "The true corner of a" patented "governmental subdivision of land is where the United States surveys in fact establish it, whether such location is right or wrong as * * * shown by a subsequent survey."

In the case of *Cragin v. Powell*, 128 U. S. 700, 9 S. Ct. 206, 32 L. Ed. 566, where the subject of prior and subsequent surveys was considered, the court thus holds the law to be: "That the power to make and correct surveys of the public lands belongs to the political department of the government and that, whilst the lands are subject to the supervision of the general land office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient." (Here follows citation of numerous authorities.) The court then continues: "It is conceded that this power of supervision and correction by the commissioner of the general land office is subject to necessary and decided limitations. Nor is it denied that, when the land department has once made and approved a governmental survey of public lands, the plats, maps, field notes and certificates all having been filed in the proper office, and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased, in good faith, from the government, against the interferences or appropriations of corrective resurveys made by that department subsequently to such disposition." That is the limitation involved in this action.

The resurvey was made subsequent to the time when the government had parted with its title, and its power to recapture any of the lands theretofore sold to the plaintiff by means of a resurvey, or otherwise, was wanting. If the original survey, as made by McKay, fixed the westerly boundary of the lands granted to the plaintiff and the plaintiff's grantors as found by the trial court, then, and in that case, whether the line as originally located was correct becomes immaterial. It is the correct line in the determination of this action, as it fixes on the grounds the lands covered by the patents, the ownership of which has passed to the plaintiff in this action. The following California

cases support the rules which we have just herein set forth: *Kimball v. McKee*, 149 Cal. 435, 86 P. 1089; *Foss v. Johnstone*, 158 Cal. 119, 110 P. 294; *Weaver v. Howatt*, 161 Cal. 77, 118 P. 519; *Weaver v. Howatt*, 171 Cal. 302, 152 P. 925; *Spiers v. Spiers*, 176 Cal. 557, 169 P. 73; *Wilmon v. Aros*, 191 Cal. 80, 214 P. 962. Practically all of the cases herein referred to support the principle that, in making a resurvey to determine the boundaries of lands which have been granted, the tracks of the original survey should be followed, so far as it is possible to discover the same and locate upon the grounds the lines of the lands patented as nearly as may be according to the original survey thereof and in reference to which lands have been sold.

[4] It is further contended by the appellants that the judgment of the court is uncertain, and that the cause should be reversed and sent back to the trial court, to the intent and purpose that the easterly meander line of the plaintiff's lands may be more definitely fixed. The easterly meander line just referred to would constitute the dividing line between lands belonging to the plaintiff and lands belonging to the defendants. We think, however, in view of the findings and judgment of the trial court, which follow the field notes of the McKay survey, and in view of the definite location of the starting point, to wit, the southwest corner of section 19, the objection of appellants in this particular is untenable, and need not be considered further.

[5] Objection is also made by the appellants that they suffered prejudice by reason of the failure of the trial court to pass upon their motion to strike out certain testimony given by the witness Sarter. While we think it is advisable in all cases for a court to pass upon motions in relation to striking out of testimony, when made, in this particular case there does not appear any reasonable objection to the course pursued by the trial court, in that appellants were not deprived of any opportunity to make any defense which they had. Their cross-examination of Sarter was very lengthy, and went into all the details of the respective surveys involved. No continuation of the trial of the case was asked in order that they might meet any of the testimony given by Sarter. The testimony given by Sarter was clearly admissible. It related to retracing the lines as originally established by McKay. What the witness testified to did not constitute a resurvey of the plaintiff's land or the re-establishment of any of the lines. It was simply a proceeding to ascertain where the lines and corners had been originally established by McKay. The record does not contain any showing that the appellants were taken by surprise by reason of any testimony given by the witness Sarter. Under these circumstances, the appellants cannot well claim that they suffered prejudice by reason of the

failure of the court to promptly deny their motion to strike out the testimony of the witness Sarter.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

99 Cal. App. 593

PEOPLE v. SCHLOSSER. (Cr. 1817.)

District Court of Appeal, Second District, Division 2, California. June 24, 1929.

Criminal law §1130(5)—Where specifications of error are unaccompanied by argument or citation of authority, appellate court will not search record to find errors.

Where specifications of error in appellant's brief are unaccompanied by argument or citation of authority, appellate court will not assume burden of searching record to determine whether there has been miscarriage of justice.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Alvera Schlosser was convicted of manslaughter, and she appeals. Affirmed.

Trent Penland and J. R. LeGallez, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J. The defendant was charged by information with the crime of murder, in that she did, on September 29, 1928, kill her husband, Fred Schlosser. The jury returned a verdict of guilty of manslaughter, and she appeals from the judgment pronounced upon the verdict and from the order denying her motion for a new trial.

The entire appeal may well be disposed of by calling attention to the fact that the various specifications of error are unaccompanied by argument or citation of authority. Under a well-known rule of procedure we are not called upon, under such circumstances, to assume the burden of searching the record to determine whether there has been a miscarriage of justice. Were this the only case where counsel have failed to point out the error alleged to have been committed and its prejudicial effect, we should be inclined to make a more exhaustive study of the record to determine whether a mistrial has occurred. But we have had occasion several times of late to call the attention of counsel to the fact that it is their duty to present the law and the argument. This is one of the duties they assume upon their admission to the bar. If we are to depart from the rule and shoulder the responsibility of the profession in this particular, the time is not far distant when the state will be utterly unable to provide suf-

ficient judicial machinery to transact its business. In the interests of a more comprehensive justice, and with a viewpoint not beclouded by the individual case, we must again assert that, where counsel will not take the time to point out the particular errors upon which he relies and the law which he invokes, we will not. *People v. Chutnacut*, 141 Cal. 682, 75 P. 340. Nowhere in appellant's opening brief (and no reply brief has been filed) is there anything which leads us to believe or even suspect that there has been a miscarriage of justice.

Judgment and order affirmed.

I concur: CRAIG, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

99 Cal. App. 401

WILLARD GEORGE HOTEL CO., Inc., v. WARDEN et al. (Civ. 3771.)

District Court of Appeal, Third District, California. June 12, 1929.

1. Quieting title §10(1)—Plaintiff must establish its own chain of title, but when both parties claim through common source neither need prove chain of title.

Plaintiff suing to quiet title and cancel tax deed may not rely on weakness of defendant's title, but must affirmatively establish its own chain of title, except that when both parties claim title through a common source it is unnecessary for either to prove chain of title.

2. Municipal corporations §578—Plaintiff suing to cancel tax deed was not required to further prove chain of title than by introducing its deed.

Where all the title possessed by defendant in action to quiet title and to cancel tax deed, and who never had possession, was derived solely from tax deed for delinquent street assessments levied against property standing of record in plaintiff's name, plaintiff's deed was prima facie evidence that grantee named therein was owner and in possession, and it was unnecessary for plaintiff to further prove its chain of title.

3. Evidence §591—Reception in evidence of defendant's tax deeds was merely prima facie evidence of matters therein recited, notwithstanding they were offered by plaintiff while examining defendant under statute (Street Improvement Act, § 29; Code Civ. Proc. § 2055).

In action to quiet title and to cancel tax deeds in which invalidity of tax deeds was specifically made an issue by pleadings, reception in evidence of defendant's tax deeds was merely prima facie evidence of matters therein recited under Street Improvement Act, § 29 (St. 1903, p. 384, Deering's Gen. Laws 1923, Act 8198), and presumptions as to regularity of proceedings leading to execution of deeds were rebutta-

ble, notwithstanding said deeds were offered by plaintiff while defendant was being examined as witness under Code Civ. Proc. § 2055.

4. Constitutional law ☞311—Rule precluding property owner from showing invalidity of proceedings resulting in forfeiture of land for failure to pay assessment of insignificant amount would be unconstitutional (Const. art. 6, § 4½).

Rule of evidence which would preclude owner of valuable property from showing invalidity of proceedings by means of which he forfeited his land for mere failure to pay street assessment of comparatively insignificant amount would violate Const. art. 6, § 4½, and would be neither just nor equitable.

5. Municipal corporations ☞579—Doctrine of caveat emptor applies to purchaser at tax sale so far as regularity of proceedings leading to tax deeds is concerned.

So far as the regularity of proceedings leading to execution of tax deeds is concerned, the doctrine of caveat emptor applies to purchaser at tax sale.

6. Municipal corporations ☞581—Tax deeds were void for failure to give owner required statutory notice (Street Improvement Act).

Tax deeds conveying property for delinquent street assessments under Street Improvement Act (St. 1903, p. 376; Deering's Gen. Laws 1923, Act 8198) were void, where notice required by statute to owner of property as prerequisite to execution of the deeds was not given.

7. Municipal corporations ☞581—Affidavit held insufficient to show due diligence to excuse service of notice to redeem from tax sale on corporate owner of hotel property (Street Improvement Act, § 28).

Affidavit reciting that purchaser at tax sale, on making inquiry at city assessor's office, was informed that property was assessed to certain hotel corporation, that affiant searched city and telephone directories and on going to address given was informed by clerk on duty that place had changed hands and that hotel company or persons representing it had departed and their whereabouts were unknown, and that affiant made inquiries of persons in vicinity without being able to ascertain whereabouts of owner of property, held insufficient to show exercise of due diligence required by Street Improvement Act, § 28 (St. 1903, p. 384, Deering's Gen. Laws 1923, Act 8198), to be relieved from requirement of giving owner notice to redeem or failure to make inquiry of county clerk for names or location of corporation or of its officers, in view of section 26 and Civ. Code, §§ 290, 299, and Code Civ. Proc. § 411.

8. Municipal corporations ☞581—Statute requiring written notice to redeem from delinquent street assessments must be strictly construed (Street Improvement Act, § 28).

Street Improvement Act, § 28 (St. 1903, p. 384; Deering's Gen. Laws 1923, Act 8198), requiring purchaser at tax sale at least 30 days before application for deed to serve on owner and occupant of property a written notice to redeem, must be strictly construed.

9. Municipal corporations ☞578—Judgment canceling tax deeds was not erroneous for failing to allow purchaser penalties and interest, where offer thereof in open court was not accepted.

Contention that judgment canceling tax deeds as void was erroneous because it failed to allow penalties and interest to purchaser at tax sale on amount which she paid held without merit, where original owner's attorney tendered the money in open court, which offer was not accepted.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by the Willard George Hotel Company, Inc., against Grace P. Warden and others. From a judgment for plaintiff, named defendant appeals. Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

George D. Blair, of Los Angeles, for respondent.

THOMPSON, J. This is an appeal from a judgment quieting title and canceling a tax deed.

The respondent is a hotel corporation. It owned lots 8 and 9 of James Townsend's subdivision of Los Angeles, according to the map thereof which was recorded in book 30, page 53, of miscellaneous records. April 21, 1923, this property was sold for delinquent street assessments to the appellant Grace P. Warden by the city superintendent for the sum of \$111.74, pursuant to the Street Improvement Act of California (St. 1903, p. 376; Act 8198, Deering's Gen. Laws of Calif. 1923).

May 17, 1924, upon appellant's demand, tax deeds to these lots were executed and delivered to the purchaser by the city engineer and superintendent of streets. The respondent was an active hotel corporation, whose articles of incorporation were on file in the county clerk's office. It was the record holder of the lots in question. A street assessment for the sum of \$22.83 against each of these lots became delinquent. Without personal service or knowledge on the part of respondent, these lots were sold and conveyed to the appellant. The certificate of sale and notice of purchase were fatally defective. There was a lack of due diligence on the part of appellant in locating or notifying the owner. Upon trial the court quieted title in the plaintiff subject to the repayment to appellant of the assessments paid by her, together with interest and penalties amounting to the sum of \$111.74, and thereupon canceled the tax deeds as void.

The appellant contends that the findings and judgment are not supported by the evidence; that the respondent, who offered in evidence the tax deeds at the trial on examination of the appellant under section 2055 of the Code of Civil Procedure, is bound there-

by; and that the conditional payment of \$111.74 does not include interest and penalties provided for by law.

The evidence shows that the respondent was the record holder of the title to the lots in question, and that the deed of conveyance from its grantors, Philip R. and Helen W. Johnson, was duly executed January 24, 1923, and recorded prior to the levy, assessment or sale of said lots to appellant for delinquent street assessments. This deed was introduced in evidence, and the respondent's record title was not further established. The record also shows that the appellant's only claim of title is based upon the tax title deeds executed to her by the superintendent of streets on May 17, 1924, pursuant to the provisions of section 28 of the California Street Improvement Act, *supra*.

[1, 2] It is true that the respondent may not rely upon the weakness of appellant's title, but upon the contrary must affirmatively establish its own chain of title, except that when both parties claim title through a common source, it is unnecessary for either to prove the chain of title. 22 Cal. Jur. 167, § 42; 5 R. C. L. 675, § 48. In the present case the appellant may not complain of respondent's failure to prove its chain of title. All the title that the appellant possessed was derived solely from the street superintendent's tax deed for delinquent street assessments levied against the property standing of record in the name of the respondent. The respondent's deed was prima facie evidence that the grantee therein named was the owner and in possession of the property. 22 Cal. Jur. 170, § 44. The appellant never held possession of the lots. Under such circumstances it was unnecessary for the respondent to further prove its chain of title. A similar situation existed in the case of *Denning v. Green* (Cal. App.) 263 P. 819, which seems to be decisive of this case upon that point. In the *Denning* Case the evidence showed that the appellant secured the tax title deed upon which he relied by the payment of delinquent taxes which were assessed to Lucy J. Benjamin in 1916, and that the property was sold for nonpayment of these taxes. The court there says: "Hence the record shows that defendant claims by virtue of a quasi-conveyance from Lucy J. Benjamin because of the non-payment of her taxes. Both parties therefore claim under a common source of title. Under these circumstances it was sufficient for plaintiff to show a conveyance of title from that source without further establishing that the grantor herself had title."

In the present case there is better reason for adhering to the foregoing rule announced in the *Denning* Case, for this appellant's sole claim of title depends upon the respondent's own default in the payment of street assessments, it being the record owner of the property, while in the *Denning* Case the tax deed rested upon the default to pay taxes by a

former record owner of the property. Applying the principle announced in the *Denning* Case, *supra*, it may be said that the appellant here necessarily bases his claim upon respondent's title deed, under which circumstances it is unnecessary for respondent to have proved its chain of title. *Strange v. Strange*, 23 Cal. App. 281, 137 P. 1104, *Thiele v. Security Trust & Savings Bank*, 202 Cal. 758, 262 P. 308.

[3, 4] The reception of appellant's tax deeds was merely prima facie evidence of the matters therein recited, regardless of the fact that the deeds were offered by the respondent while the appellant was being examined as a witness under the provisions of section 2055 of the Code of Civil Procedure. The invalidity of these tax deeds was specifically made an issue by the pleadings. Section 29 of the Street Improvement Act, *supra*, provides: "The deed of the Street Superintendent shall be prima facie evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee."

These presumptions as to the regularity of the proceedings leading to the execution of the deeds are certainly subject to rebuttal. 26 R. C. L. 424, § 382. It would be a harsh rule of evidence, and violative of section 4½ of article 6 of the Constitution, which would preclude the owner of valuable property from showing the invalidity of proceedings by means of which he is deemed to have forfeited his land for the mere failure to pay a street assessment of comparatively insignificant amount. This would be neither justice nor equity. Equity will critically scrutinize proceedings which tend to result in a forfeiture. Forfeitures are not favored. In the case of *Numitor Gold Mining Co. v. Katzer*, 83 Cal. App. 161, 171, 256 P. 464, 468, it is said: "For generations the theory of the law has been that the purchaser of a tax title is a mere speculator who, owing to the misfortune or carelessness of the owner, has become possessed of a desirable property for an infinitesimal proportion of its actual value."

[5] So far as the regularity of the proceedings is concerned which led to the execution of the tax deeds, the doctrine of caveat emptor applies to the purchaser. *Cooley on Taxation* (4th Ed.) 3045, § 1553.

[6] The deeds of conveyance from the superintendent to the appellant were void for lack of service of the notice required by statute to be made upon the owner of the property as a prerequisite to the execution of the deeds, and because the superintendent's certificates of sale of the lots were defective. In 3 *Cooley on Taxation*, 2791, § 1409 et seq., it is said: "The absence of the notice renders the sale void. This is one of the most important of all safeguards that have been deemed necessary to protect the interests of persons taxed, and nothing can be substituted for it, or excuse the failure to give it. * * * A sale

without notice to one whose name appears on the records is void against him. * * * Whatever the provision (of law) is, it must be complied with strictly, since all such provisions are mandatory. * * * A notice is bad * * * if it fails to give the name of the person taxed, when the statute requires it."

[7] The respondent was a corporation duly organized under the laws of California. As the owner of real property in Los Angeles county it was required by the provisions of section 299 of the Civil Code to file a copy of its articles of incorporation in the office of the county clerk of that county. These articles contained the name of the corporation, the location of its principal place of business, and the names and residences of the directors who were chosen for the first year. Section 290, Civ. Code. Section 26 of the Street Improvement Act above mentioned requires the superintendent of streets after publication of the delinquent list and sale of property, to execute in duplicate certificates of sales of property "setting forth the description of the property sold, the name of the owner thereof, as given on the assessment roll," etc., one copy of which must be filed in his office and the other delivered to the purchaser. Section 28 of this statute also requires the purchaser, at least 30 days prior to his application for a deed, to "serve upon the owner of the property, and upon the occupant of such property, if the same is occupied, a written notice, setting forth a description," etc. If the owner cannot be found after due diligence an affidavit to this effect must be filed with the superintendent of streets, and a copy of this notice must be posted on the premises involved in the sale. In compliance with this statute, C. D. Warden filed this affidavit in behalf of the appellant, the material portions of which are in the following language:

"That he did as such agent make inquiry at the Assessor's office of the County of Los Angeles at his office in the City of Los Angeles for the name of the person owning or to whom the property was assessed described in the attached Notice to Redeem, and was informed that said property was assessed to Willard George Hotel Co.

"That affiant searched the city directory and telephone directory of the cities of Pasadena and Los Angeles, California, seeking to find the said Willard George Hotel Co. and affiant found in the telephone directory of the City of Los Angeles the address given of said Willard George Hotel Co. as 705 West Seventh Street in said City of Los Angeles and that affiant did go to said address as above given and inquired for the Willard George Hotel Co. but was informed by the clerk on duty that the hotel at said place had changed hands and that the Willard George Hotel Co. or any person representing them had departed from said place and their address or whereabouts were unknown.

"That affiant inquired of Mrs. S. Contino, who lives directly across the street from the property described in said Notice to Redeem, and from Mrs. Florence Abajen, who lives in the first house directly to the east of the property described in said Notice to Redeem, seeking to ascertain the address or whereabouts of the owner of the property described in said Notice to Redeem, but was informed by said Mrs. Contino and Mrs. Florence Abajen that they did not know the name or address or whereabouts of the said owner described in said Notice to Redeem."

[8] It will be observed that the efforts of the appellant to locate the owner of the property, as disclosed by this affidavit, falls far short of the exercise of due diligence. In spite of the fact that appellant was informed by the assessor that these lots were assessed in the name of "Willard George Hotel Company," no inquiry was made of the county clerk for the names or location of either the corporation or any of its officers. Service upon a corporation can only be made by notice to the officers named in section 411 of the Code of Civil Procedure, and yet no inquiry was made to ascertain the names or residences of any such officers. No date is given when the appellant claims to have inquired from certain named individuals, or when she examined the city directory. In spite of the fact that the statute requires the superintendent to give the name of the owner in his certificate of sale, and that the appellant was evidently furnished the name of the owner by the assessor, the superintendent certifies that the name of the owner was "unknown." In the notice of application for her deed, which was posted on the premises, the name of no owner was mentioned. The only reference to the owner is found in the caption of this notice, as follows: "To the owners of the property hereinafter described, and to the occupants of such property." As a matter of fact, the owners were ignorant of the fact that their property had been sold for delinquent street assessments. A strict construction of the statute is required. 37 Cyc. 1479, § 5. Both the certificates of sale and the notice of application for deeds were therefore fatally defective. 26 R. C. L. 409, § 367; 3 Cooley on Taxation, 2791, § 1409 et seq.

[9] Finally, the appellant contends that the decree is erroneous because it fails to allow her the penalties and interest upon the amount which she paid. It appears, however, that each lot was sold for delinquent street assessment amounting only to \$22.83. Adding the penalty and interest provided by law, the aggregate sum would still amount to less than the sum of \$111.74, which was allowed by the court. Moreover, with reference to the repayment of the taxes, penalties, and interest which were due to the appellant, the respondent's attorney tendered the money in open court. He said: "We offer to pay it in court at this time." This offer was not ac-

cepted. In the case of *Denning v. Green*, supra, it is said: "Equally without merit is the claim that the judgment should have been made conditional on the repayment by plaintiffs to the defendant of all taxes, penalties, and costs. * * * The record shows that such tender was made in open court and refused by the defendant."

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 473

LEWIN v. PIONEER HATCHERY.
(Civ. 3739.)

District Court of Appeal, Third District, California. June 18, 1929.

1. Sales $\S$ 261(6)—Assurance that cockerels sold for breeding purposes were in good, healthy, and virile condition constituted warranty, for breach of which seller would be liable.

The assurance by seller of cockerels for breeding purposes to the effect that they were in good, healthy, and virile condition amounted to a warranty, the breach of which would make seller liable for damages.

2. Sales $\S$ 284(4)—Seller of diseased poultry to be placed with others is liable in damages, where disease is communicated to other birds.

Seller of cockerels warranting them to be healthy, knowing that they were to be placed with other poultry, is liable in damages, where birds sold had infectious or contagious disease not only in respect to animals purchased but to others to which disease is communicated.

3. Sales $\S$ 441(3)—Evidence held to warrant finding that cockerels were afflicted with chickenpox when purchased.

In buyer's action for damages against seller of cockerels, evidence held to support finding that cockerels were afflicted with chickenpox when purchased.

4. Appeal and error $\S$ 122(2)—Appellate court may adopt adequate findings based on evidence to uphold judgment (Code Civ. Proc. $\S$ 956a, as added by St. 1927, p. 583).

Under Code Civ. Proc. $\S$ 956a, as added by St. 1927, p. 583, the appellate court may adopt adequate findings based on evidence for purpose of upholding judgment.

5. Sales $\S$ 442(8)—Purchaser of diseased poultry for breeding purposes held entitled to recover value of other poultry lost through communicated disease; "article of personal property" (Civ. Code, $\S$ 3313, 3314).

Buyer of poultry for breeding purposes may recover from seller value of poultry lost by reason of disease communicated to other poultry under Civ. Code, $\S$ 3314, the term "article of personal property," as used in section 3314, not being restricted to manufactured articles, and section 3313 restricting amount of damages in

event of breach of warranty as to quality of personal property not purchased for special purpose to difference in value of property purchased not being applicable.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Article of Personal Property.]

6. Fraud $\S$ 41—Pleadings, in action for damages to poultry by reason of disease communicated by cockerels purchased from defendant, held to warrant judgment for damages for fraud or deceit (Civ. Code, $\S$ 1572, 3300).

Pleadings, in purchaser's action for damages for poultry lost through disease communicated by cockerels purchased from defendant, held to justify judgment under Civ. Code, $\S$ 3300, for damages for fraud or deceit as defined in section 1572.

7. Fraud $\S$ 42—Allegation of seller's intent to deceive is unnecessary, in absence of demurrer.

An allegation of intent to deceive on the part of the seller is unnecessary to the statement of a good cause of action for fraud or deceit, in the absence of demurrer.

Appeal from Superior Court, Sonoma County; M. S. Sayre, Judge.

Action by I. M. Lewin against the Pioneer Hatchery, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Fred S. Howell, of Petaluma, for appellant.

H. B. Churchill and Bryce Swartfager, both of Santa Rosa, for respondent.

THOMPSON, J. This is an appeal from a judgment rendered against the defendant for damages resulting from the loss of a flock of hens which died from the effect of chickenpox communicated to them from cockerels which were purchased for breeding purposes.

The complaint alleged in substance that the defendant sold and delivered to plaintiff 90 White Leghorn roosters for breeding purposes, representing to him that the cockerels were in good, healthy, and virile condition; that plaintiff had no knowledge or information to the contrary, and relying upon these representations as to the condition of health, he placed the roosters with his flock consisting of 2,050 hens, which were theretofore healthy and free from disease; that the roosters were in fact infected with chickenpox, which soon thereafter broke out among his hens, 1,350 of which died as a result of the disease, to plaintiff's damage in the sum of \$2,025.

Upon the trial the court found that the defendant "represented to plaintiff that the roosters were in good, healthy and virile condition"; that they appeared to the plaintiff to be healthy and free from disease, and that he had no knowledge or means of ascertaining facts to the contrary, but that in truth the roosters, at the time of delivery, "were infected with a * * * chicken disease known generally as the pox"; that the plain-

tiff being ignorant of the presence of the disease among the cockerels, and relying upon the defendant's warranty, placed them among his hens, which were theretofore healthy and free from disease; that the plaintiff's hens contracted the chickenpox from defendant's diseased cockerels, "so that a great number of said hens died therefrom"; and that the plaintiff sustained damages on that account as follows: "(A) For loss of hens, \$1,622.50; (B) For trips to Santa Rosa, * * * \$20.00; (C) For doctoring hens, \$112.50; (D) For medicine for hens, \$50.00; Total, \$1,805.00." Thereupon judgment was rendered in favor of plaintiff for the sum of \$1,805.

On appeal the defendant contends that the representations did not amount to a warranty; that the evidence does not support the finding that the cockerels were afflicted with pox, nor that the plaintiff sustained a loss of hens from the disease; that the court failed to find how many chickens actually died from the pox; and that the evidence fails to support a judgment for damages according to the measure thereof required by sections 3313 and 3314 of the Civil Code.

[1] The assurance on the part of the defendant, as an inducement for plaintiff to buy the cockerels for breeding purposes, to the effect that they were in "good, healthy and virile condition," amounted to a warranty, the breach of which would make the defendant liable for damages. 22 Cal. Jur. 957, § 41; 38 Cyc. 388; 24 R. O. L. 177, § 450. Mere expressions of opinion as to the fitness of an article, or words of praise and commendation of the character or qualities of animals, do not constitute a warranty. It is, however, not necessary to use the term "warrant" in order to hold a vendor liable for breach of positive assurance as to the fitness of an article or the quality or character of animals. When, however, positive averments are made by the seller for the purpose of inducing the purchase of property, respecting the soundness, health, or condition of animals or poultry, which representations are relied upon by the vendee, they will be deemed to constitute a warranty even though it may not appear that the seller intended it as such. 2 Mechem on Sales, 1102, § 1268; 1 Williston on Sales, 384, §§ 202, 210, 405; Benjamin on Sales (7th Ed.) 664; Miller v. Germain Seed Co., 193 Cal. 62, 74, 222 P. 817, 32 A. L. R. 1215.

[2] In 3 Sutherland on Damages, 2006, § 675, it is said: "If animals sold are warranted sound and are not so, but have an infectious or contagious disease which they communicate to others, where the parties contemplate their being placed with other stock, the loss, not only in respect to the animals purchased, but to others to which the warranted animals communicate the disease, may be recovered, as well as the expenses of taking care of and doctoring them." 2 Mechem on Sales, 1456, § 1825.

The same principle applies to a breach of warranty as to the health and condition of poultry.

[3] There is ample evidence to support the finding that the cockerels were afflicted with the pox. The plaintiff testified: "I first learned that the cockerels had pox when the inspectors picked out the roosters. That was the third day after the cockerels had been delivered. * * * The inspectors said the cockerels they examined had the pox. * * * There were 16 or 18 that were not banded, and of these I think about 12 during the first four days, developed the pox."

Nor does the record fail to support the finding that a great number of the plaintiff's hens died from this disease incurred from defendant's cockerels. The plaintiff testified regarding this matter: "The roosters had the pox right away the second day. The hens did not develop it until eight or ten days. When the pox broke out among the hens I took out about two or three dozen a day which I kept separate * * * and treated them. * * * We lost 1350 hens through that time. * * * Their average value was \$1.50."

Mr. Himy Lewin, son of plaintiff, testified: "I have a record of the hens that died. * * * I made a daily record of the death of the chickens from the pox. After I came home from school I would go out and bury the chickens, and counted them."

He then gave the number, which he enumerated from month to month, aggregating a total of 1,376 hens which he claimed died from this disease. The evidence is conflicting regarding this result, but on appeal it must be assumed that the trial court accepted this testimony as true.

[4] The court failed to find how many hens died as a result of this disease. It is also true that the number of hens which died from the disease was a material issue, for the defendant denied that the plaintiff lost any chickens on account of the pox. Under the provisions of section 956a of the Code of Civil Procedure as added by St. 1927, p. 583, this court is authorized to adopt adequate findings based upon the evidence, for the purpose of upholding the judgment. Accordingly, it is found upon the evidence above quoted that: "The plaintiff lost 1350 hens of the value of \$1.50 apiece, which died from chickenpox incurred from the disease communicated to them from the cockerels which were purchased from the defendant." This finding will support the judgment.

[5] Finally the defendant contends there is no evidence in the record to support damages for a breach of warranty according to the measure which is prescribed by the terms of sections 3313 and 3314 of the Civil Code. Section 3313 fixes the measure of damages which will ordinarily follow a breach of warranty as to the quality of personal property. Special circumstances, however, may warrant the allowance of consequential damages

which are the natural result of conditions deemed to have been reasonably within the contemplation of the contracting parties. 22 Cal. Jur. 1024, §§ 92-98; California Press Mfg. Co. v. Stafford P. Co., 192 Cal. 479, 221 P. 345, 32 A. L. R. 114; 8 R. O. L. 455, § 25; 17 C. J. 746, § 76. It is not necessary that the particular subject which resulted in the loss shall have been actually mentioned or discussed, if it sufficiently appears that it was reasonably and necessarily included within the contemplation of the parties. In the present case the record satisfactorily shows that the subject of diseased cockerels was actually considered by the parties at the very time of delivery. The plaintiff testified: "I took them [the cockerels] out of the coops and handed them out to Mr. Furbee, and Mr. Furbee handed them right back to Mr. Millner [defendant's manager], and I made the remark there that the roosters are scratched and painted with iodine [which, the evidence shows, is used in treatment of pox lesions]. Mr. Millner said, 'O, that's nothing,' * * * 'Don't worry Mr. Lewin, they were inspected by me very thoroughly. They are all healthy and good.'"

The appellant contends that since this cause is founded upon an alleged breach of express warranty, the measure of damages is not fixed by section 3300 of the Civil Code, but must find support in sections 3313 and 3314 of the same Code, for the reason that the first-mentioned section provides that the damages for a breach of obligation arising from contract is such sum as will compensate the aggrieved party for all detriment proximately caused thereby, "except where otherwise expressly provided by this code." In other words, the appellant contends that the sole measure of damages either direct or consequential, for a breach of contract, must find the support of some provision of the Civil Code; that since the plaintiff has seen fit to rest his cause upon an alleged breach of warranty, he must rely on sections 3313 and 3314 of the Civil Code for the measure of his damages. Section 3313 restricts the amount of damages which may be recovered in the event of a breach of warranty as to the quality of personal property which is purchased for no special purpose, to the "excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time."

This section affords no relief in the present case, for the court made no allowance for the loss of the cockerels. That feature of possible damages is therefore eliminated from consideration.

The appellant argues that section 3314 does not aid the respondent, for the reason that this section relates only to damages resulting from a breach of warranty to manufactured "articles of personal property"; that the word "article" may not be construed to in-

clude animate objects such as poultry. Section 3314 provides that: "The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose, is deemed to be that which is defined by the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose."

Limiting the application of this section to manufactured or inanimate articles alone would be unreasonable and unwarranted restriction. This construction would result in depriving an aggrieved vendee of just and adequate compensation for the breach of a warranty of animate objects of personal property. The term "article of personal property," as it is used in the preceding section of the Civil Code, should therefore receive a more liberal construction. It is not unreasonable to hold that the word "article," as it is there employed, means merely object or thing. Webster defines the meaning of the word as a distinct thing that is specifically pointed out or designated; the subject matter, concern, or item referred to. In the sense that it merely means an object or thing belonging to the class of personal property, it may apply with equal reason to either animate or inanimate objects. Webster's Dictionary defines the word "thing" as "whatever may be owned or possessed, as distinguished from persons." The Century Dictionary asserts that this word may apply to either animate or inanimate objects.

We are of the opinion that section 3314 of the Civil Code furnishes authority upholding consequential damages under such circumstances as the one presented in the present case. The latter portion of that section provides that the detriment caused by a breach of warranty as to the fitness of personal property shall include "a fair compensation for the loss incurred by the effort in good faith to use it" for the purpose for which it was purchased. In the present case the cockerels were purchased for breeding purposes. They were declared to be sound and healthy. The vendee had no knowledge to the contrary. Relying on these representations the plaintiff in good faith placed them with his flock of hens which were free from pox. It is a fair inference from the testimony to assume that the diseased cockerels infected the hens, and thereby caused the death of 1350 of them.

[6, 7] Even though this liberal construction of the phrase "article of personal property" be not accepted the pleadings would seem to justify a judgment under section 3300 of the Civil Code, based upon fraud or deceit.

It is true that the respondent appears to concede that this case must depend upon the theory of a breach of warranty. But the pleadings do not mention the term "warranty." The complaint quite fully recites facts constituting a cause of action based upon fraud or deceit as it is defined in sec-

tion 1572 of the Civil Code. Although no intent to deceive was alleged on the part of the vendor, in the absence of a demurrer this was unnecessary. 10 Standard Ency. of Proc. 56, § 4. We are therefore of the opinion that the judgment in this case may be reasonably upheld on the theory last mentioned, in which event section 3300 of the Civil Code furnishes the measure of damages.

With the modification of the finding above adopted, the judgment finds ample support in both the evidence and the findings. It is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 566

STAVNOW v. WINFREE. (Civ. 5372.)

District Court of Appeal, Second District, Division 2, California. June 22, 1929.

1. Appeal and error $\hookrightarrow$ 1010(1)—Trial court's finding, sustained by positive testimony, is conclusive on appeal.

Finding of trial court, sustained by positive evidence, is conclusive on appeal.

2. Sales $\hookrightarrow$ 479(1)—Conditional seller may not retake property and also collect purchase price.

Under conditional sales contract, one may not retake property and also collect purchase price.

3. Guaranty $\hookrightarrow$ 78(1)—Guarantor of promissory note held not entitled to attack validity of original contract pursuant to which note was given, since guarantor's liability depends entirely on guaranty contract.

Guarantor of promissory note, given by purchaser of furniture in satisfaction of checks for purchase price which had been dishonored and to forestall litigation and loss of furniture, will not be heard to attack validity of original contract of purchase nor to question consideration for guaranty, since latter is an independent obligation of guarantor, and his liability depends on terms of his own contract.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by C. A. Stavn timer against Mrs. Gertrude Winfree. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas J. Pitts, of Los Angeles, for appellant.

George C. Watson, of Los Angeles, for respondent.

CRAIG, J. During the month of November, 1923, the respondent and one Cora E. Bailey, since deceased, entered into certain instruments in writing, by the terms of which the latter received possession of a quantity of furniture, and for the use or toward the

purchase of which she agreed to pay in monthly installments the amounts therein specified. Among other provisions of the contract, it was agreed that, should default in any payment occur, the party of the first part might "take possession thereof and remove the same"; that in such event he should be "entitled to all rent then due" thereunder; that Mrs. Baley should not be entitled to "any allowance, return or set-off for payments previously made"; and that time was of the essence of the agreement. In April, 1924, three of her checks for \$100 each, which she had given and for which she had received credit, were dishonored and returned by the banks, and, in satisfaction of these obligations and to avoid being deprived of the furniture, she executed and delivered to respondent her promissory note in the sum of \$300, dated June 10, 1924, payable in 60 days, with interest, and reasonable attorney's fees in the event of enforced collection. At the time of its execution, appellant signed an indorsement upon said note, as follows:

"Mrs. Gertrude Winfree.

"Los Angeles, Cal., June 10-1924.

"For value received, I hereby waive presentation of the within note to the maker, demand of payment, protest and notice of non-payment, and do guarantee payment of the same, and of all expenses of collection thereof, including attorney's fees and also of all expenses, including attorney's fees, incurred in enforcing this guaranty and do hereby without notice expressly consent to the delay or indulgence in enforcing payment and to the express extension of the time of payment of the same. Mrs. Gertrude Winfree."

[1-3] Thereafter Mrs. Baley died, and, at the request of the public administrator, respondent repossessed the furniture. This action was instituted upon said note, against the indorser and guarantor, and, judgment having been rendered in favor of the plaintiff, the defendant appealed. The principal defense and ground of appeal urged here is that the contract was not one of lease, but of installment or conditional sale, retaining title in the conditional vendor; it is denied that the note in suit was given in payment of the amounts represented by the returned checks, and appellant insists that it represented installments due upon the purchase price of the furniture. Positive testimony introduced on behalf of the plaintiff, however, refutes this latter assertion, and the finding of the trial court is therefore conclusive that it was given, and intended, as above stated. The rule is familiar that under conditional sales one may not retake the property and also collect the purchase price—that he "may not have his cake and eat it too." But Mrs. Baley obtained the plaintiff's merchandise, and retained and enjoyed the use thereof, during her lifetime, under the terms of an agree-

ment that, should she be compelled to part with it, she would forego all payments theretofore made, and would pay any amounts then due. The rule attempted to be invoked would apply had the plaintiff sought to collect the full amount of the purchase price of the furniture, after repossessing the property. Such is not the case. That Mrs. Baley was indebted to the respondent for the amounts above mentioned, and gave her checks therefor, and received credit accordingly, is not disputed. It appears that upon the return of the checks she gave a promissory note to avoid suit thereon and to forestall the loss of the furniture. Apparently respondent had no recourse as against her estate, but in any event he did not demand payment of any future installment. He sued for the aggregate amount of three checks given by Mrs. Baley in her lifetime, prior to repossession, and theretofore temporarily satisfied by a promissory note upon which appellant was the indorser and guarantor. The terms of the original contract are only incidentally here involved, nor is a technical interpretation of its nature and character pertinent to the issue presented. The ultimate consideration for the note and contract of guaranty was, in effect, twofold. It was given, not only in satisfaction of an existing indebtedness, but also to avoid litigation and the deprivation of the maker of her necessary furnishings. Under the facts and circumstances of this case, a guarantor will not be heard to attack the validity of the original contract, nor to question the consideration for the guaranty. The latter is an independent obligation of the guarantor, and his liability depends entirely upon the terms of his own contract. *Western Natl. Bank v. Wittman*, 31 Cal. App. 615, 161 P. 137; *Cooke v. Mesmer*, 164 Cal. 332, 128 P. 917.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

99 Cal. App. 573

ELM et ux. v. BENNETT. (Civ. 6410.)

District Court of Appeal, First District, Division 1, California. June 24, 1929.

I. Appeal and error ⚡996—Evidence, in action for death resulting from automobile accident, regarding deceased's contributory negligence, held to warrant different inferences precluding review by appellate court.

Evidence, in action for damages for death resulting from automobile accident, held to present fair and reasonable ground for difference of opinion, as to whether or not deceased interfered in any manner with operation of automobile so as to make her guilty of contributory negligence, precluding interference by appel-

late court with trial court's decision that deceased was not contributorily negligent.

2. Negligence ⚡82—Contributory negligence to defeat recovery must contribute proximately to injury complained of.

In order that negligence of plaintiff may release defendant from liability, such negligence must contribute proximately to injury complained of, it must concur and co-operate with negligence of defendant up to very time of injury, and recovery is not barred if it is so remote as to become condition and not cause in chain of causation.

3. Automobiles ⚡244(58)—Undisputed evidence as to physical conditions surrounding accident held to support conclusion that deceased's act in grasping steering wheel did not contribute to collision.

In action for damages for death resulting from automobile accident, undisputed evidence as to physical conditions immediately following accident, showing that automobile in which deceased was riding struck rut in left side of road, swerved across road into gutter running parallel with right side of road, continued to run in and out of gutter for distance of about 75 feet, then started up bank and turned toward tree until within few feet of it, when it turned sharply to left, at which time deceased apparently grasped wheel so that side of car struck tree, held sufficient to support conclusion that deceased's act in grasping wheel did not contribute to collision.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Eric Elm and wife against Kathleen Bennett. Judgment for plaintiffs, and defendant appeals. Affirmed.

Bronson, Bronson & Slaven, of San Francisco (Harold R. McKinnon, of San Francisco, of counsel), for appellant.

Irvine P. Aten, of Fresno, for respondents.

KNIGHT, J. Appellant, a high school student, accompanied by two girl companions named Astrid Elm and Adeline Harding, was driving a Ford coupé along what is called the Copper King road, near Fresno, about 4 o'clock in the afternoon, returning from a high school picnic; and, while rounding a curve in the road on a slight descent in the grade, at a speed of between 20 and 25 miles an hour, the coupé ran into a rut in the left side of the road caused by recent rains, and, after swerving across the road, climbed a slight bank, ran into a tree standing 3 or 4 feet distant from the road, and overturned, causing the death of Miss Elm. As a result of the accident, the parents of the deceased brought this action for damages, and, upon trial before the court sitting without a jury, the court found, as alleged in the complaint, that the accident was proximately caused by appellant's negligent operation of the automobile, and further found that there was no

contributory negligence on the part of the deceased. Thereupon judgment was entered in favor of the respondents for \$2,500, from which judgment the appeal herein is taken.

[1] Appellant concedes that the evidence relating to the question of her negligence is sufficiently conflicting to preclude an inquiry into the trial court's finding on that issue, but she contends, as sole ground for reversal, that the evidence shows without conflict that, when the coupé struck the rut, Miss Elm negligently contributed to the accident by grasping the steering wheel. This contention is based alone upon the testimony of appellant, the essential part of which was as follows: "As we hit the rut Miss Elm grabbed the wheel. That pulled me to the other side. We hit the tree, and that was the last I knew until we got up. * * *" However, in apparent contradiction of appellant's testimony, Miss Harding, who was seated in the coupé between appellant and the deceased, testified that, although she could not say "absolutely" that Miss Elm did not reach for the steering wheel, she did not see her do it, and that, in order for Miss Elm to have done so, it would have been necessary for Miss Elm to have reached in front of her. Furthermore, appellant admits that she did not see the tree until the coupé was within a few feet of it; that at no time did she apply the brakes, and that, after seeing the tree, she did not "do anything to avoid hitting it," because, as she explained, they "were too close to it." We are of the opinion that the foregoing evidence presents a fair and reasonable ground for a difference of opinion as to whether or not Miss Elm interfered in any manner with the operation of the automobile, and therefore raises such a conflict as to preclude this court from interfering with the trial court's decision thereon. *Felsenthal v. Warring*, 40 Cal. App. 119, 180 P. 67.

[2, 3] Moreover, in order that the negligence of a plaintiff may release a defendant from liability, such negligence must contribute proximately to the injury complained of; it must concur and co-operate with the negligence of the defendant up to the very time of the injury, and recovery is not barred if it is so remote as to become a condition and not a cause in the chain of causation. 19 Cal. Jur. 649. The undisputed evidence in the case at bar as to the physical conditions present immediately following the accident shows that, after the coupé struck the rut in the left side of the road, it swerved across the road into a gutter running parallel with the right side of the road, and continued to run in and out of the gutter for a distance of about 75 feet; that it then turned slightly to the right, ran up the bank, and was headed directly for the tree until within a few feet of it, when it turned sharply to the

left, so that the side of the coupé instead of the front of it struck the tree. Even though it be assumed, therefore, as appellant claims, that Miss Elm did grasp the wheel, it may be reasonably inferred from the facts stated that she did so only when the coupé was within a few feet of the tree, after appellant had apparently lost control of the automobile, and in an effort to steer it clear of the tree and thus avert a head-on collision which at that moment seemed inevitable. And if such be the fact, it is legally sufficient to support the conclusion that Miss Elm's act in grasping the wheel did not contribute to the collision, as appellant contends, but at most resulted in preventing disaster to the other occupants of the car.

It is our conclusion that the facts above set forth are legally sufficient to sustain the findings.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

99 Cal. App. 360

HOGBERG v. LANDFIELD et al. ★
(Civ. 6581.)

District Court of Appeal, First District, Division 2, California. June 8, 1929.

Rehearing Denied July 8, 1929. Hearing Denied by Supreme Court Aug. 5, 1929.

1. Judgment $\S$ 256(2)—Recital in judgment that contract was not rescinded held contrary to finding that notice of election to rescind in due form for fraud was given showing completed rescission.

Where court found that defendant's representations in sale of corporate stock were false, known to be false by defendant, and made to induce plaintiff to enter into contract, and that plaintiff relied on representations to his injury and gave notice of rescission of both contracts in due time on ground of fraud and failure of consideration, recital in judgment that second contract had not been rescinded was contrary to finding that notice of election to rescind in due form was given; rescission being complete when notice is served.

2. Fraud $\S$ 23—Party may rely on representations concerning existing facts not within means of knowledge but known to other party.

Party is justified in relying on representations concerning existing facts not within his knowledge or his means of knowledge, but within knowledge of party making representations.

3. Licenses $\S$ 26—Fraudulent sale of securities by broker held noncompliance with Securities Act, entitling injured party to sue surety on broker's bond (Corporate Securities Act, $\S$ 2, subd. 10, $\S\S$ 6, 14, and $\S$ 2, subds. 7, 9, and $\S$ 5 as amended; Civ. Code, $\S$ 1572).

Under Corporate Securities Act (St. 1917, p. 677), $\S$ 5, as amended by St. 1923, p. 90, $\S$ 2, requiring bond conditioned on faithful compliance with provision of law and under section 2, subds. 10 and 7 (as amended by St. 1921, p.

1116, § 1), 9 (as amended by St. 1923, p. 89, § 1), and sections 6, 14; Civ. Code, § 1572, recognizing right to sue broker for fraud in sale of securities and liability of surety on broker's bond to persons suffering loss by broker's failure to comply with act, sale of securities by licensed broker through false and fraudulent representations is noncompliance with act and entitles party injured by broker's failure to comply to recover against surety.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Emil Hogberg against P. E. Landfield, doing business as an individual and also under the fictitious name of Edward Marvin Company and also under the firm name and style of P. E. Landfield Company, and another. From adverse portions of judgment, plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

Superseding former opinion in 274 P. 995.

Everette C. McKeage, of San Francisco, for appellant.

John Ralph Wilson and R. F. Mogan, both of San Francisco, for respondents.

NOURSE, J. Plaintiff sued to rescind two separate contracts for the sale of shares of corporate stock. A separate judgment was asked against the defendant Maryland Casualty Company as the surety upon Landfield's bond as a stock broker. Each contract was pleaded in a separate cause of action. Judgment went for plaintiff and against defendant Landfield on the first cause of action only, in favor of the surety company on both causes, and in favor of Landfield on the second cause. The plaintiff has appealed from the portions of the judgment denying him relief on his second cause of action and denying any relief against the surety company. The appeal is presented on typewritten transcripts.

On August 15, 1924, plaintiff paid Landfield \$2,650 under the first contract for shares of stock of the New Dominion Copper Company, and on October 24, 1924, paid him \$960 for additional shares in the same company. Both sales were made by Landfield while acting as a duly licensed stockbroker, and both sales were accomplished through the false and fraudulent representations of Landfield. The bond of the surety company was given under the terms of sections 5 and 6 of the Corporate Securities Act and was in full force during the time when the acts complained of were done.

[1] The trial court found that all the representations pleaded in the complaint were made by Landfield, that they were false, that said defendant knew them to be false, that he made the representations for the purpose of inducing plaintiff to enter into the contracts, that he knew plaintiff believed and relied on said representations, and that plain-

tiff did so rely to his injury. It was also found that the stock was practically worthless, and that, within due time, plaintiff gave notice of rescission of both contracts on the grounds of fraud and failure of consideration. Upon these findings the trial court made the conclusion of law that plaintiff was not justified in relying upon these representations when the second contract was made and recited in the judgment that this second contract had not been rescinded.

This recital is directly contrary to the finding that notice of election to rescind in due form was given. When such notice is served, the rescission is complete and the court should so find. *American Type Founders' Co. v. Packer*, 130 Cal. 459, 62 P. 744; *Prewitt v. Sunnymead Orchard Co.*, 189 Cal. 723, 732, 209 P. 993.

[2] The conclusion that appellant was not justified in relying upon the representations is contrary to the findings of fact and to the settled rule of law that a party is justified in relying upon representations concerning existing facts not within his knowledge or his means of knowledge, but within the knowledge of the party making the representations. For these reasons this part of the judgment must be reversed.

Appellant's right to recover from the surety company on its bond depends upon the construction of the Corporate Securities Act as amended in 1923 (Stats. 1923, p. 90), which as a prerequisite to a broker's license required a bond in the sum of \$5,000 "conditioned upon the faithful compliance with the provisions of law." In construing these provisions of the act the court, in *Blumenthal v. Larson*, 79 Cal. App. 726, 730, 248 P. 681, 682, said: "While the phrase 'provisions of law' is a very broad and general one, we are of the opinion that it only refers to the provisions of the Corporate Securities Act." In the *Blumenthal* Case two causes of action were pleaded, one an open book account for securities bought and sold by plaintiff for the account of the defendant, and the second, a breach of contract for the sale by plaintiff and purchase by defendant of securities for which the defendant had refused to pay. In holding that the bond required by the act did not cover such defaults as those sued for, the court drew attention to the fact that no fraud was alleged in the sale of any security good or otherwise, but that the default of the defendant for which the plaintiff sought to hold the surety was nothing more than a breach of substantive law, a matter not covered by the terms of the act. In the course of the opinion it was said: "The title of the act in question declares it to be one for the regulation and supervision of companies, brokers, and agents, to prevent fraud in the sale of securities, and it provides for the enforcement of the act and punishment for violation of its provisions. The manifest and

declared purpose is to prevent fraud in the sale of securities, as the same are defined by section 14 of the statute. This section sets forth the prohibited acts which would constitute fraud, the prevention of which was the purpose of the statute and bond." Page 731 of 79 Cal. App. (248 P. 683).

In *Mitchell v. Smith* (Cal. Sup.) 267 P. 540, the surety was sought to be held upon allegations that the broker had embezzled stock which had been entrusted to him for sale. The court there held that the language of the statute meant that a surety was liable for failure on the part of the broker to comply with the provisions of law set out in the Corporate Securities Act and not on his failure to comply with all the general laws. In *Anthony v. Van* (Cal. App.) 274 P. 563, the plaintiff sought to hold the surety upon a bond given under the same provisions of the act because of the default of the brokers alleged to have been the conversion of securities entrusted to them for sale. We there held, upon the authority of the *Mitchell* Case, that such conversion was not a matter covered by the provisions of the Corporate Securities Act and denied the plaintiff relief. In *Bridges v. Price* (Cal. App.) 273 P. 72, a case arising after the 1925 amendment to the Corporate Securities Act, we held that, because of this amendment, these cases did not control an action based upon a bond executed in accordance with that amendment. It was there said, however, that the provisions of the 1923 act to the effect that the bonds shall be conditioned "upon the faithful compliance" with the provisions of law likened the case to those of bonds conditioned upon the "faithful performance" of a contract which have always been construed as being breached by any failure of performance in the principal contract, citing *Garrett v. Dodson* (Tex. Civ. App.) 199 S. W. 675, 682; *General Bonding etc. Co. v. Hill* (Tex. Civ. App.) 195 S. W. 873; *Lamson v. Maryland Casualty Co.*, 196 Iowa, 1185, 194 N. W. 70; *Trinity Parish v. Aetna Indemnity Co.*, 37 Wash. 515, 79 P. 1097; *Long v. American Surety Co.*, 23 N. D. 492, 137 N. W. 41; *Hensley v. School District*, 97 Kan. 56, 154 P. 253. This is the principle which is applicable to the case at hand. The bond was given for the "faithful compliance" with the provisions of the law (interpreted in the cases cited as referring only to the Corporate Securities Act). The title of the Corporate Securities Act clearly discloses the purpose, among others, to prevent fraud in the sale of securities. The right of a party to sue a broker for actual fraud in the sale of securities is clearly recognized by the provisions of the act. Section 14 (St. 1917, p. 680) of the act provides that any one who fails to comply with any of the provisions of the act is guilty of a misdemeanor. Section 6 of the act (St. 1917, p. 677) provides that the corporation commis-

sioner may revoke a broker's certificate if he shall find that the broker "has violated any provision of this act or had engaged, or is about to engage in any fraudulent transaction." The complaint upon which the action is based is that the defendant Landfield, while acting as a duly licensed broker, sold to the plaintiff certain shares of stock for which the plaintiff paid him in cash; that these sales were accomplished through the false and fraudulent representations of Landfield; and that the stock so sold was practically worthless.

The word "broker" is defined in subdivision 9 of section 2 of the act (St. 1917, p. 675, as amended by St. 1923, p. 89, § 1) as one "who shall * * * engage * * * in the business of selling, offering for sale, negotiating for the sale of * * * any security." A "sale" is defined in subdivision 7 of the same section (St. 1917, p. 674, as amended St. 1921, p. 1116, § 1) as including, among other things, every contract by which for a pecuniary consideration called a price one transfers property to another. "Actual fraud" is defined in subdivision 10 of the same section (St. 1917, p. 675) as meaning the same as that defined in section 1572 of the Civil Code. The Civil Code section covers any acts committed by a party to a contract with intent to deceive another party thereto or to induce him to enter into a contract, such as the suggestion as a fact of that which is not true by one who does not believe it to be true.

[3] This is precisely the case made out by appellants against the broker in the court below. As against the broker the trial court found all the facts constituting actual fraud as here defined, and judgment properly went against the broker upon that ground. Section 5 of the Corporate Securities Act provides that the surety on the bond given under the terms of that act shall be liable to any and all persons who may suffer loss by reason of the broker's failure to comply with the act. Manifestly the sale of securities by a licensed broker accomplished through false and fraudulent representations is a noncompliance with the provisions of the Corporate Securities Act. The broker's failure to comply having been plainly put in issue and found by the trial court, judgment should have gone in favor of the plaintiff and against the surety company. A new trial upon the facts is not necessary as the findings fully cover every disputed issue of fact.

The judgment is therefore reversed, with directions to the trial court to enter judgment on the findings in favor of appellant and against the defendant Landfield and the respondent Maryland Casualty Company on both causes of action.

We concur: KOFORD, P. J.; STURTEVANT, J.

99 Cal. App. 541

Ex parte EDWARDS. (Cr. 1764.)

District Court of Appeal, Second District, Division 1, California. June 21, 1929.

1. Infants $\Rightarrow$ 18—Juvenile court has no jurisdiction in juvenile proceedings over minor not within county or resident thereof (Juvenile Court Law, § 3).

In order that juvenile court of county have jurisdiction of minor in other than criminal cases, minor must be or reside within county, in view of Juvenile Court Law (St. 1915, p. 1225) § 3.

2. Habeas corpus $\Rightarrow$ 44—On original habeas corpus proceeding in appellate court, contention that subsequent petition in juvenile court concludes inquiry into residence of infant as affecting jurisdiction in proceeding reviewed held without merit.

On original habeas corpus proceeding in District Court of Appeal to procure infant's release from custody of juvenile court, a contention that a petition filed in juvenile court subsequent to commencement of habeas corpus proceeding concluded inquiry into actual residence of minor as affecting jurisdiction in first proceeding held without merit.

3. Habeas corpus $\Rightarrow$ 44—On original habeas corpus in appellate court, petition in juvenile court without findings of fact thereon cannot prevail as against admitted facts to contrary.

Mere allegations of fact in a petition in juvenile court, without finding of fact thereon by court, cannot prevail on habeas corpus in appellate court as against admitted facts to contrary.

4. Courts $\Rightarrow$ 21—Jurisdiction of civil proceedings cannot be obtained over person of one forcibly brought within territorial limits of court.

Jurisdiction in civil cases cannot be obtained over the person of one who is forcibly brought within territorial limits of court.

5. Infants $\Rightarrow$ 16—Juvenile court proceedings to determine custody of infant are civil in nature.

Proceedings in juvenile court to determine custody of person of infant are civil in nature.

6. Infants $\Rightarrow$ 18—Juvenile court of county other than infant's residence held without jurisdiction to determine custody of such infant, which had theretofore been determined by juvenile court of county of his residence.

Where custody of infant had been determined by juvenile court of county of infant's residence, juvenile court of another county to which infant was taken by virtue of order in proceedings to determine custody held without jurisdiction of person of infant either in that proceeding or in proceeding instituted subsequent to infant's arrival in such county.

Habeas corpus by Damon Edwards, directed to the superior court of Fresno county to procure petitioner's release from custody of

such court sitting as a juvenile court. Writ granted.

Ernest R. Utley and Lee Nuffer, both of El Centro, for petitioner.

Everts, Ewing, Wild & Everts and Dan F. Conway, all of Fresno, for respondent Alice Akers.

Glenn M. De Vore, Dist. Atty., of Fresno, for respondent Oliver M. Akers.

HOUSER, J. From the files herein it appears that in the month of September, 1926, under the provisions of the Juvenile Court Law (St. 1915, p. 1225, as variously amended), a petition was presented to the superior court in Imperial county, sitting as a juvenile court, pursuant to which Damon Edwards, a minor, was adjudged free from the custody and control of his parents. More than two years thereafter, while said minor was residing with petitioner herein in Imperial county, a petition was filed in the superior court in Fresno county, sitting as a juvenile court, by which it was sought to have it judicially declared that said Damon Edwards was a ward of the juvenile court. Notwithstanding the fact (as shown by the petition therein) that, at the time the petition was filed in Fresno county, the minor in question was neither a resident of nor within said county, a citation was issued and an order made by such court, under the purported authority of which the minor was taken from Imperial county to Fresno county, and, on a hearing of the petition in the juvenile court of the latter county, temporary custody of the minor was awarded, not to the probation officer of said court, but to the then husband of the mother of the minor. Thereupon, on application to this court, a writ of habeas corpus was issued. Six days thereafter a second petition was filed in the juvenile court of Fresno county, which, among other things, contained the allegation that said Damon Edwards "is now within and now residing within the county of Fresno"; and by which second petition the petitioner again sought to have said minor declared a ward of the juvenile court of Fresno county.

The question presented for determination by this court is whether, after the juvenile court of one county has acquired and retains jurisdiction of a minor, the juvenile court of another county may by its order seize the minor in the county first exercising jurisdiction over him, carry him into the second county, and there, by virtue of the fact that he is then within said second county, acquire jurisdiction over him.

[1-3] At the outset, it is conceded that, generally speaking, and without reference to the commission of criminal offenses by a minor, in order that the juvenile court of a given county have jurisdiction over a minor, it is necessary either that the minor be or reside

within such county (section 3, Juvenile Court Law, St. 1915, p. 1225); from which it follows that since, by the allegations of the first petition filed in the juvenile court of Fresno county, it appears that at the time the petition was filed therein the minor was neither a resident of nor within the county of Fresno, the juvenile court of that county was without jurisdiction in the premises. But it is claimed that, even though the minor was unlawfully seized in the county of his residence and transported into another county and there detained in custody, by thereafter being "within" the county, the juvenile court thereof might acquire jurisdiction over him; and it is further contended that, because the second petition filed in the juvenile court of Fresno county contained the allegation that at the time of its filing the minor was "within" the county of Fresno, the fact of the actual residence of the minor is beyond inquiry by this court in this proceeding—which latter point might be disposed of by the fact that the second petition in Fresno county was not filed until after the instant proceeding was initiated. Moreover, the mere allegation in the second petition, without a finding of fact thereon by the court, should not be permitted to prevail as against admitted facts to the contrary.

[4, 5] In criminal cases, ordinarily it would seem to be the rule that, however irregular or improper may be the manner of bringing before a particular court one accused of an offense, jurisdiction of the person will attach. *Ex parte Ah Men*, 77 Cal. 198, 19 P. 380, 11 Am. St. Rep. 263; *In re Kaster*, 52 Cal. App. 454, 198 P. 1029; *Ex parte Clark*, 85 Cal. 203, 24 P. 726; *People v. Pratt*, 78 Cal. 345, 20 P. 731. On the other hand, the rule is equally well established that in civil cases jurisdiction cannot be obtained over the person of one who is forcibly brought within the territorial limits of the court. Nor are proceedings instituted under the provisions of the Juvenile Court Law of the kind of that involved herein of a criminal nature. *People v. De Fehr*, 81 Cal. App. 562, 574, 254 P. 588; *In re Daedler*, 194 Cal. 320, 228 P. 467; *In re Tahbel*, 46 Cal. App. 755, 759, 189 P. 804; *In re Brodie*, 33 Cal. App. 751, 166 P. 605.

[6] Considering the law as enunciated in the authorities hereinbefore cited, together with the fact that the order by which the minor was taken from Imperial county to Fresno county was based upon the first petition presented to the juvenile court of the latter county, in which concededly such juvenile court had no jurisdiction, and that the allegation in the second petition presented therein, to the effect that the minor was "within" and "residing within" Fresno county, was predicated solely upon a wrongful detention of said minor by virtue of an order of the juvenile court rendered in excess of its ju-

risdiction, it is clear that, without reference to other questions of law presented in behalf of and urged by petitioner herein, the minor should be restored by respondents to the jurisdiction of the juvenile court of Imperial county, and to the custody of petitioner, Cornelia Stevens, at El Centro, in said county, subject, however, to such further orders as may or shall be made by the said juvenile court of Imperial county. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

99 Cal. App. 509

Ex parte PARMAN. (Cr. 1549.)

District Court of Appeal, First District, Division 1, California. June 19, 1929.

Habeas corpus ⇨85(2)—**Alleged fugitive from justice, petitioning for habeas corpus, not showing absence from demanding state, and demand being legally sufficient, petitioner was remanded.**

Where petitioner for habeas corpus, arrested on warrant charging him with being fugitive from justice, claimed that he was not in demanding state at time of commission of alleged offense, and findings returned showed that, on hearing, extradition demand charged offense committed by petitioner in positive and direct terms, showed that petitioner offered no testimony of his absence from demanding state at time of commission of offense, and it further appeared that demand for petitioner was in all respects legally sufficient, writ was discharged, and petitioner remanded to custody.

Habeas corpus by Chris Parman, alias Chris Palmer, directed to the Chief of Police of the City and County of San Francisco to secure release of petitioner from custody. Writ discharged, and petitioner remanded.

Harry S. Whitthorne, of San Francisco, for petitioner.

PER CURIAM. Petitioner herein filed an application for a writ of habeas corpus, claiming that he was held by the police authorities upon a warrant charging him with being a fugitive from justice of the state of Washington.

He claimed in the petition that he was not in the demanding state at the time of the commission of the alleged offense. The matter was referred by this court to Hon. C. J. Goodell, judge of the superior court, city and county of San Francisco, for hearing. The findings returned to this court show that a hearing was had, and that on such hearing it appeared that the extradition demand charges an offense committed by petitioner against the laws of the state of Washington, in positive and direct terms. They further show that petitioner offered no testimony to the ef-

fect that he was absent from the demanding state at the time of the commission of the offense charged, as claimed in his petition. It also appears therefrom that the demand for the petitioner is in all respects legally sufficient. This being so, the writ is discharged, and the petitioner remanded.

99 Cal. App. 583

In re JONES' ESTATE.

JONES v. BRYSON.

(Civ. 6308.)

District Court of Appeal, Second District, Division 2, California. June 24, 1929.

Wills 554—On sisters' predeceasing testatrix, niece who was to take what surviving sister left held entitled to distribution of entire estate as substitutionary legatee (Civ. Code, § 1343).

Under will devising testatrix's property to two sisters by name, and providing for survivorship, and that on death of surviving sister what is left is to go to testatrix's niece, testatrix's brother being expressly disinherited, *held*, where sisters predeceased testatrix, will required distribution of estate to niece as substitutionary legatee under Civ. Code, § 1343; the language of the will clearly indicating intent that brother was to take nothing.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Will contest proceeding by J. Hawley Jones against Frank Bryson, administrator of the estate of Anna Dakin Jones, deceased, and another. Judgment for proponents, and contestant appeals. Affirmed.

William L. Kuehn and Arthur Loveland, both of Los Angeles, for appellant.

Winterer, Combs & Ritchie, of Los Angeles, for respondents.

CRAIG, J. This is an appeal from a final decree of distribution entered by the superior court of Los Angeles county in the above-entitled cause. All of the property of the estate of Anna D. Jones, deceased, was distributed to Anna Mabel Jones. The deceased left a will, the dispute concerning the construction of which produced this litigation. It reads as follows:

"Dated March 28, 1916

"I, Anna D. Jones of Pasadena, Los Angeles Co., California, of the age of 60 years, and being of sound mind and memory, do declare this to be my last will and testament, as follows: I do hereby give, devise and bequeath all my estate of every name, and kind, and wheresoever the same may be situated to my sisters, Sara Jones McAdam and Emma Jones Nixon. I wish the sum of (\$200.00)

two hundred dollars to be taken from the estate and given to Emma Jones Nixon, the remainder to be shared equally between them.

"For reasons known to him I give nothing to my brother J. Hawley Jones, Charleston, W. Va.

"My wishes in regard to him and my sister Jennie Jones, Deerfield, N. Y., my sisters will carry out as need arises. They are to give keepsakes to Nellie Patrick Jones and Anna Mabel Jones, Oakland, Minn., Selecting those most suitable.

"In the event of the death of either sister, the survivor inherits, and on the death of the death of (sic.) the surviving sister what is left to go to my niece, Anna Mabel Jones. Should my brother J. Hawley Jones be living, and in need, she is to help him as I should.

"My funeral expenses are not to exceed \$150.00.

"Anna D. Jones."

It is the contention of appellant that, although the will disinherits him, it does not make a complete disposition of the estate of the deceased, and that, under the circumstances, he may still claim the rights of an heir. He insists that Anna Mabel Jones is not a substitutionary legatee, and that the trial court did not so find, and it is argued that, since Sara Jones McAdam and Anna Jones Nixon, sisters of the testatrix, preceded her in death, the dispositions to them failed, and that appellant, the brother, is entitled to inherit. Respondent claims the entire estate as a substitutionary legatee, under the provisions of section 1343 of the Civil Code, which reads: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place. * * *"

We think the intention of the testatrix is clearly expressed and free from ambiguity. By its language it is plain that she intended to leave no legacy to J. Hawley Jones, her brother. It is stated in words which permit of no doubt that it was her purpose to give Anna Mabel Jones whatever of her estate should remain after the death of the survivor of her two sisters named as legatees. In the face of this language, "what is left to go to my niece, Anna Mabel Jones," it cannot be said that the will does not dispose of the entire estate. It does this, and to others than appellant, and it also expressly excludes him from any direct bequest. Hence, there is nothing of the estate to be claimed by heirs at law. If this is so, even under appellant's theory he cannot prevail.

It was the intention of the testatrix that all of her estate not devised to her two sisters above mentioned should go to Anna Mabel Jones. This is indicated by the provision that: "In the event of the death of either sister, the survivor inherits, and on the death

of the surviving sister what is left to go to my niece, Anna Mabel Jones. Should my brother, J. Hawley Jones, be living, and in need, she is to help him as I should." The mere fact that both sisters died before the testatrix, and that therefore the legacies to them failed, furnishes no basis to declare that the subsequent provision directing the disposition of the residue of the estate should be defeated. To so hold would conflict with the doctrine stated in *Estate of Gregory*, 12 Cal. App. 309, 107 P. 566, and *Estate of Heberle*, 155 Cal. 723, 102 P. 935. It is true, in the last-named matter the will expressly provided that, if the testator's sister's death should occur prior to her receiving her legacy, it should be otherwise disposed of. We think the same intention is unmistakably shown in the will here under consideration. *Estate of Fritze*, 85 Cal. App. 500, 259 P. 992, strongly relied upon by appellant, is not in point because, as stressed in the opinion, in no part of the will was there expressed the intention "that the surplus of the estate shall be taken by the person there designated."

We conclude that the sisters of the deceased, Sara Jones McAdam and Emma Jones Nixon, received estates terminable as to each by her death, and that Anna Mabel Jones was given the residue of the estate of Anna D. Jones in fee.

The judgment is affirmed.

I concur: IRA F. THOMPSON, J.

Owing to the absence of Presiding Justice WORKS, he does not join in this opinion.

99 Cal. App. 456

WOODHEAD LUMBER CO. v. E. G. NIEMANN INVESTMENTS, Inc., et al.
(Civ. 6714.)

District Court of Appeal, First District, Division 1, California. June 18, 1929.

1. Contracts ⇨187(1)—Third parties only remotely or incidentally benefited may not enforce contract (Civ. Code, § 1559).

Contract made expressly for benefit of third person may be enforced by him under Civ. Code, § 1559, and, conversely, third parties who are but remotely or incidentally benefited may not enforce contract.

2. Contracts ⇨187(1)—Third party, who establishes that he is one of class for whose benefit contract was made, may recover thereon (Civ. Code, § 1559).

In order for third party to establish that contract was made for his benefit under Civ. Code, § 1559, it is not necessary that he should be referred to by name in the contract, but it is sufficient if he shows he is one of the class of persons for whose benefit the contract is made.

3. Contracts ⇨147(3), 187(1)—Whether contract is intended for benefit of third person is question of construction, and parties' intent must be gathered from reading contract as whole in light of attendant circumstances (Civ. Code, § 1559).

Question whether contract is intended for benefit of a third person under Civ. Code, § 1559, is one of construction, and intent of parties must be gathered from reading the contract as a whole in the light of the circumstances under which it was entered into.

4. Mechanics' liens ⇨317—Materialman held entitled to sue on bond given by owner to mortgage company requiring payment of claims of laborers and materialmen, where mortgage company had prior lien (Code Civ. Proc. § 1186; Civ. Code, §§ 1559, 1641).

Materialman, whose lien was inferior to that of mortgage company making loan for construction of building, by virtue of mortgage lien having attached before commencement of construction work, under Code Civ. Proc. § 1186, held entitled to maintain suit on bond given by owner to mortgage company conditioned on indemnifying obligee against any and all loss arising by reason of failure to complete building and agreeing to pay in full claims of laborers and materialmen, since provision for payment of claims for materials was clearly intended for benefit of materialmen, entitling plaintiff to sue as the third party beneficiary under Civ. Code, § 1559; entire contract being considered together under section 1641.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Woodhead Lumber Company against E. G. Niemann Investments, Inc., and the Detroit Fidelity & Surety Company. From a judgment of dismissal, plaintiff appeals. Reversed and remanded, with directions.

Lloyd Wright, of Los Angeles (Wendell P. Hubbard and Charles E. Millikan, both of Los Angeles, of counsel), for appellant.

J. Karl Lobdell, H. L. Watt, and Charles E. R. Fulcher, all of Los Angeles, for respondent.

LUCAS, Justice pro tem. Appellant Woodhead Lumber Company, a corporation, appeals from a judgment of dismissal entered after the court sustained the demurrer of defendant and respondent Detroit Fidelity and Surety Company to appellant's amended complaint, without leave to amend.

The amended complaint in substance alleges that on or about December 5, 1925, defendant E. G. Niemann Investments, Inc., the owner of certain real property situate in the city of Los Angeles, entered into a contract with appellant by which it was agreed that the latter would furnish services and materials to said defendant to be used in the construction of a building to be erected upon said real property; that appellant with the knowledge and consent of said defendant and between the dates of February 26, 1926, and

April 24, 1926, furnished such materials and performed such services, the reasonable value of which was the sum of \$6,443.60; but that no part thereof, other than a small sum credited for materials returned, has been paid.

It is further alleged that the respondent Detroit Fidelity & Surety Company, on or about January 14, 1926, entered into a contract of surety with said defendant E. G. Niemann Investments, Inc., by which contract the said surety company became bound unto the California Mortgage Company in the sum of \$50,000. Portions of said bond are set out in *hæc verba*. After reciting that the principal named therein, to wit, E. G. Niemann Investments, Inc., was the owner of the real property above referred to and was about to construct a three-story brick apartment building thereon and that said mortgage company had agreed to loan the said owner \$50,000, taking as security a first mortgage on its property, providing a bond was furnished as hereinafter conditioned, the bond provided: "Now, therefore, the condition of this obligation is such that if the principal (the owner) shall indemnify the obligee (the mortgage company) against any and all loss directly arising by reason of the failure of the principal to fully complete said apartment building as per plans and specifications on file with California Mortgage Company, and shall also pay in full the claims of all persons performing labor upon or furnishing materials to be used in such work, then this obligation shall be void; otherwise to remain in full force and effect."

It is then alleged in said amended complaint that "said bond was conditioned upon the payment in full of all claims of all persons performing labor upon or furnishing materials on the above-described property, and that the said bond by its terms was made to inure to the benefit of any and all persons who performed labor upon or furnished materials to be used in the work" on said real property.

Judgment was asked for the value of the materials furnished and services rendered by appellant.

The respondent Detroit Fidelity & Surety Company demurred on the ground that said amended complaint did not state facts sufficient to constitute a cause of action, and on the further ground of uncertainty. We find no uncertainty existing in the complaint.

Appellant's action is based upon the asserted right to sue as a third party beneficiary it being urged that, given a liberal construction, the contract of surety between respondent Detroit Fidelity & Surety Company and defendant E. G. Niemann Investments, Inc., should be properly held to inure to appellant's benefit.

Respondent contends that while the contract of suretyship if enforced would incidentally benefit appellant, the contract itself shows it was not made for appellant's benefit and that

the allegations to the effect it was so made are conclusions of the pleader and should be treated as mere surplusage.

[1] Section 1559, Civil Code, furnishes the rule that: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

Conversely, it is the law that third parties who are but remotely or incidentally benefited may not enforce a contract. *Buckley v. Gray*, 110 Cal. 339, 42 P. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88; *Chung Kee v. Davidson*, 73 Cal. 522, 15 P. 100.

[2] But, in order for a third party to successfully contend that he was more than incidentally benefited and that the contract was made for his benefit, it is not necessary that he should be referred to by name in the contract; it is sufficient to allege and prove that he is one of a class of persons for whose benefit the contract was made. *McKeever v. Oregon Mortgage Co.*, 60 Mont. 270, 198 P. 752; *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 P. 576.

[3] It is also the law that the question whether a contract is intended for the benefit of a third person is one of construction, and that the intent must be gathered from reading the contract as a whole in the light of the circumstances under which it was entered into. VI R. C. L. p. 887.

[4] It appears from the allegations of the amended complaint that the circumstances under which the contract of surety in question was entered into were these: Defendant E. G. Niemann Investments, Inc., was the owner of a lot upon which it desired to construct an apartment building. It needed money, services, and materials. The California Mortgage Company agreed to furnish the money, and appellant Woodhead Lumber Company agreed to furnish at least a portion of the services and materials. But the mortgage company wanted assurance that its money would be returned with interest, and appellant wanted to know that its services and materials would be paid for. To secure its loan the mortgage company insisted upon a first mortgage on the property and a \$50,000 bond securing it against loss in the event the building was not completed. With the payment of the materialmen and laborers it was not concerned because its first mortgage lien, attaching prior to the commencement of construction work, would be preferred to mechanics' and materialmen's liens. Code Civ. Proc. § 1186.

With such payments appellant, on the other hand, was vitally concerned, for the liens provided by law for its protection would be secondary to the \$50,000 first mortgage lien of the mortgage company. The allegations of the amended complaint show that appellant neither furnished services nor materials until after the contract of surety was written, conditioned upon the payment in full of

the claims of all persons performing labor upon or furnishing materials to be used on the work.

The provision in the bond in reference to loss by reason of failure to complete the building clearly inured to the benefit of the mortgage company—that concerning the payment of materialmen did not. To give this latter clause effect (and it is to be remembered that “the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable * * *” [Civ. Code, § 1641]), it must be held that it inured primarily to the benefit of the materialmen. Therefore, since it is alleged that appellant was one of the materialmen, appellant is entitled to sue upon the bond. And, it being further alleged that by agreement it furnished services and materials used in the construction of the building and that the same have not been paid for, its cause of action is completely stated.

The case of *French v. Farmer*, 178 Cal. 218, 172 P. 1102, we believe, fully supports the conclusion reached herein. There one Farmer, a contractor, agreed to build a wagon road for a railroad company. The National Surety Company executed a bond to the railroad company, conditioned upon the faithful performance by the said Farmer of his obligations under his contract with the railroad company, and upon his payment of all laborers and materialmen. In holding that the said French could recover under the bond against the surety company for goods and provisions furnished the contractor, the court said: “The question is, then, squarely presented, whether or not there can be a recovery upon the bond based upon the condition thereof by a third person not a party thereto, where the bond does not by its terms expressly inure to the benefit of such third person, and the right to sue thereon is based entirely upon the theory that the third person is entitled to sue upon a promise made for his benefit. The Supreme Court of Texas, upon a bond identical in form, held that the surety could not be sued thereon by a third party. *National Bank of Cleburne v. Gulf, etc., Ry. Co.*, 95 Tex. 176, 66 S. W. 203. This was upon the theory that the bond was one of indemnity to the Railway Company, containing no express agreement to pay such third person, and therefore he could not sue thereon. If we adopt this view we violate the fundamental principle that every part of a contract should be given some effect, for the Railway Company could not, in any event, be liable for ‘goods’ and ‘provisions’ furnished the contractor in carrying out its contract, nor in this case could there be any lien therefor, as the property upon which the work was done was government property. If, under the circumstances any effect whatever is to be given to this clause in the condition of the bond, it

must be held that it was the intention of the parties to benefit such third persons rather than the Railway Company, to whom the bond ran.”

Likewise here the mortgage company could not in any event be held liable for the services and materials of mechanics and materialmen. Liens therefore could be filed, but, as seen above, they would in no wise affect the mortgage company's security. On the contrary, their own effectiveness would be impaired by the existence of the prior lien.

Restating our conclusions in the language of the foregoing opinion, if any effect whatever is to be given to the clause in the bond in reference to the payment of materialmen, it must be held that it was the intention of the parties to benefit such materialmen rather than the mortgage company, to whom the bond ran.

The judgment of dismissal is reversed, and the cause remanded with directions to overrule the demurrer.

We concur: TYLER, P. J.; KNIGHT, J.

99 Cal. App. 519

WHITE v. NATIONAL BANK OF COMMERCE et al. (Civ. 3810.) ★

District Court of Appeal, Third District,
California. June 19, 1929.

Rehearing Denied July 19, 1929. Hearing Denied by Supreme Court Aug. 15, 1929.

1. Appeal and error $\S$ 1011(1)—Findings of fact on conflicting evidence will not be reviewed.

Findings of fact supported by conflicting evidence will not be reviewed.

2. Sales $\S$ 359(1)—Evidence held to warrant jury finding that representatives of seller knew that representations that tree spray was harmless were untrue (Civ. Code, § 1572, subd. 2; § 1709; § 1710, subd. 2).

In action for price of tree spray, in which defendant filed cross-complaint for damages to trees because of false representations that spray was harmless, evidence held to warrant jury finding that seller's representatives knew that representations were untrue, irrespective of construction of Civ. Code, § 1572, subd. 2, section 1709, and section 1710, subd. 2.

3. Sales $\S$ 359(1)—Evidence of seller's practice to put on containers of tree spray labels warning that seller would not be liable for damages held not to require inference that such labels were on containers delivered to defendant.

Testimony that it was course of seller's business and practice to put labels on all containers of tree spray, warning purchasers that seller would not be responsible for damage or ill effect resulting from use, held insufficient, in view of other evidence, to require inference that such labels appeared on containers delivered to defendant purchaser.

4. Fraud ☞ 11(1)—Representations that spray would not harm citrus trees, regardless of temperature or weather conditions, held actionable representations of quality.

Representations that tree spray would not injure citrus fruit trees, fruits, or foliage, regardless of temperature or weather conditions, held not mere matters of opinion and prophecy, and not actionable, but actionable representations as to qualities of spray.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Harry R. White against the National Bank of Commerce, etc., in which defendant filed a cross-complaint, impleading the California Spray Chemical Company, etc. From the judgment rendered, the impleaded cross-defendant appeals. Affirmed.

Bradley & Bradley, of Visalia, and Wyckoff & Gardner, of Watsonville, for appellant.

H. B. McClure, of Visalia, for respondent.

FINCH, P. J. The plaintiff brought this action to recover \$1,586 alleged to be due for a quantity of tree spray, called "Volck Concentrate," purchased by the defendant. The answer denies that the spray was purchased from the plaintiff, but alleges that it was purchased from the California Spray Chemical Company. The defendant filed a cross-complaint against that company and the plaintiff, alleging that the defendant, as trustee of the estate of Richard Thew, deceased, operates and controls a large orchard of citrus fruits; that by means of deceit and false representations the cross-defendants induced the defendant to purchase the spray in question; that the spray was applied to the trees according to the company's directions; and that the effect thereof was to damage the fruit growing on the trees and the foliage thereof in the sum of \$2,300. The court found the allegations of the cross-complaint to be true, but also found that the spray destroyed the scale infesting the trees. Judgment was entered in favor of the defendant against the company for \$714, the difference between the amount of the alleged damage and the purchase price of the spray. The company has appealed from the judgment.

[1] Appellant concedes that "under the 'conflict of evidence' rule it must be taken on this appeal that the sale was made by the company directly to the bank through the agency of White (the plaintiff) and (Howard) Houston." Under the same rule, it must be held that there is ample evidence to support all of the findings except the finding that the alleged false representations "were known to be untrue by plaintiff and said California Spray Chemical Company and said agents and representatives at the time the same were made." While the evidence in support of that finding is not so satisfactory as that sup-

porting the other findings, it is deemed sufficient, as will later appear.

The court found that prior to the sale to the defendant, the company, through advertisements of which the defendant had knowledge, represented that said spray "would not burn, scald, or in any way harm citrus fruit trees, their fruits or foliage, regardless of the temperature or weather conditions"; that White and Houston, for the purpose of inducing defendant to purchase the spray, "in their capacity as agents and representatives" of the company, stated and represented "that said spray would kill the scale and other insects, their eggs and larvae which might be upon said citrus trees and their fruits and foliage thereon, without injuring or damaging said trees, their fruits or foliage, * * * regardless of the temperature or other weather conditions"; that the company and its said agents made all of such representations "in a manner not warranted by the information they had of the effect that said Volck Concentrate would have upon citrus trees, their fruits and foliage"; that, by reason of the application of the spray, "said trees were burned and injured and a great many of the oranges then growing upon said trees were burned, injured, destroyed and dropped from said trees, * * * as well as a large part of the foliage of said trees." The court made other appropriate findings which are not material to any question raised by the appeal.

[2] Respondent contends that the finding that the representations were known to be untrue is unnecessary because of the further findings that they were made in a manner not warranted by the information of the cross-defendants, citing section 1572, subd. 2, of the Civil Code, which defines such an unwarranted assertion as actual fraud. Appellant, however, contends that section 1572 relates only to the consent essential to the validity of a contract, and that section 1709 and section 1710, subd. 2, of the Civil Code, are applicable to cases such as this, citing *Hoffman v. Kirby*, 136 Cal. 26, 68 P. 321; *Toner v. Meussdorffer*, 123 Cal. 462, 56 P. 39, and *Miller v. Fireman's Fund Ins. Co.*, 6 Cal. App. 395, 92 P. 332. It is unnecessary to decide which of these contentions is correct, because, as stated, there is sufficient evidence to warrant the inference that the representatives of the company knew that the representations were untrue.

The representations made by White and Houston were made about June 17, 1925, and those made through advertisements were published prior to that time during the same year. Volck Concentrate was first placed on the market in December, 1924. Prior to that time the company manufactured and sold a spray now called Volck Standard. Volck Concentrate is composed of 83 per cent. white

oil and "17 per cent. of water and other inert matter." It contains an emulsifier which is "considerably less than one per cent." of the admixture. Volck Standard contains 25 per cent. of white oil, 50 per cent. of kerosene, and 25 per cent. of water and emulsifier. The quantity of emulsifier in the Standard ranges from 1½ per cent. to 3 per cent. The white oil "is a highly refined mineral oil, refined up to the purity of medicinal oil." "It is similar in character in purity to Nujol."

R. S. Woglum, an expert of wide experience in the use of insecticides, entomologist of the California Fruit Growers' Exchange, testified: "The oil does not mix readily with water. Therefore, it has been customary in insecticide work to mix something with the oil that would make it unite with the water, what they call an emulsifier. * * * Where you have a very small amount of an emulsion (emulsifier), it binds the oil so—the oil globules with the water—so they will loosen as soon as the spray material hits the tree. Most of the oil remains on the tree, and the spray material that runs off * * * is largely water. But by increasing the amount of emulsifier, it so rightens the emulsion that when it is sprayed on the tree, why less of the oil remains and more goes off on the ground."

The witness stated that the result of spraying with Volck Concentrate was to leave more oil on the tree than in the use of Volck Standard, and that, while for that reason the former was a more effective insecticide than the latter, it was also, for the same reason, more injurious to the fruit and foliage of the tree, and, in the opinion of the witness, it was this excess of oil which caused the injury to the fruit and foliage in the defendant's orchard. While Woglum's first experience with the use of Volck Concentrate was in February or March, 1925, the results of his observations of its effects were such that he sent out a circular, dated May 25, 1925, calling attention to some of the injuries caused by its use, which were of the same character as those in defendant's orchard.

W. H. Volck, the company's director of research, testified: "We endeavor in the Concentrate to make what is known as a quick breaking emulsion, and if you make the emulsifier very large, perhaps you would interfere with that, you wouldn't have it so quick breaking. * * * Q. How long had you been experimenting with and perfecting this Concentrate before you used it commercially? A. About two years."

"Defendant's knowledge of the falsity of

his statement may be established by inference from other facts in evidence, provided that the facts proved are such that the inference may legitimately be drawn from them, and are not equally consistent with defendant's innocence. As a general rule, however, scienter cannot be inferred from the mere fact that the statement was false, although it may be so inferred where the subject matter of the representation was so peculiarly within defendant's personal knowledge that he must have known his statement to be untrue." 27 C. J. 70.

The fact that Woglum so readily discovered the injurious effects of spraying citrus trees with Volck Concentrate warrants the inference that the company's experts must have made the same discovery during their two years of "experimenting with and perfecting" the spray. The results of such experimenting were peculiarly within their knowledge and the trial court was not bound to accept their testimony to the effect that they had observed no injurious effects from the application of the spray.

[3] The company's manager testified that it "was the course of business and the practice of the company" to put labels, containing instructions as to the use of the spray, on all packages thereof, and that such labels were put "on all drums that went out." A sample of the label to which the witness referred was introduced in evidence. It contained the following: "This material is guaranteed as to analysis and to quality, but due to conditions beyond our control, such as weather, soil moisture, etc., we will not be responsible for any damage or ill effect resulting from its use." The manager of defendant's orchard, however, testified: "I have never seen any labels on any drums." Attention has not been called to any testimony to the effect that any such label actually appeared on any of the drums of spray which were delivered to the defendant, and the evidence is not such as to require an inference to that effect.

[4] Appellant contends that the "representations were matters of opinion and prophecy and not actionable." It clearly appears that the representations were as to the qualities of the spray and not mere opinions. *J. B. Colt Co. v. Freitas*, 76 Cal. App. 278, 285, 244 P. 916; *Kolberg v. Sherwin-Williams Co.* (Cal. App.) 269 P. 975.

The judgment is affirmed.

We concur: PLUMMER, J.; ROLFE L. THOMPSON, J.

99 Cal. App. 492

**McCARTHY (McCARTHY et al., Interveners)
v. McCOLGAN et al. (Civ. 6758.)★**

District Court of Appeal, First District, Division 1, California. June 19, 1929.

Rehearing Denied July 19, 1929. Hearing Denied by Supreme Court Aug. 15, 1929.

1. Appeal and error ⇨1011(1)—Where substantial conflict exists, and trial court's conclusions find reasonable support, its findings cannot be disturbed on appeal (Code Civ. Proc. § 1847).

Credibility of witnesses is question for determination of trial court, under Code Civ. Proc. § 1847, and, though it should appear to appellate court that other conclusions might fairly and reasonably have been drawn from the evidence, where a substantial conflict exists and conclusions of trial court find reasonable support, its findings cannot be disturbed on appeal.

2. Pleading ⇨364(2)—Allegations as to forgery of deed by defendant held properly stricken out in suit to enforce trust in real property; it being immaterial and irrelevant.

In suit to enforce trust in real property, allegations of complaint as to forging of deed by defendant's surviving partner from deceased partner to defendant as grantee *held* properly stricken out; it being immaterial which partner held legal title, and not essential to relief sought that validity of deed be determined.

3. Witnesses ⇨344(2)—That defendant forged deed would not be admissible as affecting credibility, in suit to enforce trust.

That defendant surviving partner forged deed from deceased partner to himself would not be admissible, in action to enforce trust as affecting credibility of defendant.

4. Witnesses ⇨344(1)—Character cannot be attacked by evidence of particular wrongful acts.

Character cannot be attacked by evidence of particular wrongful acts, nor may questions with reference to such matters be properly asked.

5. Trusts ⇨365(2)—Laches in enforcement of trust is question of fact, to be determined by circumstances of each case.

The question of laches in suit to enforce trust in real property is one of fact, to be determined by consideration of the circumstances of each particular case.

6. Trusts ⇨365(2)—That suit to enforce trust was not commenced until after death of party to transaction is factor material to determination of question of laches.

While mere delay in enforcement of trust, in absence of prejudice to opposite party, does not constitute laches, that no claim was made until after death of party to transaction whose testimony would explain it is a factor material to determination of question.

7. Trusts ⇨365(2)—Marked appreciation in value of property or outlays for improvement are to be considered in determining laches in enforcement of trust in real property.

A marked appreciation in value of property or outlays in making improvements thereon are

elements to be considered in determining question of laches in enforcement of trust in real property.

8. Appeal and error ⇨1010(1)—Weight of testimony and determination whether plaintiffs' claim was barred by laches were questions for trial court, whose findings, reasonably supported by evidence, cannot be disturbed on appeal (Code Civ. Proc. § 2061).

In suit to enforce trust in real property, weight of testimony and determination whether circumstances shown were such as to bar by laches claims of plaintiffs were questions for trial court under Code Civ. Proc. § 2061, and its findings, reasonably supported by the evidence, cannot be interfered with on appeal.

9. Trusts ⇨372(3)—Findings that suit to enforce trust in real property was barred by laches held sustained by evidence.

In suit to enforce trust in real property, findings of trial court that claims of plaintiffs were barred by laches *held* fairly sustained by the evidence.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Eugene McCarthy, executor of the last will and testament of Harriet McCarthy, deceased, against R. McColgan, also known as Reginald McColgan, and another, in which William N. McCarthy and another filed their complaint in intervention. From the decree, plaintiff and interveners appeal. Affirmed.

J. F. Riley, of San Francisco, for plaintiff appellant.

E. J. Talbott and Glensor, Clewe & Van Dine, all of San Francisco, for appellant interveners.

Brobeck, Phleger & Harrison, of San Francisco, for respondents.

PER CURIAM. This action was commenced on February 4, 1924, by Eugene McCarthy, as executor of the last will and testament of Harriet McCarthy, deceased, against Reginald McColgan for the enforcement of an alleged trust in certain real property in the city of San Francisco upon which is situated a hotel. Eugene McCarthy is a son of the deceased. Subsequently the other children of the latter, namely, William N. McCarthy and Elizabeth Renstrom, filed their complaint in intervention, and Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, was also brought in as a party defendant to the action.

Previous to April 2, 1915, the record title to the property stood in the name of Harriet McCarthy, deceased. On that date she conveyed the same to the Harriet McCarthy Investment Company, a California corporation, all the stock of which she owned. In 1917 the property was subject to three incumbrances,

namely, a mortgage to Hibernia Savings & Loan Society (hereinafter referred to as the bank), the amount of which, with other charges, aggregated approximately \$100,000; a deed of trust, securing the payment of a note for \$8,900 and interest, to M. J. Hines, who subsequently died, this sum being also secured by a chattel mortgage on the furniture in the hotel; and a similar deed, securing the payment to defendant Reginald McColgan and Daniel A. McColgan, who were copartners in the business of lending money, of the sum of \$7,163.86 with interest. Mrs. McCarthy also owed on the purchase price of certain furniture in the hotel an amount which was subsequently determined to be \$15,000, and, in addition, sums to other creditors, the total amount of which the record does not disclose. During the year 1917, the partners above named purchased from his estate the Hines debt, taking an assignment for their benefit of the security, and at about the same time the bank commenced suit to foreclose its mortgage. Thereupon the partners caused their deed of trust to be foreclosed, the property upon the sale thereunder to be purchased for their benefit, and the record title thereto was subsequently, to wit, June 26, 1917, conveyed to Daniel A. McColgan. Thereafter a new mortgage upon the property was executed by the partners to the bank and the original mortgage satisfied. The partners subsequently paid the amount owing on the furniture, and, in addition to other purchases of furniture, have made improvements upon the property at an expense, according to the testimony of defendant Reginald McColgan, of approximately \$26,000. Harriet McCarthy, who devised her interest in the property to her children above named, died in 1920. Daniel A. McColgan died in 1921; his interest therein being devised to defendant Reginald McColgan. The executor averred that, before the deeds of trust were foreclosed, the partners promised Mrs. McCarthy that they would purchase the property upon the sale and arrange in effect for an extension of the mortgage; that they would thereafter hold the property in trust for her and her heirs, manage and conduct the hotel, applying the profit therefrom to the indebtedness, and reconvey the same to her or her heirs, free of incumbrances, at any time she or they might be able to repay the sums owing thereon. The interveners also alleged that like promises were made to them at various times until August, 1922, when for the first time the trust was repudiated by defendant McColgan, and that the promises were made by the partners with the intention of not performing the same, and for the purpose of fraudulently procuring the interest of Mrs. McCarthy in the property. Relying thereon, the deceased and interveners did not attempt to procure other loans upon the property, but permitted the partners to cause the same to be sold and conveyed to Daniel A.

McColgan, and, by reason of the promises, permitted the latter and defendant Reginald McColgan to hold the same in trust and to remain in possession thereof.

Answers denying these averments were filed by Reginald McColgan and Adelaide McColgan, as administratrix.

The court found against the allegations of the complaints, and, in addition, made the following finding, which was in accordance with the allegations of the answers filed by defendants: "Daniel A. McColgan, mentioned in the pleadings herein, was a material and necessary witness with respect to the truth of the allegations contained in the complaint and in the complaint in intervention. Said Daniel A. McColgan died on May 12, 1921. Neither the plaintiff nor the interveners, nor either of them, ever asserted the claims set forth in the complaint or the claims set forth in the complaint in intervention until after the death of said Daniel A. McColgan and until after it became impossible to secure the testimony of said Daniel A. McColgan with respect to such claims by reason of his said death. Since June 26, 1917, and prior to the assertion by the plaintiff or the interveners, or either of them, of the claims set forth in the complaint and the complaint in intervention the defendant Reginald McColgan expended large sums of money in the improvement of the real property described in the complaint and during said time the said real property has greatly increased in value. The plaintiff and the interveners have allowed the defendant Reginald McColgan to make such expenditures and have allowed such increase in value to occur without asserting any such claim, and have delayed for an unreasonable time the assertion of such claim and have abandoned the same, and the defendant Reginald McColgan would be prejudiced by the enforcement of such claim at the present time after such long-continued delay, and the court further finds that the cause of action set forth in the complaint and in the complaint in intervention is barred by the laches of the plaintiff and of the interveners."

The decree entered thereon adjudged Reginald McColgan to be the owner of the property in fee simple, and that neither Mrs. McCarthy at the time of her death nor her children had or have any right, title, or interest therein.

As grounds for the appeal, it is contended that the findings are unsupported, and that the court erroneously struck out appellants' complaint in intervention, and refused to admit in evidence a deed alleged therein to be a forgery.

The executor gave no testimony in support of the matters alleged in the complaints other than his willingness to repay any sums found to be owing to the defendants. The interveners, however, testified to promises made by the partners before the sale that the title should be held and the property managed as

alleged, and also to admissions made on subsequent occasions that such was the agreement; further, that C. E. Blanchard, a contractor, had previous to the sale offered Mrs. McCarthy \$20,000 for the property subject to the incumbrances which, with the claims of the unsecured creditors, he agreed to pay, and allow her one year to redeem by paying the sums advanced, with interest at 10 per cent.; that, persuaded by the partners, and relying upon their promises as stated above, she rejected the offer. Blanchard corroborated the interveners as to the offer claimed to have been made by him. Their testimony regarding admissions by the partners that they held the property in trust for Mrs. McCarthy and her children was corroborated by other witnesses, who testified to like admissions to them or in their presence. A qualified witness also testified that in his opinion the value of the property at the time of the sale was approximately \$238,000. Defendant Reginald McColgan denied the promises and admissions claimed, and also that Mrs. McCarthy had been induced to decline an offer for the property from Blanchard. Evidence was adduced that in 1923 William N. McCarthy admitted that of his own knowledge he knew of no statement having been made by either of the partners that they would under any circumstances reconvey the property to Mrs. McCarthy, and also that he had testified in another action that the partners were the owners of the property, which they were obliged to take over in 1917 to protect their loans. It was also testified by a witness claiming to be familiar with real estate values in San Francisco that there was a marked depression in such values in 1917, and that in his opinion the property was then worth about \$125,000.

Appellants insist that, in view of the circumstances and the testimony adduced by them at the trial as above, defendant's evidence afforded no reasonable ground for the conclusions of the trial court, and that findings in accordance with the allegations of the complaints should be made in this court.

The only witnesses who testified to the promises alleged were William McCarthy and Elizabeth Renstrom, the interveners. Six witnesses were called, however, by the plaintiffs to testify to admissions by the partners. Four of these testified that, at a meeting of the creditors of Mrs. McCarthy, held before the sale or the purchase of the Hines note, defendant Reginald McColgan stated that the partners intended to protect Mrs. McCarthy and the Hines heirs against the other creditors, and on this occasion accused one of the witnesses, an attorney representing the Hines estate, of attempting to deprive Mrs. McCarthy of the property. One of the witnesses last mentioned, with a fifth, also testified to subsequent admissions by the partners that they were holding the property for Mrs. McCarthy and her children. The sixth witness, a car-

penter, testified that one of the partners made the same statement to him while he was employed at the hotel. Two of the above witnesses admitted that they had previously had litigation with the partners over other property interests. Another was the husband of Mrs. Renstrom, and the relations of the attorney with the partners had manifestly been unfriendly. The two among the number who could fairly be said to have been unbiased were one of the heirs of Hines, whose testimony was confined to what occurred at the creditors' meeting, and the carpenter mentioned. As to the latter, however, the circumstances under which it was claimed the admission was made might reasonably have created a doubt in the mind of the court as to the credibility of the testimony in that respect. Nor does it appear certain, as claimed by appellants, that Blanchard was an unbiased or disinterested witness as, according to appellants' testimony, the partners in another transaction sought unsuccessfully to overreach Blanchard, but the latter was warned of the design by interveners.

[1] The credibility of the witnesses was a question for the determination of the trial court (Code Civ. Proc. § 1847; *Badover v. Guaranty Trust & Sav. Bank*, 186 Cal. 775, 200 P. 638; *Crow v. Crow*, 168 Cal. 607, 143 P. 689; *Dracovich v. Dracovich*, 53 Cal. App. 361, 200 P. 44); and, though it should appear to this court that other conclusions might fairly and reasonably have been drawn from the evidence, yet, where, as here, a substantial conflict exists, and the conclusions of the trial court find reasonable support, the rule is settled that its findings cannot be disturbed on appeal (*Waer v. Waer*, 189 Cal. 178, 207 P. 891; *Webster v. Lowe*, 177 Cal. 385, 170 P. 850; *Levi v. Chesley*, 178 Cal. 145, 172 P. 607; *Stransky v. Callan*, 81 Cal. App. 476, 253 P. 960).

[2] The complaint in intervention, in addition to the matters stated above, alleged that Daniel A. and Reginald McColgan were copartners, and that, upon the death of his brother, Reginald, the surviving partner, caused the name of the former as grantor to be forged to a deed purporting to convey the property to him as grantee, and that the same was recorded. This deed the interveners sought to have declared void. The allegations respecting the deed were stricken out on motion, and of this appellants complain.

The order was not erroneous, it being immaterial, in view of the other facts alleged, as to which partner held the legal title, nor was it essential to the relief sought that the validity of the deed be determined. The claim of defendant McColgan to his brother's interest in the property rested upon the devise from the latter, and his title to that interest had its inception at the time of the brother's death. *Western Pacific Ry. Co. v. Godfrey*, 166 Cal. 346, 136 P. 284, Ann. Cas. 1915B, 825. He stated, however, on cross-

examination that he caused the above deed to be filed for record, following which the record was offered in evidence by appellants, but, upon objection to its materiality, it was excluded. The purpose of the offer, as stated by appellants, was to impeach McColgan by showing that the deed was forged.

[3, 4] The fact, if true, was not a fraud upon appellants, nor was it relevant to that or any other issue in the case; the only persons affected thereby being those interested in the estate of Daniel A. McColgan. It is nevertheless urged that the fact, if proved, would affect the credibility of the surviving partner, and appellants in support or their contention rely upon the case of *Masters v. Seeley* (C. C. A.) 138 F. 719. This was an action upon an account, in which the defendant sought to show upon the cross-examination of the plaintiff that a previous action on the claim had been filed, a judgment by default obtained, and that this judgment had been set aside on the grounds of fraud and collusion. It was held that the fact was relevant on the question of the good faith of the plaintiff, and also as tending to show that he had dealt unfairly with the defendant in regard to the subject-matter of the controversy. In the present case, however, the act, although a wrong upon those interested in the estate of the deceased McColgan, was not so as to appellants, nor did it tend to show that the defendant had on previous occasions dealt unfairly with them. Moreover, the rule is well settled that character cannot be attacked by evidence of particular wrongful acts, nor may questions with reference to such matters be properly asked. *Sharon v. Sharon*, 79 Cal. 633, 22 P. 26, 131; *Evans v. De Lay*, 81 Cal. 103, 22 P. 408; *Barkly v. Copeland*, 86 Cal. 483, 25 P. 1, 405; *Jones v. Duchow*, 87 Cal. 109, 23 P. 371, 25 P. 256; *Estate of James*, 124 Cal. 653, 57 P. 578, 1008; *People v. Crandall*, 125 Cal. 129, 57 P. 785.

[5-9] The question of laches—the finding on which defense we have quoted—is one of fact (*Wolff v. Canadian Pac. Ry. Co.*, 123 Cal. 535, 56 P. 453), which is to be determined by a consideration of the circumstances of each particular case (10 Cal. Jur. Equity, § 64, p. 526). While mere delay in the absence of prejudice to the opposite party does not constitute laches (*Newport v. Hatton*, 195 Cal. 132, 231 P. 987; *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 P. 243), that no claim was made until after the death of a party to a transaction whose testimony would explain it has been held to be a factor material to the determination of the question (*Bell v. Hudson*, 73 Cal. 285, 14 P. 791, 2 Am. St. Rep. 791; *Burke v. Maguire*, 154 Cal. 456, 98 P. 21). So, also, a marked appreciation in the value of the property or outlays in making improvements thereon are elements to be considered. *Chapman v. State Bank*, 97 Cal. 155, 31 P. 896; *Stevenson v.*

Boyd, 153 Cal. 630, 96 P. 284, 19 L. R. A. (N. S.) 525; *Akley v. Bassett*, 68 Cal. App. 270, 228 P. 1057. The record contains testimony sustaining the finding quoted, and its weight was a question for the trial court (Code Civ. Proc. § 2061), as was also the determination whether the circumstances shown were such as to bar by laches the claims of plaintiffs; and its findings, being reasonably supported by the evidence, cannot be interfered with on appeal. *Wolff v. Canadian Pacific Ry. Co.*, supra; *Suhr v. Lauterbach*, 164 Cal. 591, 130 P. 2.

It is our conclusion that the findings of the trial court against the allegations of the complaints as well as upon the special defenses last mentioned were fairly sustained by the evidence, and that no error has been shown which would justify a reversal of the judgment.

We find no merit in defendants' contention that, by reason of the conveyance by Mrs. McCarthy of her interest in the property to the Harriet McCarthy Investment Company, the present action could not be maintained by her executor or heirs.

The judgment is affirmed.

99 Cal. App. 465

STERNES et ux. v. SUTTER BUTTE CANAL CO. (Civ. 3712.)★

District Court of Appeal, Third District,
California. June 18, 1929.

Rehearing Denied July 18, 1929. Hearing Denied by Supreme Court Aug. 15, 1929.

1. Evidence ⇨474(18)—Landowners familiar with land taken for canals and general situation in vicinity could testify as to value thereof.

Landowners familiar with land taken for construction of canals, uses to which it could be adapted, and general situation in immediate vicinity, *held* competent to testify as to value thereof, in action for damages.

2. Appeal and error ⇨1002—Jury's finding on conflicting evidence as to value of lands taken for canals must stand.

In action for damages by construction of canals across plaintiffs' land, jury's finding on conflicting evidence in respect to values and compensation must stand, in absence of other matters in evidence materially affecting verdict.

3. Trial 260(5)—Refusal of instruction to disregard mortgagee's bid on foreclosure sale in determining value of lands taken for canals held not prejudicial error, in view of instructions given.

In action for damages by construction of canals across plaintiff's lands, refusal of instruction not to consider amount bid for such lands by mortgagee on foreclosure sale in determining value thereof when ditches were constructed *held* not prejudicial to defendant, in view of instructions not to indulge in speculation, surmise, or conjecture, nor consider remote and conjectur-

al uses of land or opinions as to value thereof, if sold in subdivisions or at forced sale.

4. Appeal and error ⇨882(16)—Defendant injecting mortgagee and foreclosure proceeding into case, and not objecting to stipulation for mortgagee's dismissal, cannot complain of references to such proceeding in argument.

Where mortgagee was made party to, and foreclosure proceeding injected into, action for damages by construction of canals across plaintiffs' land on defendant's motion, and stipulation for dismissal of mortgagee was made without objection by defendant, latter cannot complain on appeal of reference in argument of plaintiffs' counsel to such proceeding.

5. Husband and wife ⇨270(5)—Wife was not necessary or proper party to action for damages by construction of canals across community lands (Civ. Code, § 172a).

While amount of damages, recovered by plaintiffs for construction of canals across land, acquired by them while living together as husband and wife subsequent to enactment of Civ. Code, § 172a, constituted community property, wife was neither a necessary nor proper party to action.

6. Husband and wife ⇨270(3½)—Canal company could offset amount husband agreed to pay toward cost of construction and rights of way against damages recovered for construction of canals across community lands (Civ. Code, § 172a).

Canal company *held* entitled to offset amount agreed to be paid by husband toward cost of constructing ditches and obtaining rights of way against amount of damages recovered by husband and wife for construction of canals across their community lands, though wife did not sign agreements, as she was not necessary or proper party under Civ. Code, § 172a.

Appeal from Superior Court, Sutter County; E. P. McDaniel, Judge.

Action by Floyd G. Sternes and wife against the Sutter Butte Canal Company, a corporation. Judgment for plaintiffs, and defendant appeals. Modified, and affirmed as modified.

Isaac Frohman, of San Francisco, and Seth Millington, of Gridley, for appellant.

Arthur Coats, of Yuba City, for respondents.

MONCUR, Justice pro tem. This is an appeal from the judgment of the superior court of Sutter county after trial by jury wherein plaintiffs were awarded damages by reason of the construction of certain canals across their lands. This case has been before this court before, and in an opinion rendered by this court (61 Cal. App. 737, 216 P. 66) the facts are fully stated. Therefore, it is deemed unnecessary in this opinion to restate the facts out of which this litigation has proceeded. Following the decision of this court a second trial was had, and, as a

result thereof, a jury awarded to plaintiffs compensation for the lands taken in the said action, the acreage thereof being 5.18 acres, amounting to the sum of \$1,036, and damages to the lands not taken, being for so-called severance damages, seepage, etc., amounting to the sum of \$8,196. The law of the case as settled on the former appeal, so far as values and damages to the land not taken are concerned seems to have been closely followed, but it is contended by appellant that the values and damages awarded are excessive, and not in conformance with the evidence in the case. With the exception of the evidence of the plaintiff Floyd G. Sternes, the values fixed by plaintiff's witnesses are less than the value per acre for the land taken as awarded by the jury. In connection, however, with the amount of the award in this respect, we will quote particularly from the testimony of plaintiff Floyd G. Sternes. This testimony is as follows:

"Q. Do you know the market value of this land? A. Very closely. You meant at that time?

"Q. Yes. Taking it as to the first day of December, 1919. A. Yes, sir. * * *

"Q. Taking it as of December 1st, 1919, and before the construction of the ditches and canals shown upon that map by the Sutter Butte Canal Company, what, in your opinion, would be the market value of that land? * * *

"The Court: The highest price it would bring for cash in the open market at that time, at a public sale.

"Mr. Millington: And giving a reasonable time to find a purchaser.

"The Court: With counsel's explanation as to what the question should be you can reframe it.

"Mr. Coats: "All right. What was, in your opinion, the value of that land, considering its value, and the price that could be obtained in the open market, and giving the seller a reasonable time to make the sale for cash? A. As a whole?

"Q. Yes. A. I should say two hundred and fifty dollars an acre. * * *

"Mr. Coats: Q. What, in your opinion, was the reasonable value of the remainder of the tract of land not included in these ditches, taking the same things into consideration, the price that you could have obtained therefor in the open market for cash, and giving the seller a reasonable time to obtain that price, after the construction of these ditches? A. I was not able to sell it."

The latter answer by order of the court was stricken out. The following then occurred:

"The Court: What would it be, if you had a reasonable time to make the sale—what could it have been sold for? A. About a hundred dollars an acre.

"Mr. Millington: How much? A. One hundred dollars an acre."

[1, 2] It appeared also from the testimony of Mr. Sternes, particularly on cross-examination, that he had in contemplation a subdivision of the property, but a fair reading of the record indicates that his valuation of \$250 per acre was not based upon subdivision valuations. It seems to be the idea of appellant that in the testimony of respondents' witnesses to a very large extent at least sufficient foundation was not shown for their testimony to warrant the court in permitting it to go to the jury. However, a careful examination of the record shows that these witnesses were familiar with the land and the uses to which it could be adapted, were owners of lands and were familiar with the general situation in the immediate vicinity. The testimony of defendant's witnesses in respect to values did nothing more than create a conflict in the evidence. The jury heard the evidence and weighed the testimony. We are satisfied that, so far as values are concerned, unless it can be found that other matters of evidence which we will now note materially affect the verdict, the finding of the jury in respect to values and compensation must stand. In this connection we will now refer to a stipulation and testimony of a sale on foreclosure of the property originally involved herein and to the amount received therefor on such foreclosure sale.

[3, 4] Preliminarily, it is to be noted that the Savings Bank of Sutter County held a mortgage upon the lands owned by plaintiffs at the time of the commencement of this action. The Savings Bank of Sutter County was not originally made a party to the action, but subsequently on motion of defendant it was brought in. At the commencement of the second trial the action as against said Savings Bank of Sutter County was dismissed, but, prior to said dismissal, after some discussion between counsel, a stipulation was entered into without objection on the part of the defendant, the colloquy between counsel in respect to said stipulation being as follows:

"Mr. Coats: So far as the bank is concerned, the plaintiffs are willing to stipulate that the mortgage was subsisting at the time the Sutter Butte Canal Company entered upon the land, and that the mortgage was for the amount specified in the Judgment Roll of the case of Savings Bank of Sutter County, plaintiff, v. Floyd G. Sternes and Marian May Sternes, defendants, and which mortgage was previously introduced in evidence in that case, and that the land was sold under the foreclosure proceeding after these men had built their ditches across this land for the price of sixty dollars an acre or thereabouts; and, if that is stipulated to, we have no objection to their going out. Sixty dollars an acre was the price paid by the

bank for that land at the foreclosure proceedings.

"Mr. Frohman: The records show that they bought it in for the amount due on the mortgage. It was simply an offset to the amount due the bank, but I do not know how much it was an acre.

"Mr. Coats: The records show that the bank was the bidder at the sale, and whether they bought it in for the amount of the mortgage or not is immaterial, but they bid it in at approximately sixty dollars an acre, if you are willing to stipulate to that—all right.

"Mr. Frohman: For the amount of the judgment the bank held—we will stipulate to that. Nobody asks for any relief against the bank."

We particularly refer to this conversation amounting, in effect, to a stipulation dismissing the bank from the action, for the reason that counsel for appellant predicate misconduct on the part of counsel for the plaintiffs in respect to argument before the jury in connection with this particular matter of the amount for which the property was sold under foreclosure and also predicate error on the part of the court in the refusing of certain instructions in connection therewith. Obviously, and we assume it is a matter of common knowledge that, a sale of property under foreclosure is a forced sale. The court instructed the jury as follows:

"By 'Market Value' is meant, not what the owner could realize at a forced sale, but the highest price estimated in terms of money which the land would bring, if offered for sale in the open market with reasonable time in which to find a purchaser with knowledge of all the uses and purposes as to which it was adapted and for which it was capable, as shown by the evidence."

Also the court instructed the jury as follows at defendant's request:

"In determining what compensation may be payable to the plaintiffs on account of any damages which may have resulted from the construction of said ditches to plaintiffs' land not occupied by said ditches, you are not to indulge in speculation, surmise or conjecture. The law does not require the defendant to pay damages or compensation based upon speculation, surmise or conjecture.

"The uses to which land may be put and which may be considered in determining its value do not include remote and conjectural possibilities.

"Testimony as to what a witness may think is the value of plaintiffs' land based upon what it is assumed by him to be worth if it were sold in subdivisions for cash or on a deferred payment plan, must be disregarded by the jury. (Sacramento, etc., R. R. Co. v. Heilbron, 156 Cal. 408-412, 104 P. 979.)"

The following instruction was requested by defendant, which was refused by the court:

"The price which the Savings Bank of Sutter County, the mortgagee of the plaintiffs' land, bid for said land on the sale thereof under the decree of foreclosure of its mortgage, is not to be considered by you in your determination of the value of said land at the time the defendant constructed or operated its ditches on plaintiffs' land."

This instruction might well have been given, but, in view of the instructions given by the court, particularly wherein they were told that they could not consider values at a forced sale, we are unable to see where any prejudice resulted to defendant by the refusal of the court to give this instruction. In respect to the claim made by appellant that counsel for plaintiffs in his argument to the jury was guilty of misconduct in referring to the price obtained on sale of the property through the foreclosure proceedings and the failure of plaintiffs to effect a sale of the property during the pendency of the foreclosure proceedings, it need only be said that the bank as a party to the action and the foreclosure proceedings in connection with the bank's relation to the action were injected into this case on the motion of defendant, and, the stipulation in reference to the dismissal of the bank having been entered into without objection on the part of the defendant it is not now in a position to complain of any reference whatever in the argument of counsel for the plaintiff in connection with said foreclosure proceeding. We do not hold that this matter was properly admissible before the court or jury, and we simply intend to say that, by reason of its admission before the court and jury in connection with the circumstances disclosed by the record in this case, defendant is in no position to complain thereof.

We are satisfied that, in connection with the verdict and award of the jury, no error of which defendant is entitled to complain is to be found in the record.

[5] We will now consider the alleged counterclaim or cross-complaint of defendant concerning the agreements entered into between plaintiff Floyd G. Sternes and defendant. These agreements are quite thoroughly discussed in *Sternes v. Sutter Butte Canal Co.*, 61 Cal. App. 737, 216 P. 66, hereinbefore referred to, and we deem it unnecessary to lengthen this opinion by any further particular reference to said agreements. So far as the counterclaim or offset of the amount of \$2,600 to any judgment by plaintiffs herein is concerned, it should be specifically noticed that plaintiff Marian May Sternes did not sign either of said agreements. The property owned by plaintiffs at the time of the commencement of this action was acquired by them subsequent to their marriage, while they were living together as husband and wife, and subsequent to the enactment of section 172a of the Civil Code of this state in

1917. It therefore was clearly community property, and the amount recovered by plaintiffs by reason of the acts complained of in this case constituted their community property. But, even under said section 172a, plaintiff Marian May Sternes was neither a necessary nor proper party to the action. In the case of *McKay v. Lauriston* (Cal. Sup.) 269 P. 519, at page 522, it is said:

"At the time said real property was conveyed to plaintiff, section 172a of the Civil Code read as follows:

"The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or incumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or incumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

"In the recent case of *Stewart v. Stewart*, 199 Cal. 318, 249 P. 197, this court after an exhaustive review of the decisions of this court, as well as those from other jurisdictions where the community property law prevails, considered and determined the right of the wife in community property acquired under the laws in force in this state immediately following the adoption of said section 172a and the amendment in the same year of section 172 of the Civil Code, relating, in its amended form, to community personal property. In that case we held that under the laws of this state as in force in the year 1918, relative to the rights of the wife in community property acquired while such laws were in effect, the wife had no present vested interest in the community property during the continuance of the marriage relation, except that she might by resort to appropriate judicial remedies protect and safeguard the community property against the inconsiderate and fraudulent acts of the husband."

In the case of *Moody v. Southern Pacific Co.*, 167 Cal. 786, 141 P. 388, it is held that the husband has the like absolute power to dispose of the community property other than household goods and clothing, that he has of his own separate property, except that he cannot make a gift thereof without the consent of the wife. Civ. Code, § 172. "In general, the husband is the only party entitled to sue in respect to community property and the wife is neither a necessary nor a proper party to such suit." In *Caputo v.*

Fusco, 54 Cal. App. 191, at page 192, 201 P. 604, it is said:

"Elisa Caputo, the wife, was not a proper party plaintiff in the action to recover the community property. (Spreckels v. Spreckels, 116 Cal. 339, 349, 58 Am. St. Rep. 170, 36 L. R. A. 497, 48 P. 228; In re Burdick, 112 Cal. 387, 393, 44 P. 734.)"

[6] We are satisfied that the trial court was in error in excluding from consideration of the jury the contracts for the payment of the \$2,600 as agreed to by plaintiff Floyd G. Sternes, and the defendant was entitled to offset the sum of \$2,600 against any amount recovered against it. Counsel for respondents herein to avoid the necessity of a new trial, and, to terminate this litigation, if possible, by way of stipulation in his brief, makes the following statement:

"The court might allow the counterclaim and credit it upon the judgment, and then allow interest thereon from the date of the going in possession, and in case the court did this, respondents expressly waive all right or claim to greater aggregate judgment of principal and interest than that rendered by the jury.

"If the court should allow the counterclaim and credit it upon the aggregate judgment rendered, and also determine that plaintiffs are not entitled to interest on the balance, we also stipulate that the judgment in such case may be so modified. * * *

We are satisfied that respondents are not entitled to recover interest on the judgment appealed from herein prior to the date of its entry. But, in accordance with the stipulation as above set forth, the judgment is modified by deducting from the amount thereof, to wit, \$8,196 the sum of \$2,600, leaving the amount to be recovered under the said judgment \$5,596, and, as so modified, the judgment is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

99 Cal. App. 586

In re LAVIN'S ESTATE.★

Appeal of MURPHY et al.

(Civ. 6646.)

District Court of Appeal, Second District, Division 2, California. June 24, 1929.

As Modified on Denial of Rehearing July 19, 1929. Hearing Denied by Supreme Court Aug. 22, 1929.

1. Wills ⇨439—Intention of testator governs construction of will, and must be given full effect, if possible.

Primary inquiry in construing will is to determine intent of testator, which must be given full effect, if possible.

2. Wills ⇨660—Interest of coexecutrix, attempting to prevent distribution to legatee, under paragraph in will forfeiting interest of contesting beneficiaries, held not subject to forfeiture.

Where coexecutrix of will during course of probate proceedings attempted to prevent distribution to legatee, who as alleged indirectly contested and aided in contesting will, under paragraph annulling any bequest to beneficiary who objected to probate thereof, or contested or aided in contesting any provision thereof, coexecutrix's share was not subject to forfeiture under such provision, in absence of anything to indicate bad faith, since, if coexecutrix had information which led her to believe that beneficiary had brought himself within exclusionary clause, it was her duty to prevent beneficiary from becoming recipient.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Proceedings in the settlement of the estate of John Drury Lavin, deceased. From part of a final decree ordering distribution of part of the estate to Nannie L. Markham, Frank F. Murphy and others appeal. Affirmed.

Henry L. Knoop and Clarence M. Heublein, both of Los Angeles, for appellants.

McFadden, Holden & Friis and Leonard Evans, all of Anaheim, for respondents.

THOMPSON, J. This is an appeal from that part of the final decree ordering the distribution to Nannie L. Markham of one-fourth of the rest, residue, and remainder of the estate of John Drury Lavin. The facts leading up to and necessary to an understanding of the situation are as follows:

John Drury Lavin died testate on February 20, 1923. By his will he nominated Nannie L. Markham, William A. Dolan, and Wm. J. Siemann to be the executors thereof. Upon the petition of the three so named the superior court of Orange county admitted the will to probate on March 16, 1923, appointing the petitioners executors. Within a year from the time of the order, one of the appellants here, Marcella Lewis, filed her petition praying for a revocation of the probate, the grounds of which it is not necessary to state. It is sufficient to note that the petition was dismissed by the superior court, and that subsequently an appeal therefrom was likewise dismissed. The fiftieth paragraph of decedent's will reads as follows:

"Should any of the beneficiaries under this my will object to the probate thereof, or in any wise, directly or indirectly, contest, or aid in contesting the same, or any of the provisions thereof, or the distribution of my estate thereunder, then and in that event I annul any bequest herein made to such beneficiary, and it is my will that such beneficiary shall be absolutely barred and cut off from any share in my estate, for I now solemnly declare that all property of which I am now

possessed has been accumulated by my own efforts, aided and assisted by the prudent and economical management of my household affairs by my sisters, Sarah J. Lavin, now deceased, and Mrs. Mary E. Downing, and that none of the other beneficiaries herein named, or anyone else, has ever contributed anything towards it, or assisted in its accumulation."

There were three petitions for partial distribution filed by the executors of the last will and testament, which were joined in by Michael C., Joseph T., John L., and Marion C. Markham. In each of these three petitions, as well as in that for final distribution, filed by the executors alone, it was alleged that Marcella Lewis had filed a petition for revocation of the probate of the will, and it was further set forth that John B. Murphy (a brother of Marcella Lewis) had actively assisted and promoted the filing of the contest, and had directly and indirectly contested and aided in contesting the will, and all of these petitions asked that no distribution be made to either Mrs. Lewis or Rev. John B. Murphy on account of the acts so alleged. The court found that Mrs. Lewis was not entitled to the legacy left to her by the will, but declared that Rev. John B. Murphy had not directly or indirectly contested the will, and was, therefore, entitled to have distributed to him all sums left him thereby. It is the contention of the appellants that, since Nannie L. Markham attempted to prevent distribution to John B. Murphy, she also cut herself off from any rights as a legatee. The respondents deny the soundness of this assertion, and also reply that appellants have no right to prosecute an appeal from that portion of the decree involved here, for the reason that they are not prejudicially affected thereby.

[1, 2] We shall first consider the argument that Nannie L. Markham brought herself within the terms of the exclusionary clause by her participation in the various petitions for distribution, containing the allegations already recited. The primary inquiry must be to determine the intent of the testator. The authorities declare (see *Estate of Major* (Cal. App.) 264 P. 542; *In re Kitchen*, 192 Cal. 384, 220 P. 301, 30 A. L. R. 1008, and

Estate of Hite, 155 Cal. 436, 101 P. 443, 21 L. R. A. [N. S.] 953, 17 Ann. Cas. 993), and the principles of equity dictate, that when this shall have been ascertained it is the duty of the courts to give it full effect, if possible.

It is neither difficult in the instant cause to discern the purpose of the testator, nor impossible to extend to that purpose complete accord in the distribution of the estate. It is manifest from a reading of the clause that the testator intended that any beneficiary who should attempt to defeat any of the provisions of his will should take nothing. He was equally clear in discountenancing a direct contest and indirect interference. It cannot be doubted that, had the facts warranted the conclusion, and had the court found that John B. Murphy had aided and abetted his sister, Marcella Lewis, in the contest which she filed, it would have been the duty of the court to declare the legacy to him lapsed and to have refused him distribution. It is also patent that the testator imposed upon his executors the obligation of carrying out the terms of his will, in so far as legally possible. If they had information which led them in good faith to believe that a beneficiary had by his actions brought himself within the exclusionary clause of that instrument, it became their duty in accomplishing the design of the testator, as laid down in his will, to report their information to the probate court and attempt to prevent him from becoming the recipient under an instrument he had indirectly endeavored to overthrow. It cannot, therefore, be seriously argued, in the absence of anything to indicate bad faith, at least, that Nannie L. Markham has in any manner forfeited her right as a beneficiary.

The conclusion to which we have come renders it unnecessary to pass upon any of the questions raised by the respondents.

Judgment affirmed.

I concur: CRAIG, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

99 Cal. App. 579

CALVERT v. HAMILTON. (Civ. 5360.)

District Court of Appeal, Second District, Division 2, California. June 24, 1929.

1. Executors and administrators $\hookrightarrow$ 221 (4)—In action on rejected claim against estate, evidence did not make prima facie case of sale of truck to deceased or of account stated.

In action on a rejected claim against an estate, evidence *held* insufficient to make prima facie case of sale by plaintiff of automobile truck to deceased or of account stated.

2. Trial $\hookrightarrow$ 163—Motion for nonsuit held to sufficiently state grounds as failure to prove sale and failure to show account stated.

In action on rejected claim against an estate, motion for nonsuit on ground that plaintiff failed to prove cause of action against defendant, and on further ground that evidence did not show that plaintiff at any time sold deceased an automobile for price of \$1,088, or any other sum, and did not show that at any time deceased became indebted to plaintiff in sum of \$1,088 or any other sum, and did not show an account stated, *held* to sufficiently state grounds of motion.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action upon a rejected claim by Bert Calvert against Virginia E. Hamilton, executrix of the estate of Earl R. Hamilton, deceased. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Cooper & Collings, of Los Angeles, for appellant.

C. E. McDowell, of Los Angeles, for respondent.

IRA F. THOMPSON, J. This is an appeal by plaintiff from a judgment of nonsuit, in which the appellant asserts that, giving to the testimony introduced its full probative value, he established a prima facie case, and that the grounds stated in the motion for the nonsuit were not sufficiently explicit to authorize the court to grant the motion. The action was one against the respondent in her representative capacity upon a rejected claim, and contained two counts. The first count alleged a balance due, in the sum of \$1,088, on account of the purchase by deceased from the plaintiff of an automobile truck, and the other set forth an account stated. The plaintiff introduced testimony to the effect that on November 21, 1921, the deceased sold to the plaintiff upon a lease purchase contract the automobile in question for the total price of \$2,250, payable \$700 upon execution of the agreement, and the balance at the rate of \$155 per month, commencing January 3, 1922; that Calvert made two payments of \$155.55 each, and, at a time when he was five months in arrears, Calvert entered into a conditional

contract for the sale of the truck to one Paden for the sum of \$3,000, \$900 to be paid upon execution of the contract and \$150 per month; that this contract was assigned to the deceased; that, at the time this second contract was executed, to wit, June 27, 1922, Calvert made a payment on account of the original contract of \$400, leaving a balance due, including interest and a hoist, of \$1,027. Mrs. Hamilton, called by the plaintiff, also produced a third contract dated November 20, 1922, between the Hamilton Auto Works, under which designation the deceased transacted his business, and one Mike Roselli, calling for a total price of \$2,285, the payment of \$300, upon execution of the contract and monthly installments of \$165 each. She also said that Roselli paid a total of \$1,360.91, including a charge of \$100 for insurance and \$125 on a hoist; that following payment of this amount the truck had been wrecked. The appellant lays considerable stress upon a memorandum in the handwriting of Mr. Hamilton, which he introduced in the trial court, and which reads as follows:

Earl Hamilton

Los Angeles, Cal 7-1-22

M Bert Calvert to Hamilton Auto Works,

Trucks, Tractors, Automobiles, Bodies, etc.
3566 South Park Ave.

Phone South 6369.

Lease Contract Balance due..... 1272

Paid 6/28 400

2100 New Lease
200 Brokerage

1900

872 Due on old lease

1028 B. Calvert
60 Colvears

1088

[1] Taken in connection with the testimony which we have recited, does this memorandum establish a prima facie case? It must be borne in mind that title to the truck was at all times in the deceased. Also it must be observed that no payments were made on the new lease subsequent to the initial deposit and Hamilton repossessed himself of the truck and entered into the third contract with Roselli. Counsel argues that, inasmuch as appellant was to receive under the Paden contract the sum of \$2,100, and only owed \$1,272, it should be assumed that Hamilton had agreed to accept the new contract in lieu of the old and pay appellant the difference. This construction is impossible, however because simultaneously with this new contract Hamilton required appellant to pay, and appellant did actually pay, on account of the old contract the sum of \$400. Considering the circumstances of the parties, this payment of \$400 gives to the memorandum a definite meaning, and, eliminating the payment it is unintelligible. In view of the payment

however, it seems certain that Hamilton had agreed with appellant that, if the latter made a substantial payment on account of the delinquency, he would permit him to pay the balance due on the old contract, plus a brokerage, and realize the difference on the new. It is obvious that there is nothing to indicate that the deceased had agreed to pay appellant anything—in fact, payment of the \$400 conclusively establishes the contrary. Therefore, there is no evidence either that appellant sold to the deceased an automobile truck or that there was an account stated.

[2] Turning now to the other contention of appellant that the motion for a nonsuit failed to state the grounds of the motion, we find that counsel stated his grounds as follows: "On the ground that the plaintiff has failed to prove a cause of action against this defendant; and on the further ground that the evidence does not show that plaintiff at any time sold Earl R. Hamilton an automobile for the price of \$1,088 or any other sum and does not show that at any time said Earl R. Hamilton became indebted to plaintiff in the sum of \$1,088 or any other sum" and "does not show an account stated." Under the state of the testimony in this case, and fully conscious of the rule that the moving party must point out precisely the points upon which he relies, we are of the opinion that the grounds of the motion were properly, although concisely, stated. The respondent relied upon the failure of proof in the respects to which we have already called attention, to wit, the failure to prove in any way the sale of an automobile to the deceased and the failure to show an account stated or any indebtedness upon which to state an account. The motion was sufficiently stated.

Judgment affirmed.

I concur: CRAIG, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

99 Cal. App. 372

PREO v. ROED et al. (Civ. 6743.)

District Court of Appeal, First District, Division 1, California. June 11, 1929.

1. Appeal and error $\S$ 607(1)—Transcript could be used, where notice requesting transcript was not filed within statutory time, but no notice of termination of proceedings for new trial was given (Code Civ. Proc. $\S$ 660, 953a).

Reporter's transcript was before appellate court and available for use, where notice to clerk requesting transcript was not filed with clerk within 10 days after motion for new trial was denied by operation of law under Code Civ. Proc. $\S$ 660, but no notice of termination of proceedings for new trial was given under section 953a.

2. Master and servant $\S$ 316(1)—"Independent contractor" is one representing will of employer regarding result only.

An "independent contractor" is one who renders service in course of an occupation representing will of his employer as to result of his work only, and not as to means by which it is accomplished.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Independent Contractor.]

3. Evidence $\S$ 75—Statutes relating to presumptions where evidence is suppressed held inapplicable, where defendant did not produce contract on issue of whether driver injuring plaintiff was defendant's employee (Code Civ. Proc. $\S$ 1963, subds. 5, 6, 2061).

Code Civ. Proc. $\S$ 1963, relating to presumptions under subdivision 5 that evidence willfully suppressed would be adverse if produced, and under subdivision 6 that higher evidence would be adverse from inferior being produced, and section 2061 relating to introduction of weaker evidence where stronger evidence is within power of party, held inapplicable where defendants did not introduce contract for delivery of milk on issue of whether truck driver injuring plaintiff motorcyclist when delivering milk was employee of defendant.

4. Automobiles $\S$ 242(6)—That truck striking motorcycle was hauling milk delivered to defendant did not create presumption truck owner or driver was defendant's employee.

Fact that truck striking motorcycle was hauling milk which, upon its arrival, was received by defendant corporation, did not create presumption that either truck owner or truck driver was an employee or servant of defendant corporation.

5. Automobiles $\S$ 242(6)—Plaintiff seeking recovery on theory of respondeat superior had burden of proving relation of master and servant.

In action by motorcyclist for injuries sustained in collision with truck, where plaintiff sought to recover against defendant corporation upon theory of respondeat superior, burden of proving relation of master and servant was on plaintiff.

6. Master and servant $\S$ 301(1), 302(1)—To recover on theory of respondeat superior, plaintiff must establish status of master and servant, and that act was within scope of employment.

In order to recover against an employer on theory of respondeat superior, plaintiff must establish, first, status of master and servant, and, second, that act was done within scope of servant's employment.

7. Automobiles $\S$ 194(2)—Owner of truck striking motorcyclist was not "servant" of dairy company, where he was responsible only for gathering milk and took no orders regarding method (Civ. Code, $\S$ 2009).

Owner of truck striking motorcyclist was not servant of dairy company under Civ. Code, $\S$ 2009, where he was responsible only for gathering up milk and delivering it at depot of defendant corporation within hours agreed upon

and did not take orders from any one as to manner of doing the work or as to how he was to haul milk, or who was to operate, or drive truck.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Servant.]

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Murle Preo against B. A. Roed and another for damages for personal injuries arising out of a collision between a motortruck and a motorcycle. From a judgment for plaintiff, defendants appeal. Affirmed in part, and reversed in part.

Superseding former opinion in 277 P. 145.

Fenston, Williams & Hansen and Frank Kauke, all of Fresno, for appellants.

Gallagher & Jertberg, of Fresno, for respondent.

CAMPBELL, Justice pro tem. In this action the jury found for the plaintiff and against the defendants and assessed plaintiff's damages in the sum of \$7,500. From the judgment entered upon this verdict defendants have appealed.

The action grew out of a collision which took place between a truck owned by defendant B. A. Roed, which was being operated by his brother, L. A. Roed, and a motorcycle driven and ridden by plaintiff; it being alleged that defendant B. A. Roed was delivering milk of the Jersey Farm Dairy Company, under which name defendant Frank M. Helm, Inc., was doing business, and the damages awarded were for personal injuries received by plaintiff as the result of such collision.

Appellant B. A. Roed has filed no brief, and appellant Frank M. Helm, Inc., in its brief, contends that the judgment should be reversed for the reason that defendant B. A. Roed, whose truck, which was driven by his brother, L. A. Roed, and which collided with the motorcycle driven and ridden by respondent, was not an employee of defendant Frank M. Helm, Inc., but was an independent contractor. Respondent disputes this contention and urges that the evidence and inferences properly deducible therefrom sufficiently support the allegation that B. A. Roed was at the time of the accident in the employ and acting as the servant and agent of appellant Frank M. Helm, Inc., and further urges that the reporter's transcript on appeal—the appeal having been taken under the alternative method—cannot be considered for the reason that the notice of appellant to the clerk to prepare the transcript under the provisions of section 953a of the Code of Civil Procedure was not given within the time allowed by law, and this court is without jurisdiction to avail itself of the reporter's transcript, and therefore the clerk's transcript is the only record in the case properly before the court.

[1] This latter contention of respondent is based upon the fact that the notice to the county clerk requesting that the transcript of the testimony, etc., be made up and prepared was not filed with the clerk within 10 days after the motion for new trial was denied by operation of law under section 660 of the Code of Civil Procedure; the motion not having been made nor acted upon by the court within the two months' period prescribed by the statute. No notice of the termination of the proceedings for a new trial was given under section 953a of the Code of Civil Procedure. In support of his position respondent cites *Bernschein v. Whitaker*, 175 Cal. 130, 165 P. 523, as holding that under the situation presented here the court is without jurisdiction to avail itself of the reporter's transcript. That case, however, is overruled in the recent case of *Amstead v. Pacific Gas & Electric Co.*, 201 Cal. 198, 256 P. 209, where the court, in passing on the precise question involved here, says: " * * * Under the provisions of section 953a of the Code of Civil Procedure, when a proceeding upon motion for a new trial is pending, the time of the appellant to give and file his notice and request for a transcript does not expire until 'ten days after notice of decision denying said motion or of other termination thereof.' * * * The case of *Bernschein v. [Whitaker]* 175 Cal. 130, 165 P. 523, in so far as it is in conflict with the foregoing views, is overruled." Under this authority we must hold the reporter's transcript before us and available for use in determining the point urged by appellant Frank M. Helm, Inc., that defendant Roed was not an employee of defendant corporation, but was an independent contractor.

The facts of the case are as follows: Frank M. Helm, Inc., a corporation, was at the time in question transacting business under the name of Jersey Farm Dairy Company, handling dairy products in the city of Fresno. Several years prior to the accident complained of there was an association of dairymen known as the San Joaquin Valley Milk Producers' Association. The Jersey Farm Dairy Company purchased from the San Joaquin Valley Milk Producers' Association milk delivered at its depot in Fresno, and the defendant B. A. Roed, under an agreement made by him with the association, gathered up milk from the various dairymen producers and hauled or delivered the milk to the corporation. The association went out of business, and, instead of having a contract for the purchase of milk from an association, the corporation made separate contracts with the individual dairymen, respectively, and the defendant B. A. Roed continued to haul milk to the depot of the corporation. According to the testimony of J. S. Canham, manager of the corporation, "there are drivers that had their entire route, when we took them on, same as in the case of Roed, and several others." Each contract made by the corporation with

the dairymen contained the provisions that the seller agreed to sell and deliver at the buyer's premises all the milk produced from a certain number of cows or from a certain dairy, and that the milk was to be delivered twice each day at the buyer's premises at 1820 Tulare street, Fresno, Cal., and that payments for all milk delivered during each month were to be made on the 15th of the following month. The rate paid to defendant Roed, according to his testimony, is fixed by the dairymen. The rate when the association ceased and the corporation took the milk direct from the dairymen was the same as formerly paid by the association, but four or five years ago the dairymen complained and the rate was reduced. The corporation each month paid Roed his delivery charges and paid the dairymen the amount due them for milk delivered after deducting the hauling charges paid to Roed. In a few instances dairymen who had contracts for delivery of milk to the Jersey Farm Dairy Company protested to J. S. Canham, manager of the corporation, that the price of delivery was too high. On each of these occasions Mr. Canham referred them to B. A. Roed and notified B. A. Roed of the protest. If a new customer was secured, the manager of the corporation would either tell the driver to call at the new customer's place and get his milk or would tell the dairyman to hail the driver and send his milk in.

[2] From the foregoing facts respondent urges that the inference may be properly drawn that defendant B. A. Roed was the servant of Frank M. Helm, Inc. We question this conclusion. Section 2009 of the Civil Code provides: "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." An independent contractor is one who renders service in the course of an occupation, representing the will of his employer as to the result of his work only and not as to the means by which it is accomplished. *Fidelity & Casualty Co. v. Industrial Accident Com.*, 191 Cal. 404, 216 P. 578, 43 A. L. R. 1304. In *Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 480, 183 P. 178, 183, the court says: "The accepted doctrine is that, where the essential object of the employment is the performance of work, the relation of master and servant does not exist unless the employer retains the right to direct the mode and manner in which the job shall be done; or, in other words, not only what shall be done, but how it shall be done. (*Labatt on Master and Servant*, sec. 64; *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 P. 721.) 'The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for' (*Green v.*

Soule, 145 Cal. 96, 99, 78 P. 337, 339). He is deemed to be the master who has the supreme choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate results of the work, but in all the details." The facts in the case of *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 P. 721, are somewhat similar to the facts in the present case. Here, as in that case, the manager of the corporation directed the person employed in the matter of the material to be hauled; there was no arrangement whereby the person employed was to personally drive his truck or vehicle; he could place any competent man in charge, and here defendant Roed did in fact employ his brother, who was driving the truck at the time of the accident. Each month Roed received a check from the corporation representing the aggregate amount the various dairymen should pay to him for delivering the milk to the corporation. If in *Western Indemnity Co. v. Pillsbury* the injured party had been the employee of the owner of the team instead of the driver and owner, the situation would be the same as in the present case. Thus, if L. A. Roed has been injured while in his brother's employ at a monthly wage and while driving his brother's truck as such employee, the corporation would not be liable to him under the Workmen's Compensation Act (St. 1917, p. 831, as amended). If not liable to L. A. Roed in such case, it would seem that the corporation cannot be held liable for his negligence, if any there were, whereby plaintiff was injured. The following language from the opinion by Mr. Chief Justice Holmes in *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922, quoted in *Western Indemnity Co. v. Pillsbury*, supra, is apropos here: "In cases like the present, there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street."

[3, 4] Respondent argues that since the contracts provide that the dairymen will respectively deliver their own milk, and since B. A. Roed did deliver the milk and was paid by Frank M. Helm, Inc.—even though paid from funds belonging to the dairymen—the conclusion follows that the corporation employed B. A. Roed to deliver the milk purchased by the corporation and the jury was obliged to accept the failure of either of these defendants to produce the evidence of a contract between them made for the delivery of the milk by B. A. Roed as strong evidence that such contract, if shown by the evidence, would be adverse to the contention of defendants, and cites section 1963 of the Code of Civil Proce-

dure, providing that certain presumptions are satisfactory, if not contradicted, as follows: Subdivision 5: "That evidence willfully suppressed would be adverse if produced." Subdivision 6: "That higher evidence would be adverse from inferior being produced." Respondent also cites from section 2061 of the same Code: "That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, * * * that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory" evidence "was within the power of the party, the evidence offered should be viewed with distrust." We fail to see the application of these sections to the record here presented. Plaintiff's motorcycle collided with a truck operated by L. A. Roed, which truck was the property of defendant B. A. Roed. Therefore there arose an inference that L. A. Roed was at the time, and in the line or course of his employment, operating the truck as an employee or servant of defendant B. A. Roed, and, if in fact he was not then acting as such employee or servant, it devolved upon defendant B. A. Roed to show the status or relationship at the time of the accident, if that inference was to be dispelled. *Maupin v. Solomon*, 41 Cal. App. 323, 183 P. 198; *Brown v. Chevrolet Motor Co.*, 39 Cal. App. 738, 179 P. 697. The fact that the truck was hauling milk, which upon its arrival in Fresno would be received by the corporation, did not create an inference or presumption that either defendant B. A. Roed or L. A. Roed was an employee or servant of the corporation any more than a railway company transporting merchandise from one party to another is the servant of the party sending or the party receiving the merchandise, or that a truckman hauling a farmer's wheat to a grain merchant—who may be authorized to pay the truckman and deduct the amount of the cartage from the seller's proceeds—is the servant of the merchant.

[5] The plaintiff sought to recover against the corporation upon the theory of respondeat superior. The burden, therefore, of proving the relation of master and servant or employer and employee was upon plaintiff. The plaintiff called for cross-examination the manager of the corporation and the defendant Roed; and while showing that the milk was being conveyed by a truck to be delivered to the corporation, and that the compensation to be received by defendant Roed would be

handed to him by the corporation, the plaintiff by such witnesses also established the fact that the defendant Roed was not an employee or servant of the corporation, but that he was an independent contractor. It is true that these witnesses were called for cross-examination under section 2055 of the Code of Civil Procedure and plaintiff was not bound by their answers, but their testimony, however, is in no manner refuted by any other witness.

[6] The quantum of proof necessary for the plaintiff to produce when relying on the doctrine of respondeat superior is stated in *Kish v. California State Automobile Association*, 190 Cal. 246, 251, 212 P. 27, 29, as follows: "It is insisted by plaintiff that the evidence adduced having conclusively shown the relation of master and servant a prima facie case was made out of the responsibility of the master which must be overcome by the defendant, and that a nonsuit was therefore improper. But to recover against an employer upon the theory of respondeat superior, it is necessary for the plaintiff to establish the two distinct facts of (1) the status of master and servant, and (2) that the act was done within the scope of the servant's employment."

[7] Defendant Roed did not take orders from any one as to the manner of doing the work, or how he was to haul the milk, whether by team or automobile truck, or who was to operate or drive the truck or vehicle. He was responsible only for gathering up the milk, transporting it safely and delivering it at the depot of the corporation within the hours agreed upon by the dairymen and the corporation, and was therefore not the servant of the corporation.

Stedman v. Stedman, 179 Cal. 288, 176 P. 437, holding under sections 1963 and 2061 of the Code of Civil Procedure that where weak corroboration was offered where stronger evidence was possible, the court was bound to presume under the circumstances that their testimony would be unfavorable and was for that reason suppressed, being a divorce action, where the statute requires the plaintiff to make out his case by sufficient corroborating evidence, has no application here.

As to appellant B. A. Roed, the evidence amply supports the judgment against him, and as against him the judgment is affirmed. It must, however, be reversed as against appellant Frank M. Helm, Inc., and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

99 Cal. App. 534

ACKLEY v. PRIME. (Civ. 6492.)★

District Court of Appeal, First District, Division 1, California. June 21, 1929.

Rehearing Denied July 19, 1929. Hearing Denied by Supreme Court Aug. 19, 1929.

1. Attorney and client ⇨78—Attorney engaging another attorney to collect sum, payment of which attorney had guaranteed, was primarily liable for money collected.

Under general rule that, where one is retained as an attorney or who undertakes to perform an act which requires an attorney, himself engages an attorney to perform the act, the latter is but a subagent, and relation of attorney and client does not subsist between him and original employer; attorney who engaged another attorney to collect a sum, payment of which he had guaranteed, was primarily liable for money collected by attorney thus employed.

2. Money received ⇨6(5)—Action for money had and received will lie to recover from attorney money belonging to hospital whose bill for services to clients attorney promised to pay.

Where defendant attorney guaranteed payment of hospital bill for services rendered client, and money came into hands of defendant and his agent as result of settlement obtained in lawsuits sufficient to cover hospital bill, which money in equity and good conscience belonged to hospital and was being withheld from it, held that an action for money had and received will lie.

3. Frauds, statute of ⇨159—Whether promise to answer for obligation of another is original or collateral is question of fact unless there is unambiguous written contract when question is for court (Civ. Code, § 2794).

Under Civ. Code, § 2794, whether or not promise to answer for the obligation of another is original or collateral is question of fact, unless negotiations of party are incorporated in an unambiguous contract, when it is for court to determine, and solution of question is dependent largely on determination of whether direct object of promise is to become liable on default in performance of another, for payment of another's debt, or whether such object is to subserve some purpose of promisor, although effect is to pay debtor's obligation.

4. Frauds, statute of ⇨158(4)—Evidence held to support finding that attorney promising to pay for hospitalization of injured clients incurred primary liability therefor; "guarantee."

Evidence held to sustain finding that promise of attorney incorporated in letter to pay for hospitalization of his injured clients was an original promise incurring primary responsibility and not a collateral promise to incur a secondary liability, and fact that attorney used word "guarantee" in letter does not alter situation, since use of such word does not in itself import contract of guaranty, as it is frequently used in sense of promise or agree, etc., importing an original obligation on part of person executing same.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Guarantee.]

5. Appeal and error ⇨1035—That action should have been founded on contract of guaranty instead of for money had and received will not require reversal where money was admittedly due (Const. art. 6, § 4½).

Even though agreement by attorney to pay for hospitalization of injured client constituted a contract of guaranty, a judgment in favor of hospital in an action for money had and received will not be reversed, where it is shown that money sued for is admittedly due, as defense that complaint for its recovery should have declared on special contract instead of on common counts is a technical one, and, in view of Const. art. 6, § 4½, does not require reversal of judgment.

Appeal from Superior Court, City and County of San Francisco; F. M. Jamison, Judge.

Action for money had and received by Edward Ackley against Spencer G. Prime. Judgment for plaintiff, and defendant appeals. Affirmed.

William F. Herron, of San Francisco, for appellant.

Franklin T. Poore, of San Francisco, for respondent.

PER CURIAM. This is an action to recover upon three assigned claims for money had and received, each claim being made the subject of a separate count in the complaint, the first of which was dismissed. The second and third counts are based upon allegations to the effect that defendant received from Samuel R. Allan and Charles Hammer, respectively, the sums of \$365.55 and \$477.55 to and for the use of the Morton Hospital, a corporation, but refused to pay any part thereof to said corporation or to plaintiff. The trial resulted in a judgment in favor of plaintiff, and the defendant appeals; the sole ground urged for reversal being that the evidence fails to establish a cause of action for money had and received, that defendant's liability, if any, was upon a written contract of guaranty, and that plaintiff's action should have been founded thereon.

[1] It appears that defendant, as attorney for Allan and Hammer, instituted two actions in their behalf to recover damages from the Remington Typewriter Company on account of personal injuries sustained by them in an automobile collision. The injuries necessitated hospital treatment, which was furnished by the Morton Hospital under the following circumstances, as the same were established by the testimony of three members of the hospital staff, namely Drs. Gardner and Morton, and Edith Barnett, the superintendent: Defendant, after explaining the circumstances under which the men were injured, and that as their attorney he had instituted actions for the recovery of damages, agreed that, if the hospital management would receive the men and furnish them with necessary hos-

pitalization, he would pay the cost thereof out of the money received in said lawsuits, and would be "personally responsible" for such payment. Under such agreement the men were admitted to the hospital, and, after being treated there for a short time, Dr. Morton requested defendant to "confirm" his agreement in writing, which the defendant did; the letter to that effect reading as follows:

"March 21st, 1924.

"Supt. Morton Hospital, 1055 Pine Street, San Francisco, Calif. Dear Sir: You have in your hospital as patients, Samuel R. Allen and Charles Hammer, both suffering from injuries as a result of automobile accidents and said cases are under the personal supervision of Doctor George Gardner. Actions for damages in each of the foregoing cases have been filed against alleged persons causing the injuries, and I am the Attorney of record representing the persons herein named. As these cases were placed in your hospital as a result of my solicitation, I wish by this letter to guarantee to your institution the payment of the necessary indebtedness in the case and treatment of both Allen and Hammer and services in connection therewith. Both of these cases are being defended by Insurance Companies, as a result of Policies for Liability issued to the Owners of the Automobiles causing the injuries. Very truly yours, Spencer G. Prime."

Thereafter the men remained in and were treated at the hospital until they recovered from the effects of their injuries. Eventually Allan's case against the typewriter company was settled for \$2,500, and a check for that amount was made payable to defendant and Allan jointly, and delivered to defendant. After certain expenses were deducted and Allan was paid his share of the settlement, defendant retained for himself approximately \$1,240, but he refused to pay any part of Allan's hospital bill. Before Hammer's case was brought to trial, a disagreement arose between Hammer and defendant, which resulted in a substitution of attorneys, defendant being succeeded by attorney Reed M. Clarke. The case was afterwards brought to trial and a judgment obtained for \$13,000. Thereupon two attachments were levied against the judgment. One was issued in an action brought by the defendant Prime against Hammer to recover attorney's fees. The other was issued in an action commenced in the name of the Morton Hospital against Hammer to recover the amount of the latter's hospital bill. The plaintiff in each action was represented by Attorney Herron. Subsequently a settlement was made in each case. Prime received a "substantial sum" in payment of his claim for attorney's fees, the amount not being disclosed by the record; and the full amount of the hospital demand, amounting to \$488.84, was paid by check

drawn in favor of and delivered to Mr. Herron, who subsequently cashed the same. However, no part of the money received on said check was ever paid to the Morton Hospital. In this connection Mr. Herron testified that the failure to pay the money to the hospital was due to the fact that Dr. Morton was absent in Europe for several months, that he had always kept the money for him, and had never paid any part of it to Mr. Prime. At the time the check was delivered to Mr. Herron, the indorsement thereon read: "In full of all demands in that said action entitled Morton Hospital, Plaintiff, vs. Charles Hammer, Defendant, pending in the Superior Court of S. F. No. 152, 192, in which action payee is attorney for plaintiff."

Defendant admits that he engaged the services of Mr. Herron to commence the action on behalf of the hospital against Hammer, but claims that Dr. Morton authorized him so to do. This latter statement was contradicted by Dr. Morton. He testified, in substance, that defendant, after having obtained a statement of Hammer's account from the hospital, caused said action to be instituted on his own initiative, in order to protect himself under his promise to the hospital to stand personally responsible for the cost of Hammer's treatment, and that, after the attachment had been levied, the defendant informed him that there would be no charge against the hospital for making the collection. Mr. Herron testified that he commenced the action without knowing who had engaged his services; that he got his authority from the papers which were left in his office, the complaint having been verified by Dr. Morton; that he did not know whether his own clerk or some one else's brought the papers to his office; and that he had never seen Dr. Morton prior to the day on which the present action was tried. In view of the foregoing conflict, it must be presumed on this appeal that the trial court accepted as true the testimony of Dr. Morton, and concluded therefrom accordingly that, so far as Mr. Herron's services were concerned, he was acting as defendant's agent and not for the hospital; and that consequently, under the general rule declaring that, "where one is retained as an attorney, or who undertakes to perform an act which requires an attorney, himself engages an attorney to perform the act, the latter is but a subagent and the relation of attorney and client does not subsist between him and the original employer" (6 Cor. Jur. 631), defendant was primarily responsible also for the money collected by Mr. Herron.

[2] It would appear, therefore, that the money thus coming into the hands of the defendant and his agent as a result of the settlements obtained in said lawsuits was sufficient to cover the cost of hospitalization of the defendant's clients, and that in equity and good conscience it belonged to the hos-

pital, and was being withheld at the time of the commencement of this action. Under such circumstances it has been held that an action for money had and received will lie, *M. H. Hoffman, Inc., v. Bernstein Film Productions*, 42 Cal. App. 12, 183 P. 293; *Fox v. Monahan*, 8 Cal. App. 709, 97 P. 765.

[3] Aside from the foregoing view, however, and even assuming it to be the law, as defendant contends, that an action for money had and received cannot be maintained where it appears that the defendant's liability is a secondary one only, arising out of a special contract of guaranty, we are of the opinion that the evidence here does not establish such a contract. With reference thereto, section 2794 of the Civil Code provides that a promise to answer for the obligation of another is deemed an original obligation of the promisor and need not be in writing, where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety; and in this connection it has been held that whether or not the promise is original or collateral is a question of fact (*Harris v. Frank*, 81 Cal. 289, 22 P. 856); or, in case the negotiations of the party are incorporated into an unambiguous written contract, it is for the court to determine, and that the solution of the question is dependent largely upon a determination of whether the direct and leading object of the promise is to become liable upon the default in the performance of another, for the payment of another's debt, or whether such object is to subserve some purpose of the promisor, although the effect is to pay the debtor's obligation (*Clay v. Walton*, 9 Cal. 328; 13 Cal. Jur. 87).

[4] The facts of the present case, when construed in the light of the authorities above cited, are amply sufficient to support the conclusion that the object of defendant's promise to the hospital was not, as defendant contends, to incur a secondary liability to pay for the care of his injured clients in the event only that they defaulted in making such payment, but that his intention was to create a primary liability to pay for the same out of the proceeds to be received from said lawsuits, in conformity with an agreement he had made with his clients to that effect, and that the hospital management so understood it. And the circumstance of defendant having used the word "guarantee" in said letter or elsewhere during the making of the agreement does not alter the situation, because, as has been held, the use of such word does not in itself import a contract of guaranty; it being frequently used in the sense of promise or agree, etc., importing an original obligation on the part of the person executing the same (*Meyer v. Moore*, 72 Cal. App. 367, 237 P. 550; 13 Cal. Jur. 87); and, when the context of

the letter is considered along with the oral testimony relating to the making of said agreement, it becomes apparent at once that defendant intended to be understood as incurring a primary responsibility, and that it was upon the strength of such primary responsibility that the credit for the hospitalization of Allan and Hammer was extended.

[5] Even though a strained construction of the evidence be given, and it be held that the transactions relating to said agreement constituted a special contract of guaranty and that plaintiff's remedy was restricted to an action founded thereon, it is plain to be seen that, since neither of the original debtors have paid the debts defendant "guaranteed," the bringing of an action for the enforcement of the contract of guaranty would necessarily result in a judgment in favor of plaintiff. That being so, a reversal of the present judgment is not warranted, for, as said in *California Jurisprudence*, vol. 17, p. 632, where it is shown that the money sued for is admittedly due, the defense that the complaint for its recovery should have declared upon a special contract instead of upon common counts "is a technical one, and in view of section 4½ of article 6 of the Constitution a judgment for plaintiff on the common count will not be reversed on the ground that there is an executory written contract between the parties where the result would not be changed by sending the case back for a retrial on other pleadings"—citing *M. H. Hoffman, Inc., v. Bernstein Film Productions*, supra.

The judgment is affirmed.

The PEOPLE of the State of California, Plaintiff and Respondent, v. K. OSAKI and K. Yoshioka, Defendants and Appellants. (Cr. 1079.)★

District Court of Appeal, Third District,
California. June 15, 1929.

Appeal by defendants from a judgment of the Superior Court of Sutter County, K. S. Mahon, Judge, of conviction of violating the Alien Land Law and from an order denying motion for new trial. Reversed.

On Rehearing.

For former opinion, see 278 P. 252.

Lloyd E. Hewitt, of Yuba City, W. P. Rich, of Marysville, and Brobeck, Phleger & Harrison, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Dep. Atty. Gen., for respondent.

PER CURIAM. Disregarding the fact that the petition for rehearing was not filed herein within the time required by the rules of this court and the rules of the Supreme Court, being only filed this day, nevertheless we have

given the petition such consideration as the limited time allowed us under the Constitution permits. Further consideration convinces us that section 9a of the Alien Land Law, as amended in 1927 (St. 1927, p. 880), placing the burden of proof upon the defendants as to facts necessary to be shown to prove the corpus delicti of the offense charged, is unconstitutional. In the recent case of *Manley v. State of Georgia*, 49 S. Ct. 215, 73 L. Ed. —, the Supreme Court of the United States, in speaking of presumptions, where the Legislature of Georgia attempted to make certain facts presumptive evidence of guilt, the court said: "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. 'It is not within the province of the legislature to declare an individual guilty or presumptively guilty of a crime'—citing *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899. The Legislature, in the act under consideration, attempted not only to make proof of certain facts presumptive evidence of that which is necessary to constitute a crime, but also attempted to shift the burden of proof by the simple expedient of inserting certain allegations in the information or indictment. In no other instance has the Legislature attempted to relieve the state from proving all the elements necessary to constitute the corpus delicti of the offense charged. The holding seems to us absolutely necessary that such a proceeding is a denial of due process of law under the Constitution of this state (art. 1, § 13) and of the Fourteenth Amendment to the Constitution of the United States.

The petition for rehearing is denied.

99 Cal. App. 462

JOHNSTON v. GROOM et al. (Civ. 6457.)

District Court of Appeal, First District, Division 2, California. June 18, 1929.

1. Appeal and error ⇨931(1)—Appellate court will assume, where evidence was in sharp conflict, that evidence supporting finding was true.

In suit to foreclose mechanic's lien, where evidence on issue whether certain payment released certain of defendants from claim of lien in that amount on building was in sharp conflict, District Court of Appeal, in accordance with rule that, where evidence appears that supports finding made, finding will be sustained, will assume that evidence payment was to be applied towards diminishing lien was the truth.

2. Mechanics' liens ⇨115(4)—Where payment was made with understanding it was to apply so as to decrease mechanic's lien on building, parties were thereby bound (Civ. Code, § 1479).

Where payment to contractor was made with understanding that it was to be applied

toward certain building job, so as to decrease lien thereon, creditor receiving money under those conditions was therefore bound by them, under Civ. Code, § 1479, providing that, if debtor, at or before time of payment, directs application of payment to any particular obligation, and creditor receives money, he is bound by direction.

3. Payment ⇨47(1)—Where payment is understood as applying to particular debt, appropriation by either party cannot be changed to injuriously affect rights of third parties.

Where payment is made with understanding that it is to apply towards payment of particular debt, appropriation by either party cannot be changed, so as to injuriously affect rights of third parties.

4. Mechanics' liens ⇨115(1)—When payment is made on account of lienable obligation, owners are "third parties" whose rights would be injuriously affected by subsequent appropriation of payment to another obligation.

When payment has been made on account of lienable obligation, the owners are "third parties" whose rights would be injuriously affected by subsequent appropriation of payment to another obligation.

[Ed. Note.—For other definitions, see Words and Phrases, Second and Third Series, Third Party.]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by R. E. Johnston against Harry C. Groom and others. Judgment for plaintiff in less amount than prayed for, and he appeals. Affirmed.

David Cosgrave, of Redwood City, for appellant.

Ross & Ross, of Redwood City, for respondents.

NOURSE, J. Plaintiff sued to foreclose a mechanic's lien in the sum of \$1,946. The cause was tried before the court without a jury, and resulted in a judgment for plaintiff in the sum of \$946 from which he appeals on typewritten transcripts.

The defendant Groom was a building contractor, and in the course of his business constructed a building for the other defendants in Redwood City. The plaintiff was a cement contractor, who furnished the materials for and performed the cement work on the same building under a subcontract with Groom. At about the same time Groom and the plaintiff were engaged in the construction of other buildings under the same arrangements. Groom admittedly owed plaintiff the sum of \$1,946 on account of the work and labor performed on the Redwood City building, while his indebtedness to plaintiff on the other contracts amounted to \$2,357. On June 1, 1927, acting under Groom's instructions and his arrangement with the plaintiff, Mrs. Groom deposited with the Bank of Italy in Redwood

City her check for \$1,000, with instructions to credit the proceeds to plaintiff's account. This was done, and the whole controversy here is whether this payment should be applied to the Redwood City job, or whether the plaintiff could apply it to the general indebtedness of Groom.

The trial court found that the payment of June 1st was made upon the Redwood City contract, and released the remaining defendants from the claim of lien in that amount upon that building. The lien was ordered foreclosed to the extent of the balance, \$946, which sum the remaining defendants paid into court following the judgment. The sufficiency of the evidence to support this finding presents the only question on this appeal.

[1] The evidence on this issue is in sharp conflict, but in accordance with the general rule that, where evidence appears that supports the finding made, the finding must be sustained, we will assume that such evidence is the truth, and we will here recite the facts as outlined by respondents, with the mere statement that it was contradicted in almost every particular. The Redwood City contract was referred to by all parties as the "Beeger job No. 2." In May, 1927, appellant approached Groom and asked for a payment of \$1,000 on the Beeger job. Groom was leaving for the East, and instructed his wife to pay appellant \$1,000 on the Beeger job. Appellant later asked Mrs. Groom for that sum, and then directed her to deposit it with the Bank of Italy to his credit. On June 1st Mrs. Groom deposited her check for \$1,000 in the Bank of Italy, with instructions to credit the proceeds to appellant and noted on the check that it was given on account of the Beeger job. Prior to that appellant had approached the respondent Smith, and asked if he could arrange with Groom so that he, the appellant, could get a payment of \$1,000 on this same job. After the deposit had been made to his account in the bank, he again saw Smith and told him everything had been fixed up. On July 7th thereafter the appellant and Groom met to settle their accounts, and thereupon, by arrangement between themselves, agreed that this payment of \$1,000 should be credited to other indebtedness of Groom. The latter then gave the appellant his note for \$1,357, representing the balance of this other indebtedness, and left appellant free to claim the full sum of \$1,946 upon his lien for work done on the Beeger job. This evidence fully supports the finding under attack.

[2-4] But appellant argues that, notwithstanding this fact, the creditor and the debtor had the right to apply the payment to such indebtedness as they agreed upon, and that, they having agreed to apply it to the other indebtedness, appellant should be permitted to enforce his lien to the full amount. The proper application of a payment where sever-

al obligations exist between the creditor and the debtor is fixed by section 1479, Civil Code. There it is provided that, if the debtor, at or before the time of payment, directs the application of the payment to any particular obligation, and the creditor receives the money, he is bound by the direction. 20 Cal. Jur. 931. Here the finding is that the payment was made under directions to apply it on the account of the Beeger job. The appellant, having received the money under these conditions was, therefore, bound by them. The rule is uniform that, when this has been done, the appropriation by either party cannot be changed so as to injuriously affect the rights of third parties. *Goss v. Strelitz*, 54 Cal. 640, 645; 30 Cyc. 1251. When a payment has been made on account of a lienable obligation, the owners are third parties whose rights would be injuriously affected by a subsequent appropriation of the payment to another obligation.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

PEOPLE v. BRYANT et al. (Cr. 3140.)

Supreme Court of California. June 27, 1929.

1. Criminal law §1165(2)—It is Supreme Court's policy to hear appeals on merits and avoid, if possible, forfeiture of substantial rights upon technicalities.

It is policy of Supreme Court to hear appeals upon merits and to avoid, if possible, all forfeiture of substantial rights upon technicalities.

2. Criminal law §1071—Appeal should be heard on merits, where defendants substantially complied with statute but failed to file application to trial court stating grounds of appeal (Pen. Code, § 1247).

Defendants' appeal from conviction of crime of obtaining money under false pretenses should be heard on merits, where defendants substantially complied with Pen. Code, § 1247, but failed to file and present an application to trial court stating in general terms grounds of appeal and points upon which defendants relied.

Seawell, J., and Waste, C. J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

J. F. Bryant and another were convicted of obtaining money under false pretenses, and they appeal. On motion to dismiss the appeal. Motion denied.

Superseding opinion in 273 P. 795.

Charles W. Ostrom, John Henderson Pelletier, and Elliott H. Barrett, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for respondent.

PER CURIAM. The defendants were convicted on January 27, 1929, in the superior court in and for the county of Los Angeles of the crime of obtaining money under false pretenses. On February 1, 1928, they filed their notice of appeal to the District Court of Appeal, but they failed to comply, technically, with section 1247, Penal Code, in that they did not file with the clerk and present an application to the trial court which stated in general terms the ground of appeal and the points upon which the appellants rely. On January 31, 1928, the day when judgment was pronounced upon the verdict, appellants filed a written notice of appeal and also gave oral notice of appeal from the judgment and order denying their respective motions for new trials. On the following day they filed with the clerk of the court in which the proceedings were had the following notice and request, addressed to the clerk of said court:

"Please take notice that the defendants have appealed from the judgment heretofore rendered in the above-entitled action, and state that in order to properly prepare the

appeal, it will be necessary for them to have a phonographic copy of the reporter's transcript, together with all the evidence taken upon the trial and of proceedings had in the case relative to testimony taken before the court at the trial of said action and, as well, the clerk's transcript as required by the Penal Code of this state, including the indictment; a copy of the minutes of the trial; a copy of other minutes of the action, including the proceedings on motion and arrest of judgment and new trial; a copy of the written charges given by the court to the jury; a copy of the instructions requested by the defendants and refused by the court, and a copy of instructions requested by defendants and modified by the court, after given; also transcript of any oral charges; a copy of the judgment and any written or printed exhibits offered in evidence at the trial of the cause, and the defendants hereby request that an order of this court be made accordingly."

After the appellants had completed their record upon appeal, a motion was made by the Attorney General to dismiss the appeal, which motion was granted by the District Court of Appeal. On petition therefor, a hearing in this court was granted, and the motion to dismiss is before us for determination.

The attorneys who prepared the papers on appeal evidently relied upon the act of the Legislature (St. 1927, p. 1048) which practically repealed section 1247, Penal Code, but they also evidently overlooked the fact that, by virtue of section 1246, Penal Code, also enacted in 1927 (St. 1927, p. 1047), section 1247 remained in force and effect until such time as the Judicial Council had promulgated rules of procedure governing appeals in such cases, which had not been done at the time this appeal was taken.

This mistake is one which might be made readily, and indeed the number of cases in which it has been made bears evidence of the fact that the form of the legislation conditionally repealing section 1247, Penal Code, was in the nature of a trap to the unwary.

[1] It is the policy of this court, of course, to hear appeals upon the merits and to avoid, if possible, all forfeiture of substantial rights upon technicalities.

[2] In the instant case, there was a substantial compliance with section 1247, for it is not disputed that the record on appeal is sufficient in every respect, excepting the failure on the part of appellants to comply with those particular portions of section 1247, Penal Code, which provide that the application filed with the clerk and presented to the trial court should contain a statement in general terms of the grounds of the appeal and the points upon which appellants rely.

This provision is for the benefit of the appellate court to aid it in deciding the points

raised upon appeal, and no one else is prejudiced by the omission in this case. In other words, the appellants substantially complied with section 1247, Penal Code, and the defect worked no injury to any one, but resulted merely in an extra burden being placed upon the appellate court. In view of these facts, and the fact that the legislation conditionally repealing section 1247, Penal Code, is in a form which may readily mislead, we are disposed to take the view that the appeal should be heard upon its merits.

The motion to dismiss the appeal is denied.

SEAWELL, J. I dissent. This case was originally decided by this court January 15, 1929 (273 P. 795), and upon a rehearing granted, a majority of the court have joined in the above decision, which holds contrary to said original decision. Nothing said in the main opinion has caused me to depart from the views as set forth in said original decision and I, therefore, adopt so much of said decision as may be necessary to state the situation and the law applicable thereto:

"It is not disputed that the record on appeal is sufficient in every respect, excepting the failure on the part of appellants to comply with those particular portions of section 1247, Penal Code, which we have indicated by symbols of emphasis and which provide that the appellant 'Must, within five days [upon appeal taken], file with the clerk and present an application to the trial court, *stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon.* If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken.'

"It is not contended by appellants that they complied with that portion of said statute which provides for the filing with the clerk and the presentation to the trial court of an application containing a statement of the grounds of appeal and the points upon which the appellants relied. It is appellants' contention that section 1247, Penal Code, was directly and unqualifiedly repealed by the Legislature of 1927 [St. 1927, p. 1048] and was not effective at the time the appellants attempted to perfect their appeal, to wit, February 1, 1928. The Attorney General, on the other hand, contends that said section remained effective by virtue of the saving clause of section 1246, which by amendment [St. 1927, p. 1047] was made a part of said section by the same act which also conditionally repealed said section 1247. Said amended section 1246 became effective in the latter part of July, 1927, and reads: 'The record on appeal shall be made up and filed in such time and manner as shall be prescribed in rules to be

promulgated by the Judicial Council. Until such rules are promulgated, the time and manner provided by statutes in force on January 1, 1927, shall govern.' * * *

"By article 6, § 1a, subd. 5, of the Constitution, as amended, the Judicial Council may adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are in force. It is conceded that, at the time the motion was made to dismiss the appeal, the Judicial Council had not promulgated any rules on the subject.

"Sections 1246 and 1247, Penal Code, and successive sections amended conditionally or unqualifiedly repealed are in *pari materia* and have to do with the preparation and perfection or dismissals of appeals and were considered in *one* act. There can be no doubt that it was the intention of the Legislature to continue in force the rules of procedure then in effect until such times as said procedural rules should become supplanted by a system that would better harmonize with the new order of things, which was assuming shape under the supervision and direction of the Judicial Council. In *People v. McClellan* (Cal. App.) 263 P. 841, it was held that section 1247, relates to the time and manner of making up and filing the record on appeal, and, if not complied with, the appeal would be subject to dismissal. There can be but little doubt that the Legislature regarded the subject matter of said section as constituting a part of the procedure upon appeal, inasmuch as said section provided not only that 'if such application is not filed within said time, the appeal is wholly ineffectual,' but that it 'shall be deemed dismissed.' This language renders the act self-executing.

"The intent of the Legislature and the object it had in mind must not be lost sight of in interpreting or giving effect to statutes, and, where apparent conflict or uncertainty exists in the several provisions of an act, or where several separate acts promotive of a general plan or system are not harmonious or congruous, it is the duty of courts to look to the purpose or intent of the Legislature and give that construction to the various acts which the reason and sense of the situation manifestly demand. 23 Cal. Jur. 725.

"The question whether a repeal of a prior statute, absolute in terms, can be limited in its operation and effect for any reason has frequently arisen; and the decisions of the courts have been uniform, that while the language of the repealing clause must be accepted as the expression of the will of the Legislature, and effect given to it according to its terms, unless it appears, although the language of the appeal was general and unqualified, that it was intended to be used in a qualified or limited sense; that whenever that intent is discovered effect must be given to it, as in the interpretation of other acts." (Authorities cited.)

"Statutes in *pari materia* relate to the

same subject, the same person or thing, or the same class of persons or things, and are to be read together, for the reason that it is to be implied that a code of statutes relating to one subject is governed by the same spirit, and are intended to be harmonious and consistent. They are to be taken together as if they were one in law, as one statute.' (Authorities cited.) *Smith v. People*, 47 N. Y. 330, 338.

"While section 4 of chapter 620 of the Statutes of 1927 (p. 1047) purports on its face to repeal, upon the effective date thereof, section 1247 of the Penal Code, yet, if in construing said chapter 620, as a whole, it can reasonably be said that the Legislature intended such repealing clause to become effective only as of the time the Judicial Council might promulgate the rules contemplated by section 1 of said chapter 620, then this court may very properly disregard a literal interpretation of the repealing clause and give effect to the legislative intent. That the courts should not literally construe an express repealing clause contained in a statute, but must, when ascertainable, give expression to the legislative intent as evidenced by other portions of the same or contemporaneous statutes, has long since been judicially determined. *Smith v. People*, supra; *State v. Moorhouse*, 5 N. D. 406, 408-411, 67 N. W. 140; *State v. Joyce*, 307 Mo. 49, 269 S. W. 623, 625; *Golden Valley County v. Lundin*, 52 N. D. 420, 203 N. W. 317, 319; *Hogg v. Bd. of Com'rs*, 57 Colo. 463, 141 P. 478, 480; *Parshall v. State*, 62 Tex. Cr. R. 177, 138 S. W. 759, 764; *Attorney General v. Duncan*, 76 N. H. 11, 78 A. 925, 927; *Indianapolis Union R. Co. v. Waddington* 169 Ind. 448, 82 N. E. 1030, 1032. The New York case above cited (*Smith v. People*, supra) appears to be a leading case upon the subject. The rule announced in the foregoing cases is again well stated in 26 Am. & Eng. Encyclopedia of Law (2d Ed.) 720, § 5, as follows:

"A clause in a statute purporting to repeal other statutes is subject to the same rules of interpretation as other enactments, and the intent, if fairly expressed, must prevail over a mere literal interpretation clearly at variance with such intent. But even where the repealing statute is broad enough in its terms to embrace a particular earlier statute, yet if it is apparent that it is not the legislative intent to repeal such statute, a literal inter-

pretation of the repealing act will not be adopted.'

"As was said in *State v. Moorhouse*, supra, the repealing clause must be construed 'in the light of the circumstances surrounding its enactment, and also in connection with other statutes passed at the same time as part of the general scheme of legislation of which this repealing statute was only a subordinate feature.'

"While it may be true that the statement provided for in section 1247 of the Penal Code does not, in strictness, constitute a part of the record on appeal, its preparation and filing is a necessary step, not only in the perfection of a criminal appeal but is essential to a proper presentation of the record on such appeal. *Rhodes v. Sargent*, 17 Cal. App. 54, 57, 118 P. 727; *People v. Fleming*, 166 Cal. 357, 375, 136 P. 291, Ann. Cas. 1915B, 881. This being so, it is apparent that the Legislature intended the repeal of section 1247, supra, by section 4, c. 620, Stats. 1927, to be suspended until the rules contemplated by section 1 of said chapter should be promulgated and adopted by the Judicial Council.

"Appellants did not file with the clerk and present the application to the court, stating in general terms the grounds of appeal, etc.; nor was it contained in any record on appeal. This being so, the appeal was ineffectual and was properly dismissed if the saving clause of section 1246 was valid and applied to section 1247. No case has been called to our attention by appellants which held that an adoption of rules of procedure by reference is not permissible.

"Acts and statutes, which provide that a method of procedure in effect at a designated past period of time shall be continued in force, are not uncommon, and are generally accepted as being within the power of the Legislature. The amendment of section 1246, Penal Code, and the repeal of section 1247, Penal Code, accomplished in the same act, gave notice as to the procedure that was in effect. If appellants were not informed of the adoption of rules by the Judicial Council in some approved method, they could have safely relied upon the procedure as it formerly stood."

For the foregoing reasons I am constrained to dissent.

I concur: WASTE, C. J.

207 Cal. 430

**CRESCENT WHARF & WAREHOUSE CO.
v. CITY OF LOS ANGELES.
(L. A. 9938.)**

Supreme Court of California. June 26, 1929.

1. Eminent domain ⇨271—Municipality in taking private property for public use is neither trespasser nor tort-feasor, in absence of negligence.

Municipality, having the right to take private property for a public use, in doing so is neither a trespasser nor a tort-feasor, in the absence of some act of negligence committed in the prosecution of public works.

2. Eminent domain ⇨277—Owner's right to compensation for private property taken for public use by municipality was subject to charter provision requiring claim within six months (Const. art. 1, § 14).

Owner's right to compensation under Const. art. 1, § 14, for private property taken for public use by municipality, was subject to charter provision requiring claim for money or damages to be presented within six months after occurrence from which damages arose or after last item of account or claim accrued.

3. Eminent domain ⇨167(1)—Mode or procedure for taking or payment for property may be provided by statute or charter, in absence of constitutional provision.

Where state Constitution provides neither the mode for the taking nor for the payment for private property taken for public use, the mode or procedure may be provided by either statutory or charter provisions.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben A. Schmidt, Judge.

Action by the Crescent Wharf & Warehouse Company against the City of Los Angeles. Judgment of dismissal, and plaintiff appeals. Affirmed.

O'Melveny, Millikin & Tuller, William W. Clary, and O'Melveny, Tuller & Myers, all of Los Angeles, for appellant.

Jess E. Stephens, City Atty., Clyde M. Leach, Asst. City Atty., and Joseph T. Watson, Deputy City Atty., all of Los Angeles, for respondent.

SEAWELL, J. This appeal is taken from a judgment of dismissal entered upon demurrer sustained without leave to amend. The demurrer was based upon general grounds and upon the more specific ground that the alleged claim sued upon was not presented to the defendant city of Los Angeles "within six months after the occurrence from which the alleged damages arose or within six months after the claim accrued," as provided by the charter of said city.

The property involved has its situs at and upon San Pedro bay, city and county of Los Angeles, and is a part of the tidal lands held

in trust by the city of Los Angeles for the use and benefit of the people of the state. Said property alleged to have been taken and actually physically destroyed by plaintiff without compensation therefor having first been made and to recover which compensation this action was commenced, as hereafter described, was granted to said city of Los Angeles by act of the Legislature May 1, 1911. Stats. 1911, p. 1256. See, also, *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79. The complaint segregates or classifies said property as follows:

(1) A wharf 304.75 feet in length, situate on leased property; (2) a certain leasehold estate arising from a lease executed by Los Angeles and Salt Lake Railroad Company, a corporation, as lessor, and appellant herein, as lessee, dated December 23, 1901, for a term of 50 years; (3) all rights, interest, and privileges granted to appellant by virtue of an ordinance adopted by the board of supervisors of the county of Los Angeles January 22, 1904, for the term of 20 years, beginning February 15, 1904, which ordinance authorized appellant to construct a wharf upon lands fronting upon and extending into the waters of San Pedro harbor and to collect and take tolls thereon during said term of 20 years.

It will not be necessary to determine whether appellant, at the time respondent caused said wharf to be destroyed as an incident to the dredging and widening of the main channel of San Pedro harbor, owned any interest in or right to said wharf or the soil upon which said wharf had its support, for the reason that no demand was presented to said city sooner than two years and eleven months after the claim for money or damages accrued. Plaintiff alleged that during "the months of June, July, August and September, 1923, defendant took the property of plaintiff * * * and appropriated it for public use, namely, for widening the main channel of San Pedro Harbor." No demand was made upon said city of Los Angeles until August 3, 1926, on which day a demand in writing was made for the payment of the sum of \$40,445.35. Thirteen days thereafter the demand was disallowed in toto.

Section 376, Los Angeles City Charter, contains the provision with which appellant failed to comply. It reads as follows: "No suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city until a demand for the same has been presented as herein provided, and rejected in whole or in part. If rejected in part, suit may be brought to recover the whole. Except in those cases where a shorter period of time is otherwise provided by law, all claims for damages against the city must be presented within six (6) months after the occurrence from

which the damages arose, and all other claims or demands shall be presented within six (6) months after the last item of the account or claim accrued."

Appellant takes the position that since its right to compensation springs directly from the Constitution (art. 1, § 14) it cannot be barred by any charter provision or any statute of limitation short of the period required by law for acquiring property by adverse possession.

Such a claim can only find support upon the theory that the guaranty of the Constitution to the citizens that the state or its agencies may not take or damage private property for public uses without making provision for the just compensation therefor to the owner, as provided by said article 1, section 14, State Constitution, *ex proprio vigore*, immunizes the owner of property so taken from the bar of the statute of limitations, and perhaps other statutory requirements, which affect the investment and divestment of title to real property generally. A distinction is assumed to exist as to the extent and stability of property rights conferred by statutes and those conferred by the express mandate of the Constitution. In order to accept appellant's conclusion it is necessary to start with the premise that a property right which arises from the express command of the Constitution vests a right or title in the grantee superior to any right or title that may be founded upon statute in the absence of such a constitutional pronouncement. The Constitution does not attempt to make a distinction between the ownership of property acquired by any of the methods provided by law, and there is no such thing as degrees of security by which real property shall be held and enjoyed. All that the framers of the Constitution meant to do was to protect the citizen in his ownership of property against the state or its agencies appropriating private property to public uses against the will of the owner without making just compensation for all damages which the owner should sustain by the exercise of governmental power. It was not intended to remove the subject-matter beyond the operation of reasonable statutory enactments which affect property rights generally, such as the bar of the statute of limitations.

[1-3] Appellant has cited decisions of other jurisdictions which have given expression to the doctrine that where land is taken under the right of eminent domain "there can be no question about their [owners'] right to recover the damages sustained, if the same have not been paid, for no statute of limitations can bar their constitutional right to actual compensation for the land so taken from their ancestor. * * *" *Carter v. Ridge Turnpike Co.*, 208 Pa. 565, 57 A. 988. In the state of Pennsylvania a rule of evidence obtained to the effect that after the lapse of twenty years from the time the damages accrued it

would be presumed that said damages had been paid. Included in the list of cases relied upon by appellant—most of which are within the jurisdiction of Pennsylvania—are *McFarlan v. Morris*, 44 N. J. Law, 471; *Faulk v. Missouri River, etc., R. Co.*, 28 S. D. 1, 132 N. W. 233, Ann. Cas. 1913E, 1130; *Clark v. Water Commissioners*, 148 N. Y. 1, 42 N. E. 414; *Kineaid v. City of Seattle*, 74 Wash. 617, 134 P. 504, 135 P. 820. To this list may be added the most recent case decided by the Washington state Supreme Court, *Wong Kee Jun et ux. v. Seattle*, 143 Wash. 479, 255 P. 645, 52 A. L. R. 625. The case last cited is the latest in point of time (1927) which may be offered in support of appellant's contention. Because of a condition of confusion and uncertainty existing in the law of that state, a review of all former decisions was made as to whether damages for injury to private property caused by the improvement of a highway, if there is in fact an exercise of the power of public domain, could be limited to such damages as accrued within the time limited by the municipal ordinance for giving notice of claims. In that case the plaintiffs sought to recover damages to their real property caused by a slide resulting from the removal of lateral support by the city in its regrade of certain adjacent streets some years before the action was commenced. The question whether the plaintiffs were limited, as prescribed by the city charter, in their action for damages to such damages only which may have been sustained within a period beginning 30 days prior to the filing of the claim, was decided in the negative and a charter provision requiring the presentation of a claim as a prerequisite to bringing said action was held to be inoperative. The holding of the courts upon which appellant relies as authority for its contention is that a claim for "compensation" or for "damages" to the owner of real property resulting from an appropriation of his property is in its nature the price of the land taken and is not an ordinary contract claim, and therefore the claimant may not as a condition precedent be required to present it to the city and to require the claimant to do so is a violation of the constitutional provision that private property shall not be taken for public use without just compensation first being made to its owner; that the city does not go upon the lands as a trespasser. Having the right to take, a municipality is neither a trespasser nor a tortfeasor in the absence of some act of negligence committed in the prosecution of public works. It is further contended that the right to compensation is not dependent upon an implied promise to pay, a doctrine which we think is not only contrary to the great weight of authority as expressed in the decisions of the Supreme Court of the United States, notably *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 S. Ct. 306, 28 L. Ed. 846, and many subsequent decisions, and in the deci-

sions of various state courts, but also contrary to the fundamental principles of the rules of equity. When a state Constitution such as ours provides neither the mode for the taking or for the payment of private property, the mode or procedure may be provided by either statutory or charter provisions. The following quotation taken from 16 Cal. Jur. 396, 397 is supported by the decisions of this state: "The power to impose reasonable periods of limitation is unquestioned, for a statement of a right in a constitution is always subject to reasonable statutory limitations of the time in which such right may be enforced, unless the constitution itself declares otherwise. The legislature may prescribe the different periods of time within which different species of obligations may be enforced and may prescribe that as to some obligations there shall be no limitation of time. And it has been said that it is competent for the legislature to declare that there shall be no limitation of time against the enforcement of any obligation of a foreign corporation; its declaration that upon the failure to file a designation of a person upon whom process may be served, the corporation shall be denied the benefit of the statute of limitations is only an exercise of this power. The time for presenting claims against municipalities may be prescribed by their charters."

The case of *Bancroft v. City of San Diego*, 120 Cal. 432, 52 P. 712, is not only in point on the question urged by appellant, but it is peculiarly applicable for the reason that it arises out of the same situation found to exist in the cases relied upon by appellant. Mrs. Bancroft owned property in the city of San Diego fronting on a street which suffered damages by reason of the changing of the street grade. She failed to present a claim for damages to the common council within the six months' period prescribed by the city charter or at all. The policy of a charter adopting a six months' period in which claims for damages to property, which is in a sense a taking of the property, is held to be beyond question. The reason for the rule was thus stated by Mr. Justice Wilbur in *Western Salt Co. v. City of San Diego*, 181 Cal. 696, 186 P. 345:

"The reason for this type of legislation, requiring claims to be first presented to the legislative body of a city or county before suit is brought is thus stated in an early case in this state: 'We think the intention of the

legislature was to prevent the revenue of the county from being consumed in litigation, by providing that an opportunity of amicable adjustment should be first afforded to the county, before she could be charged with the costs of a suit.' * * * This reason applies with like force to all claims against a city, however originating.

"It is, however, claimed that this provision of the charter is invalid for the reason that the freeholders' charter conflicts with the general law, and is only supreme in 'municipal affairs.' * * * This contention is predicated upon the proposition that by the general law a complaint for damages is a sufficient presentation of a demand against an individual or private corporation. The question involved here, however, is an entirely different one, namely, the method of securing payment of claims against a municipality, an agency of the state. There is no general law upon that subject, but the charter of each municipality prescribes the method for such payment. The charter controls and, as the plaintiff has failed to present his claim for damages within the time provided by the charter, the demurrer was properly sustained."

We may add to what is above said that it is important to municipalities in making preparations for carrying cities through each fiscal year to be informed within a reasonable time in advance as to the indebtedness or liability that they are expected to meet. Otherwise claims which should have and could have been provided for, had a demand been made within a reasonable time after liability had accrued, may accumulate to the disadvantage of the claimant as well as to the financial embarrassment of the city. The policy of such ordinances is sound as applied to the affairs of municipalities, and there can be no constitutional objection to the enactment of charter provisions which require demands to be presented within a reasonable period after their accrual.

Other cases of this jurisdiction which sustain the ruling of the trial court are: *Bigelow v. Los Angeles*, 141 Cal. 503, 75 P. 111; *Spencer v. Los Angeles*, 180 Cal. 103, 179 P. 163; *Metropolitan Life Ins. Co. v. Rolph*, 184 Cal. 557, 194 P. 1005.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

In re HEULER'S ESTATE.

HEULER v. HEULER.

(L. A. 10528.)

Supreme Court of California. June 21, 1929.

1. Wills ⚭87—Intent of testator is determinative whether instrument is testamentary in character.

The intent of testator is the important question in determining whether instrument proposed as will was testamentary in character.

2. Wills ⚭93—Acquiescence of wife in marriage agreement is immaterial in determining whether instrument was testamentary disposition of testator's property.

Acquiescence of testator's wife in marriage agreement is immaterial in determining whether instrument setting forth such agreement was testamentary disposition of testator's property.

3. Wills ⚭87—Marriage agreement giving life estate in one-third of income with remainder to testator's children by first marriage, who also took residue in equal shares, held testamentary in character.

Marriage agreement between testator and wife, executed before marriage, which stipulated that wife should enjoy life income of one-third of testator's property with remainder to testator's children by former marriage, who were also given residue of estate in equal portions, *held* testamentary in character in view of other evidence.

4. Wills ⚭179—Marriage contract testamentary in character must be given effect, where later will was defectively executed.

Where testamentary disposition revoking disposition made by marriage agreement failed because of defective execution, the earlier disposition made by marriage contract testamentary in character must be given effect.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

In the matter of the estate of George T. Heuler, deceased. Proceeding by George E. Heuler to have admitted to probate as decedent's will a certain marriage contract, contested by Christina Heuler. From an adverse judgment, contestant appeals. Affirmed.

Superseding opinion of District Court of Appeal in 272 P. 301.

Merriam, Rinehart & Merriam, of Pasadena, for appellant.

Horace S. Wilson and Constan Jensen, both of Los Angeles, for respondent.

LANGDON, J. This is an appeal by Christina Heuler, wife of deceased, from an order admitting to probate as the last will of George T. Heuler, deceased, a certain document in the handwriting of George T. Heuler, deceased, which reads as follows:

"Marriage Contract.

"The following agreement between George T. Heuler, on the one part, and Christina Wagner on the other part, was executed on Monday, the 4th day of January, 1909. George T. Heuler is entering the state of matrimony on Tuesday the 5th day of January, 1909, after this mutual and legally witnessed agreement. If George T. Heuler departs from this life first, so shall Christina Wagner receive her legal third share only under the following conditions. After an honest, conservative estimate shall the third part of my estate be converted into cash and given over to a trust company where Christina Wagner may draw the interest thereof after six months until the end of her life.

"The other two-thirds shall be divided equally among my three children of my first marriage, or their heirs, or their survivors. Also shall my three children George, Leo, Erna after the death of the above mentioned Christina Wagner receive the above mentioned capital.

"If, on the other hand Christina Wagner departs from this life before George T. Heuler so shall George T. Heuler, her husband, inherit all moveable property which she now owns or shall own, without reservation, without interference from her relatives.

"[Signed] George T. Heuler
"Christina Wagner."

[1, 2] The only question upon the appeal is whether or not deceased intended this document as a testamentary one.

It is difficult to cite cases which may serve as precedents, as each case is decided upon its own peculiar facts, and there is a wide variety in the surrounding facts and circumstances of each case. The governing inquiry, of course, is as to the intention of the deceased. We think the language of the foregoing instrument clearly indicates testamentary intent, and that the surrounding facts and circumstances in evidence suggest that the deceased, at the time he wrote out the foregoing document in his own handwriting, intended to dispose of his property after his death. The document disposes of all of deceased's property, leaving it, ultimately, to his children and their descendants. These children were the issue of a first marriage. That marriage and a second marriage of Heuler had resulted in a divorce, and he was about to enter upon his third marriage with appellant here at the time the foregoing document was executed. He made a reasonable provision for his third wife in the event of his death by giving her a life interest in the income from one-third of his estate. He not only provided for his children after his death, but mailed a copy of the document involved here to each of these children. The document was signed by the woman who was to be his

wife, thus showing her acquiescence, which, however, is immaterial.

[3,4] The only fact in the instant case which would seem to justify the position of appellant that the document set forth herein is not a will is that years after the execution of this so-called "marriage contract," the deceased attempted to make a will leaving to his wife a life interest in all his property, while by the "marriage contract" she had been given a life interest in but one-third of the property. This later document was ineffective because of defective execution. However, even this circumstance, when considered with all the attendant conditions, does not make the holding of the trial court erroneous. Indeed, it seems but a natural occurrence and entirely consistent with the view that the earlier document was intended as a testamentary disposition of the property of deceased. It will be remembered that deceased had entered into two prior marriages, both of which had resulted disastrously. He was about to make a third venture in matrimony. He was nearly 60 years old and had three children of his first marriage. He wished to provide for these children and also to make some provision for his wife. He entered into a testamentary disposition of his property to meet these desires, and the wife agreed to this. Later, after over 15 years of married life and after educating one of his sons as a physician and after a quarrel with the husband of his daughter, all of which appears from the language of the will defectively executed or from the testimony in the record, he changed his views as to what was an equitable distribution of his property and attempted to give his wife a life interest in all the property and the balance to be divided among his children, with the exception of the son, whom he had sent to college, and he assigned, as a reason for his exclusion, the fact that he had received his share in the expense of his education. It seems clear to us that the deceased made a will, the document under consideration here, upon entering into his marriage with the appellant. Later, he attempted to make another will by which she would have received a larger share of his estate. This second will would have been, perhaps, a more equitable distribution of his property, but that problem is not before us. The decedent having executed one testamentary disposition of his property, this court is bound by the terms thereof in the absence of a legal revocation thereof. In this case, a revocation was attempted by drawing a new will, but, unfortunately, that attempt failed to comply with the statute and so had no force and effect. The law requires, then,

that the earlier disposition of the property be given effect.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

In re HEULER'S ESTATE.★

HEULER v. RINEHART.

(L. A. 10527.)

Supreme Court of California. June 21, 1929.

Rehearing Granted July 18, 1929.

Executors and administrators ↔ Appointment of administrator is erroneous, where deceased left valid will.

The appointment of an administrator of an estate is erroneous, where deceased left a valid will.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

In the matter of the estate of George T. Heuler, deceased. On the petition of George E. Heuler, letters of administration issued to Jay D. Rinehart were revoked, and the administrator appeals. Affirmed.

Superseding opinion 272 P. 304.

Merriam, Rinehart & Merriam, of Pasadena, for petitioner.

Horace S. Wilson and Constan Jensen, both of Los Angeles, for respondent.

LANGDON, J. This is an appeal from an order revoking letters of administration and the appointment of Jay D. Rinehart as the administrator of the estate of George T. Heuler, deceased. If the deceased left a valid will which was properly admitted to probate, the order involved upon this appeal, appointing an administrator of the estate of an intestate, is, of course, erroneous. In the companion case of Heuler v. Heuler (L. A. No. 10528 of the records of this court), this day decided (278 P. 1031), it is held that the deceased died testate and that the document offered for probate as his last will was properly admitted to probate. That decision disposes of this appeal.

The order and judgment appealed from are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

207 Cal. 381

MURRAY et al. v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR MARIN COUNTY et al. (S. F. 13372.)

Supreme Court of California. June 20, 1929.

1. Wills ⚡269—Children of mother's sisters and brothers named as class in will were not entitled to notice of probate proceedings as "legatees named" (Code Civ. Proc. § 1304).

Where will bequeathed personal property to children of mother's sisters and brothers as a class, it was not necessary, under Code Civ. Proc. § 1304, to serve notice of time appointed for probate of will upon such legatees named as class, since words "addressed to legatees named," within such statute requiring notice, means that persons, either natural or artificial, whose names appear on face of will as legatees, must be notified by mail if their names appear in such manner that they may be addressed by names so appearing with reasonable assurance that envelope so addressed would reach addressee in due course of mail.

2. Wills ⚡281—Failure to set forth in petition for probate specific names and addresses of legatees included within class did not deprive court of jurisdiction to try will contest (Code Civ. Proc. § 1300).

Where will bequeathed personal property to children of mother's sisters and brothers, if petitioners for probate of will were required to set forth in petition, under Code Civ. Proc. § 1300, specific names and addresses of legatees included within class mentioned if such names and addresses were known to petitioners, failure to perform that duty, if it existed, did not deprive court of jurisdiction to try contest.

3. Wills ⚡269—Names and residences of heirs not mentioned in petition for probate must be deemed unknown, and clerk need not mail copies of published notice (Code Civ. Proc. § 1300).

Where petition for probate of will under Code Civ. Proc. § 1300, is silent as to names and residences of heirs, they must be deemed by clerk to be unknown to petitioner, and he is not required to mail copies of published notice.

4. Executors and administrators ⚡1—Wills ⚡203—Probate of will and administration of estate is in nature of proceeding in rem.

Probate of a will and the administration of an estate is in the nature of proceeding in rem.

5. Wills ⚡269—Upon filing of petition, publication of notice, and production of will, power to proceed with probate of will attaches (Code Civ. Proc. §§ 1300, 1303).

Power to proceed with probate of will attaches upon production of will, filing of petition for probate pursuant to Code Civ. Proc. § 1300, and publication of notice provided by section 1303.

6. Wills ⚡320—Proof of mailing notices of probate proceedings being insufficient, court has power to continue hearing until sufficient proof is produced (Code Civ. Proc. § 1304).

If, upon hearing of application to admit will to probate, proof of mailing notices required by

Code Civ. Proc. § 1304, is insufficient, court has power to continue hearing until sufficient proof of mailing be produced.

7. Wills ⚡263—In will contest, contestant is plaintiff, and petitioner for probate is defendant, but only those desiring to oppose contest become parties litigant in such opposition (Code Civ. Proc. § 1312).

Under Code Civ. Proc. § 1312, the contestant of a will is plaintiff, and petitioner for probate thereof is defendant, and only those who desire to oppose contest become parties litigant in such opposition.

In Bank.

Application by William P. Murray and another for writ of mandamus prayed to be directed to the Superior Court of Marin County, D. M. Young, Judge, to compel respondent to proceed with the trial of a contest of the will of Robert P. Rathbun, deceased. Peremptory writ issued.

Thomas P. Boyd, of San Rafael, and Knight, Boland & Christin, of San Francisco, for petitioners.

Thomas, Beedy, Presley & Paramore, of San Francisco, for respondents.

SHENK, J. This is an application for a writ of mandamus to compel the respondent court to proceed with the trial of a contest, before probate, of the will of Robert P. Rathbun, deceased. The will, together with a petition for the probate thereof in the county of Marin, was filed on April 24, 1928. All of the estate of the testator was left to his mother, Emelie Chapman Ashe, with the exception of that portion bequeathed to specifically named legatees, and those coming within the class mentioned in the following provision of the will: "My personal property is to be divided share and share alike among the children of my mothers sisters and brothers. * * * This upon my mothers death."

The petition for the probate of the will set forth the names and addresses of the heirs and legatees of the decedent and stated that the individuals therein named were of lawful age, all in compliance with the requirements of section 1300 of the Code of Civil Procedure, which provides that the petition for the probate of the will must, among other things, show: "3. The names, ages, and residences of the heirs, legatees, and devisees of the decedent, so far as known to the petitioner." Notice of the time set for the hearing of the petition was duly published. Copies of this "notice" were mailed to each of the heirs and to the legatees of the testator specifically named in the will and in the petition at the addresses therein shown. The decedent's surviving widow, Jane Williams Rathbun, one of the legatees specifically named, instituted a contest of the will on numerous grounds. The contest came on for hearing on February 4, 1929, before the re-

spondent judge sitting with a jury. On the second day of the trial the contestant moved the court for an order denying probate on the ground that it did not appear from the affidavit of mailing that notice of the time and place of hearing the petition for the probate of the will had been mailed to the "children" of the decedent's "mother's sisters and brothers" named as a class in the will, and who, it appears, are 21 in number. The court concluded that sufficient notice had not been given, discharged the jury, and refused to proceed further with the hearing of the contest, on the ground of lack of jurisdiction so to do. Whereupon the present proceeding was instituted.

As a return to the alternative writ the respondent judge filed a general and special demurrer to the petition and likewise an answer. It may fairly be said that the issues joined or tendered by both pleadings present questions of law only.

[1] The parties have centered their argument on the proper construction of section 1304 of the Code of Civil Procedure, which, so far as pertinent, provides: "Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator and the devisees and legatees named in the will at their places of residence, if known to the petitioner. * * * If their places of residence be not known, the copies of the notice may be addressed to them, and deposited in the post office at the county seat of the county where the proceedings are pending. * * *" The petitioners urge that the court had jurisdiction to proceed with the contest for the reason that there was on file an affidavit showing that notice had been mailed to all persons specifically named in the will. It is especially stressed that if the *names* of the legatees be not shown on the face of the will, notice need not be mailed to them. The respondents insist that when the will designates as legatees the nephews and nieces of the decedent's mother as a class they are *named* in the will and must each have the statutory notice by mail in order that the court acquire jurisdiction to hear the petition for probate. It is conceded that no notice of the hearing of the application for the probate of the will was mailed to the nephews and nieces of the decedent's mother. The question is squarely presented: Under section 1304 of the Code of Civil Procedure, is it necessary to serve legatees not specifically named in the will but designated therein as a class with copies of the notice of the application for the probate of the will in order that the court have jurisdiction to proceed with a contest of the will before probate?

This question must be answered in the negative. The Code section provides that copies of the notice must be "addressed" to the legatees "named" in the will. This requirement plainly means that the persons, either natural or artificial, whose names appear on the face

of the will as legatees, must be notified by mail if their names appear in such manner that they may be addressed by the name so appearing with reasonable assurance that an envelope so addressed would reach the addressee in due course of mail. In a broad sense it may be said that the "children of my mother's sisters and brothers" are named in the will as legatees, but a communication addressed to them under that designation and deposited in the post office at the county seat of the county wherein the proceedings are pending would be entirely futile as affording any notice. It may be assumed that before distribution it will be necessary for the court, on proper evidence, to ascertain who the nephews and nieces of the decedent's mother are by name, but when evidence as to the identity of said persons is necessary the assertion that they are named in the will would seem to be negated.

[2-6] It may also be assumed that it was the duty of the petitioners to set forth in the petition for the probate of the will the specific names and addresses of the legatees included within the class mentioned if such names and addresses were known to the petitioners, but a failure to perform that duty, if it existed, did not deprive the court of jurisdiction to try the contest. Indeed it was said in *Nicholson v. Leatham*, 28 Cal. App. 597, 153 P. 965, 155 P. 98, that the omission from the petition of a statement of the names, ages, and residences of the heirs, legatees, and devisees of the decedent, even if known to the petitioner, could not operate to deprive the court of jurisdiction, and that when the petition is silent as to the names and residences of the heirs they must be deemed by the clerk to be unknown to the petitioner and he is not required to mail copies of the published notice. The probate of the will and the administration of the estate is in the nature of a proceeding in rem. *King v. Chase*, 159 Cal. 420, 425, 115 P. 207; 11 Cal. Jur. p. 236. The power to proceed therewith attaches upon the production of the will and the filing of the petition pursuant to section 1300 of the Code of Civil Procedure and the publication of the notice provided for in section 1303 of that Code. *Nicholson v. Leatham*, supra. If upon the hearing of the application to admit the will to probate the proof of mailing the notices required by said section 1304 be insufficient, the court would have the power to continue the hearing until sufficient proof of mailing be produced. *Curtis v. Underwood*, 101 Cal. 661, 669, 36 P. 110. It has been held that upon the institution of the contest before probate the offer to prove the will is arrested, and the probate thereof cannot be decreed until the contest is determined. *Estate of Gregory*, 133 Cal. 131, 65 P. 315; 26 Cal. Jur. p. 1078. However, in *Estate of Black*, 199 Cal. 257, at page 261, 248 P. 1015, 1016, it was said: "That the order of procedure upon the hearing of the petition for probate and

the trial of the contest of the will is within the discretion of the trial court. Some of the cases cited hold that the better practice is to withhold the hearing of the petition for probate until after the trial of the contest of the will in which event, as above indicated, the court need only hear evidence on all the points required by the statute for the validity of a will which were not raised by the contest. * * * Other cases hold that the better practice is to require the proponents of a will to establish a *prima facie* case preliminarily to the hearing of the contest. * * * Other of the cases simply hold that it is a matter entirely within the discretion of the trial court." But discretion to disturb the order of proof may not be confused with or interrupt jurisdiction to proceed in the exercise of such discretion.

[7] On the contest of a will the contestant is the plaintiff and the petitioner for the probate thereof is the defendant. But only those who desire to oppose the contest become parties litigant in such opposition. Section 1312, Code Civ. Proc.; Estate of Relph, 192 Cal. 451, 221 P. 361; 26 Cal. Jur. p. 1078. In the contest before the respondent court involved in the present proceeding, the petitioners for the probate of the will are resisting the contest. The subject-matter of the controversy and the proper parties are before the court and no satisfactory reason appears to sustain the position of the respondents. The peremptory writ should therefore issue. It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

207 Cal. 457

PODRAT et al. v. OBERNDORFF et al.
(L. A. 9093.)

Supreme Court of California. June 27, 1929.

1. Chattel mortgages ⇨172(1)—Mortgagee, having right to reduce property to possession for default, may employ action for claim and delivery (Civ. Code, § 2967).

Where right to reduce property to possession in case of default is conferred upon mortgagee by contract, an action for claim and delivery may be employed to secure possession of it, regardless of which of methods of foreclosure specified in Civ. Code, § 2967, mortgagee intends to employ.

2. Chattel mortgages ⇨290—Mortgage authorizing mortgagee to sell property in manner provided by law and pay costs, including counsel fees, allows reasonable attorney's fees in foreclosure by action (Civ. Code, §§ 2967, 3005; Code Civ. Proc. § 694).

Chattel mortgage, providing that on mortgagor's default mortgagee could take possession

of property and proceed to sell property in manner provided by law and from proceeds pay amount of note and all costs of sale including counsel fees, *held* to allow an attorney's fee in reasonable amount, whether mortgage be foreclosed by action under Code Civ. Proc. § 694, or by summary sale under Civ. Code, §§ 2967, 3005.

Curtis, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Abner Podrat and others against Oscar Oberndorff, Carrie Belle Watson, and others. From a judgment for plaintiffs, Carrie Belle Watson and other defendants appeal. Affirmed.

Superseding opinion in 271 P. 755.

Walters & Mauk and C. S. Mauk, all of Los Angeles, for appellants.

Max Schleimer, of Los Angeles, for respondents.

O'Melveny, Tuller & Myers and Albert Parker, all of Los Angeles, amici curiæ for defendants and appellants.

PRESTON, J. An appeal in this cause was taken by certain defendants from the whole of the judgment in favor of plaintiffs, foreclosing a chattel mortgage and ordering a sale of the property covered thereby. Since the said appeal the judgment has been satisfied in all respects except as to the item of \$517.67 allowed plaintiffs as attorneys' fees and the item of \$140.04 allowed as taxes paid. The relationship of the various parties to the issues involved in the action is such that considerable space would be required to explain the situation, but this, if done, would throw no light upon the questions now remaining, and a further statement in this respect is deemed unnecessary. Furthermore, as the appeal is on the judgment roll alone, and the pleadings and findings support the allowance of the item of taxes paid, there is no ground for review of the court's action on this item.

This leaves as the sole question for discussion the power of the court to allow said or any attorney's fee. This question recurs solely upon the following provision of the chattel mortgage: "It is also agreed that if the mortgagor shall fail to make any payment, as in the promissory note provided, then the mortgagee may take possession of the said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount of said note specified, and all costs of the sale, including counsel fees and not exceeding — per cent. upon the amount due, paying the overplus to the said mortgagor, all of said costs, including said counsel fees, being hereby secured."

Appellants insist that under this clause attorney's fees are allowable only when a sale of the mortgaged premises under foreclosure is made by the summary method provided in the chapter on pledges, Civil Code, §§ 2967 and 3005, and that inasmuch as this method was not followed but the regular method provided by the Code of Civil Procedure was employed, no attorney's fees can be allowed in the action. Admittedly attorney's fees may not be allowed if no warrant is found for such action in the contract of the parties; hence the correct interpretation of the above language of the instrument is required of us.

At the outset reference must again be made to section 2967 of the Civil Code, from which we ascertain that upon default, the mortgagee has either one of two remedies—one by a summary sale as under the chapter on pledges, and the other under the chapter of the Code of Civil Procedure relating to foreclosure proceedings by court action. We should also note the fact that sales had under either method must be conducted in the manner of sales had under execution (Civ. Code, § 3005; Code Civ. Proc. § 726), at which the personal property, if capable of manual delivery, must be present. Section 694, Code Civ. Proc.; *Ely v. Williams*, 6 Cal. App. 455, 92 P. 393; *Wixom v. Davis*, 57 Cal. App. 620, 623, 207 P. 694. We should also note the fact that the taking of possession by the mortgagee under his contract with the mortgagor does not give him title, but merely increases the value of his security. *Harper v. Gordon*, 128 Cal. 489, 61 P. 84; *Blodgett v. Rheinschild*, 56 Cal. App. 728, 737, 206 P. 674.

[1] If the right to reduce the property to possession in case of default is conferred upon the mortgagee by the contract, an action for claim and delivery may be employed to secure possession of it, and this too whether the mortgagee intends to employ the one method or the other of foreclosure. Indeed, the claim and delivery action may be prosecuted while the action for foreclosure is pending in the court. *Ely v. Williams*, supra; *Ashcroft Estate Co. v. Nelson*, 26 Cal. App. 400, 401, 147 P. 101; *Blodgett v. Rheinschild*, supra; *Wixom v. Davis*, supra; *Harper v. Gordon*, supra.

[2] We may now give closer consideration to the language of the mortgage " * * * may immediately proceed to sell the same in the manner provided by law." Is not a sale conducted by either method a compliance with this provision of the contract? The chattel mortgage contains no other language respecting foreclosure than that above set forth. The two methods are not separately identified. Consequently there is no reason to say that a sale under the pledge law is meant and a sale under the foreclosure proceeding provided by the Code of Civil Procedure excluded for each is surely a sale in the manner provided by law. It seems clearly to be the

true meaning of the clause that a foreclosure by either method is contemplated and that any such sale conducted under either warrants the allowance of an attorney's fee. Moreover, it would seem that the general language was employed in order to cover both methods.

In the case of *Brickell v. Batchelder*, 62 Cal. 623, 630, we find the following language: "It would be difficult to detect any difference between a stipulation empowering a mortgagee to proceed to foreclosure on such default, and one giving authority on like default 'to proceed to sell' 'in the manner prescribed by law.' The law prescribes but one mode of sale in the case of mortgaged property, and that is at public outcry, by virtue of an execution issued on a judgment of foreclosure. (Code Civ. Proc., §§ 684, 726, 744.) The power given in the mortgage by the clause just above quoted is to proceed to sell in the manner prescribed by law—which, in our judgment, is in substance the same as a power to proceed to sell by means of an action to foreclose. The power to sell in the manner prescribed by law being given, all means given by law to render such power effectual are also conferred; that is, all means necessary to effectuate a sale in the mode established by law are given. The power to use the lawful means necessary and proper to carry out the express power is conferred and given by an implication as strong and clear as if it was expressed in so many words. (Civ. Code, § 1856.) This is a familiar and well-established rule in the construction of powers. (See *Story on Agency*, secs. 55, 56, 58, 59, 60, 73; *Wharton on Agency*, sec. 187.)"

While the above language was used with reference to a real estate mortgage, we see no reason for putting a different construction on the same words when applied to the same subject where personal property is involved. The quotation above set forth was approved in *Mercantile Trust Co. v. San Joaquin, etc., Corp.* (Cal. App.) 265 P. 583. See, also, *Maddox v. Wyman*, 92 Cal. 674, 28 P. 838, where the provisions of section 726 et seq. were made applicable to a chattel mortgage with practically the identical language found in the chattel mortgage here.

It is said that certain early cases in Michigan and South Carolina support a conclusion contrary to the one here announced. The basic facts necessary to determine the applicability of these cases are not before us, and what investigation we have been able to make does not confirm a conclusion that the situations there were parallel with the one before us. For example, in the Michigan cases real estate mortgages were referred to which did not contain the language here under consideration. The South Carolina cases cite no authority to sustain them, and the facts contained in the opinions are so meager and the discussions so brief that the reasoning upon

which the conclusions are based cannot be fully discerned. And at any rate, we are better satisfied with the interpretation here announced.

Lastly, no reason can be suggested for a mortgagee to have an attorney's fee allowed him where the mortgage is foreclosed by the summary method, where the services of an attorney are not needed, and denied him when foreclosure is by the regular method—a case in which the services of an attorney are usually indispensable. Common reason would also suggest that a debtor in default would prefer to have the foreclosure proceeding conducted according to the method provided by the Code of Civil Procedure, for in such case the element of time would enter as well as a chance to be heard as to the ascertainment and adjudication of the true amount of the indebtedness and fixation of the proper fee.

These facts argue for the broader construction of the language. We therefore conclude that the language of the mortgage in question should be so construed as to allow an attorney's fee in a reasonable amount whether the mortgage be foreclosed by the one method or the other provided by law.

It follows that the judgment appealed from should be in all respects affirmed, and it is so ordered.

We concur: WASTE, C. J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

CURTIS, J. I dissent. There are two distinct and separate methods provided by the Civil Code for the foreclosure of a chattel mortgage, one "in the manner and upon the notice prescribed by the title on 'pledge,'" and the other "by proceedings under the Code of Civil Procedure." Civ. Code, § 2967. The method of foreclosure in the manner and upon the notice prescribed by the title on pledge is a short and summary proceeding, and is one in which the services to be performed by an attorney are very simple, and consequently the charges of such attorney would be small. On the other hand, when the mortgagee resorts to proceedings under the Code of Civil Procedure, he must institute an action in court and prosecute the same until judgment is rendered and a sale under order of court had. These proceedings are much more extended, often quite complicated, and frequently occupy a long period of time in the courts. It is apparent that the charges of an attorney to conduct such proceedings would be far greater than if he were employed to conduct a simple sale of the mortgaged property as a pledge. A mortgagor may be willing, and may agree, to pay a reasonable attorney's fee for the services of an attorney to conduct this less expensive method of foreclosing on the mortgaged property, and may be unwilling to obligate himself to pay the larger attorney's fee incident to a foreclosure of the

mortgage by an action in court. The obligation to pay an attorney's fee is a matter governed solely by contract. *Boob v. Hall*, 107 Cal. 160, 40 P. 117; *Clemens v. Luce*, 101 Cal. 432, 35 P. 1032. Therefore, where a mortgagor has agreed to pay an attorney's fee simply for services rendered in foreclosure of the mortgage as a pledge, there is no authority on the part of the court, in which an action is instituted to foreclose said mortgage, to enter judgment against him for an attorney's fee in said action.

As before noted, these two methods of foreclosing a chattel mortgage are separate and distinct. In the one the mortgaged property is taken possession of by the mortgagee and sold as a pledge. This method is the one and the only one mentioned or referred to in the chattel mortgage in this action. The clause giving the mortgagee authority to "take possession of the said property, * * * and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount of said note * * * including counsel fees" can only refer to the method of foreclosure in the case of a pledge. For in the foreclosure by an action at law the mortgagee does not take possession of the mortgaged property, but in the decree of foreclosure, the officer named therein is empowered to seize the mortgaged property and sell the same under said decree of foreclosure. *Pacific Investment Co. v. Ross*, 131 Cal. 8, 63 P. 67. The words "may immediately proceed to sell the same in the manner provided by law" must be read in connection with the words which precede them, and as thus read these words can only mean that the property, after the same has been taken possession of by the mortgagee, must be sold in the manner as provided by law for the sale of pledged property. The majority opinion cites the case of *Brickell v. Batchelder*, 62 Cal. 623, 630, as containing a contrary holding. It was there held that the words "proceed to sell in the manner prescribed by law" in the mortgage there under consideration, empowered the mortgagee to institute an action to foreclose the mortgage and sell the mortgaged property under execution sale. The mortgage involved in that action, however, was a real estate mortgage, and the decision was based expressly upon the law relative to foreclosure of mortgages upon real property which "prescribes but one mode of sale in the case of mortgaged [real] property." The law is entirely different, as has before been pointed out, regarding mortgaged personal property, concerning which the law expressly and definitely prescribes two modes of sale. That being the case, the words used in the present mortgage can only refer to the mode of foreclosure indicated in the context in which these words are used, and this as indicated above means a foreclosure by the mortgagor taking possession of the mortgaged property and immediately selling the same,

"in the manner and upon the notice prescribed by the title on 'pledge.'"

While this case appears to be one of first impression in this state, the question involved has frequently been before the courts of other jurisdictions. Jones on Mortgages enunciates the rule as follows: "Under a provision in a power of sale for an attorney's fee in case of foreclosure by (seizure and sale) no allowance can be made, if the mortgage is foreclosed in chancery instead." 3 Jones on Mortgages, p. 520, § 2060, citing *Van Marter v. McMillan*, 39 Mich. 304; *Sage v. Riggs*, 12 Mich. 313, and *Hardwick v. Bassett*, 29 Mich. 17. All these cases are directly in point. For instance, as was said in the case of *Sage v. Riggs*, supra: "The error complained of in this decree is the nonallowance of \$100 attorney's fee for foreclosing the mortgage, provided for in the power of sale. It is insisted complainant is entitled to the \$100, whether the foreclosure is in chancery, or at law by advertisement and sale under the power. It is not in a separate clause of the mortgage, standing by itself and providing a fee for foreclosing the mortgage generally, but in the power of sale of which it is a part. The language of the power is, 'rendering the surplus moneys, if any there be, to the parties of the first part, their heirs, executors or administrators, after deducting the costs and charges of such vendue and sale aforesaid, and also one hundred dollars as an attorney fee, should any proceedings be taken to foreclose this indenture.' The meaning of the words, 'should any proceedings be taken to foreclose this indenture,' relied on by appellant, is easier asked than answered—nor is it necessary to decide. For they must be understood and construed with reference to the subject-matter of the power, that is, a foreclosure by advertisement and sale of the mortgaged premises, and not a foreclosure in equity, of which no mention is made in the power or in any part of the mortgage." In the case of *Hardwick v. Bassett*, supra, the opinion was rendered by Judge Cooley, and in part is as follows: "This is a foreclosure case in which a bill has been taken as confessed against all the defendants, and decree entered for the amount due on the mortgage, including seventy-five dollars for an attorney's fee, the power of sale having provided that in case of foreclosure 'a reasonable number of dollars' might be deducted from the proceeds of sale for an attorney's solicitor's or counselor's fee. The allowance of this sum was erroneous, as the clause which permitted it could only have reference to a foreclosure under the power of sale. *Sage v. Riggs*, 12 Mich. 313." In the case of *Van Marter v. McMillan*, supra, the identical question was involved and the court on the authority of *Sage v. Riggs*, supra, struck out the allowance for attorney's fees. This same question has been

before the Supreme Court of South Carolina in two well-considered cases. In the case of *Brown et al. v. Kolb*, 92 S. C. 309, 75 S. E. 529, it is said: "The mortgage provided that on default the mortgagee might seize and sell the property, and that upon the sale 'he shall apply the proceeds of such sale, after deducting all expenses and charges, including attorney's fees, toward the payment and discharge of the indebtedness,' etc. Under a similar contract it was held in *Walker v. Killian*, 62 S. C. 482, 40 S. E. 887, that the mortgagee could not claim the fees if he foreclosed by action, and not by seizure under the power." In this action the judgment was modified by striking therefrom the attorney's fees.

My attention has not been called to a single case, in any jurisdiction supporting the rule enunciated in the majority opinion. In the face of the well-considered cases above mentioned, in which some of our most eminent American jurists, including Judge Cooley of Michigan, have participated, it seems ill advised for this court to prescribe a rule in conflict with all the adjudicated cases to be found in the reports, and contrary to the views of our most reputable text writers. Besides, it does not seem either equitable or just that the court should fasten on the unfortunate mortgagor, who has been unable to meet the payments called for by his mortgage, an obligation to pay the necessarily larger fee to which an attorney would be entitled in a foreclosure action, when his only contract was to pay the nominally small charge incident to summary proceedings to foreclose said mortgage as a pledge. In my opinion the judgment in this action should be modified by striking therefrom the provisions thereof allowing plaintiff an attorney's fee for foreclosing said chattel mortgage.

207 Cal. 414

ROSEMEAD CO. et al. v. SHIPLEY COMPANY et al. (L. A. 9961.)

Supreme Court of California. June 25, 1929.

I. Mortgages ☞33(5)—Usury ☞18—Agreement that defendant should take title to property, and that plaintiff should have right to repurchase, held a usurious loan and the conveyance a mortgage.

Agreement under which defendant was to put up the amount necessary to release building site from lien of trust and take conveyance thereto, and building was to be erected from proceeds of mortgage to be placed thereon, and plaintiffs were to have privilege of repurchasing for a specified amount, held a loan at a usurious rate of interest and the conveyance a mortgage.

2. Appeal and error ⇨231(2)—General objection to filing of amended complaint is insufficient claim of error.

A general objection to the filing of an amended complaint at the trial was an insufficient claim of error.

3. Pleading ⇨248(2)—Amended complaint based on same state of facts as original, did not introduce new cause of action because it sought equitable, instead of legal, relief.

Where original and amended complaints were both based on the same state of facts, the amended complaint did not introduce a new cause of action merely because the original complaint prayed for a money judgment and the amended complaint for equitable relief.

4. Dismissal and nonsuit ⇨54—Plaintiff may not be dismissed because of mistake as to relief to which entitled.

There is but one form of action in California, and plaintiff may not be dismissed merely because he is mistaken in the nature of the relief to which he is entitled.

5. Election of remedies ⇨7(1)—Change from law to equity side of court does not bring about election when opposing party is not prejudiced.

Change from law to equity side of court by amendment of prayer for relief does not bring about election of remedies, if the change involves no prejudice to opposing party.

6. Compromise and settlement ⇨18(3)—Offer to restore was not necessary when plaintiff received nothing under compromise agreement sought to be canceled (Civ. Code, § 1691).

Where plaintiffs who had caused land to be conveyed to defendant as security, in order to facilitate sale to third party, entered into compromise agreement under which they executed quitclaim deed and permitted decree to be entered quieting title in defendants, but defendants failed to carry out the compromise agreement, and claimed to own the property, notice of rescission and offer to restore, as contemplated by Civ. Code, § 1691, was not necessary to authorize cancellation of the compromise agreement, as plaintiff received nothing under the agreement.

7. Mortgages ⇨8—Transaction may be both a mortgage and a resulting trust.

It is possible for a transaction to be at one and the same time a mortgage and a resulting trust.

8. Mortgages ⇨8—Foreclosure is ordinarily necessary, though transaction gives rise to resulting trust.

So long as transaction retains features of mortgage, foreclosure is ordinarily necessary, even though transaction may also give rise to a resulting trust.

9. Mortgages ⇨8—That conveyance was by third person instead of alleged mortgagor did not make it a resulting trust rather than a mortgage.

Where plaintiffs caused real estate to be conveyed to defendant as security, fact that deed was not made directly by plaintiffs, but

by bank which held legal title, did not alone make transaction a resulting trust instead of a mortgage.

10. Compromise and settlement ⇨8(3)—Party's acts held fraudulent as respected right to cancel compromise agreement.

Where plaintiffs caused real estate to be conveyed to individual defendant as security, and, to facilitate sale to third party, entered into compromise agreement under which they executed quitclaim deed, and permitted decree to be entered quieting title in corporate defendant to which individual defendant had conveyed, defendants' acts held to show fraud, as respected cancellation of the compromise agreement.

11. Mortgages ⇨608½—Where decree ordered accounting and reconveyance, defendants who had conveyed to corporation controlled by them could not complain because required to join in reconveyance.

Where decree declared conveyance to individual defendants a mortgage, and directed an accounting, and ordered reconveyance on payment of amount found due, individual defendants who had conveyed to corporation controlled by them could not claim error in requirement that they join in the deed of conveyance.

In Bank.

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Action by the Rosemead Company, a common-law trust, and others, against the Shipley Company and others for an accounting. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

Edward Judson Brown, of Los Angeles, for appellants.

Charles W. Fournl, Ingle Carpenter, and Edward W. Tuttle, all of Los Angeles, for respondents.

PRESTON, J. By it the plaintiff, Rosemead Company, a common-law trust, is declared the owner of the property in suit. As incidental to this relief, the defendant Shipley Company, a corporation, is found to be the alter ego of its grantor, the defendant Don P. Jones, and is declared to hold the conveyance of said property as security only. The decree also declares the transaction resulting in the conveyance of said property as security to be usurious, and the right to interest is thereby denied. An accounting is had between the parties, and a reconveyance is directed upon payment of the true amount loaned and unpaid as found therein; also, as further incidental relief, an agreement of compromise between the parties as to the division of the proceeds of a prospective sale is impeached and canceled for fraud, and, as incidental to the last-named relief, a quitclaim deed, in furtherance of said agreement, of the property to defendants by plaintiffs is

canceled, as is also a decree taken for the same purpose, quieting title to said property in the defendants. The decree is an apt illustration of the scope and efficacy of the powers of a court of equity.

The salient facts needful for the purposes of this discussion are: Plaintiffs, a common-law trust and its trustees and beneficiaries, owned, subject to a trust in the Security Trust & Savings Bank of Los Angeles, a subdivision of land known as Rosemead Gardens. Desiring to promote activity in the sale of lots in this tract, plaintiffs conceived the idea of erecting on lot 1 and a portion of lot 2 thereof a store building. The court found the building site to have been at the inception of this transaction of the value of \$4,500. Plaintiffs in this emergency sought the defendant Don P. Jones, a presumed friend, and entered into with him an elaborate agreement in writing, intended doubtless to hide, rather than to elucidate, the true intent of the parties.

[1] The writing bore date of January 22, 1923, but was executed in March following. It provided in substance that Jones should put up \$1,866.67, the amount necessary to release the said site from the trust held by the bank, and should take a deed of conveyance of the property; that a brick store should be erected thereon at a cost not to exceed \$9,600, which sum was to be obtained by a mortgage upon the property. Plaintiffs were to procure the builder, agree with him on the terms, and were to supervise the construction without charge to Jones. This latter covenant Jones exacted by a special writing. Plaintiffs were to have one year after construction to repurchase the property and improvements for the sum of \$3,000 and interest on \$2,000 at the rate of 7 per cent. per annum from the date of the deed, the balance of \$1,000 to draw no interest. Plaintiffs likewise were to secure tenants for the property, but Jones was to receive all rentals, and was to apply them to the payment of the contemplated mortgage and interest, taxes, insurance, and interest on the \$2,000 to himself and to hold the remainder if any, to be adjusted and accounted for at the time of the exercise of the option by plaintiffs to repurchase. It was further provided, however, that, if said rentals were insufficient for all or any of these several purposes, plaintiffs would make such deficiency good. The contract further provided that, if at any time during the coming five years the mortgage should be foreclosed, and Jones should lose the amount advanced by him, or any part thereof, plaintiffs were to pay him the said deficiency, with interest.

Jones put up the said sum and took a deed from the bank. A builder was procured by plaintiffs and the building started, but the party proved unfaithful, and the parties to this agreement got together and decided to finish the building by each putting up a portion of the sum required over and above the

sum of \$5,000 that had been raised by a mortgage on the property and had gone into the construction of the building. Under this new arrangement, plaintiffs put up the sum of \$2,200, and Jones put up the balance. The building was finished in the summer of 1923, and plaintiffs immediately secured tenants for it. Various rentals were from that time forward received by Jones.

The court below on this contract as construed by it, on the conduct of the parties with respect thereto, and on the oral testimony of plaintiffs and their witnesses, found this arrangement to be a loan and the conveyance to Jones a mortgage. This finding is so evidently correct that comment is unnecessary. It is a plain case of a loan of \$1,866.67 and an agreement to pay a bonus of \$1,133.33, besides lawful interest on the sum of \$2,000. The disguise in which the transaction is clothed only emphasizes the fact that it is a loan, and a loan at a grossly usurious rate of interest. Several writings of defendant Jones were introduced in evidence showing his exorbitant interest demands and demands for bonuses. One witness testified that Jones said he was getting 28 per cent. interest from others, and would exact the same rate from plaintiffs.

It is true that within the one year provided for in said writing plaintiffs did not exercise the so-called option to repurchase nor repay said defendant for the sums advanced by him, but this requirement, if material, was waived by the unsatisfactory statements of account given by Jones to plaintiffs and the above-mentioned other executed oral modifications of said contract made to finish said building. However, after the year had expired, Jones did render a statement of his account, in which he claimed advances to the amount of \$6,135.66, on which he demanded a bonus of \$3,691.40, coloring the transaction, nevertheless, by the assertion that it was an offer to sell at such figures.

The court, after declaring the transaction a loan, and after decreeing the agreement respecting interest to be usurious, stated the account between the parties, and found that Jones had actually advanced over and above the rents received by him the true sum of \$3,073.37. If it was proper to deny interest, no criticism of this item can be made.

But the story must be carried further—early in the proceedings, the defendant Jones and his wife deeded said property to defendant corporation, a concern in which they owned practically all the stock, and of which Jones was the president and controlling spirit. It is not claimed, nor could it be claimed, that this corporation is in the position of an innocent purchaser for value. On February 1, 1925, this corporation brought a suit against plaintiffs to quiet title to the property, which suit was answered by plaintiffs by the setting up of the transaction presumably as hereinabove outlined. A suit for

the foreclosure of a mechanic's lien in the sum of \$750 was also pending at this time. Plaintiffs, seeking to extricate themselves from this maze of difficulties, essayed to sell the property, and to that end procured a bona fide purchaser who was willing to pay the sum of \$17,000 for it and to go into escrow arrangements to this effect, which he did on his part by putting up the full proposed purchase price. Plaintiffs then sought out defendants, and finally agreed with them in writing upon a division of this purchase price.

This agreement was, in substance, that defendants should deliver in escrow the necessary conveyance to pass title to the purchaser and accept the sum of \$9,291.67, paying therefrom the sum of \$1,441.67, and receiving a net amount to themselves of \$7,850. The remainder was to be used in satisfying the mortgage on said property and the final balance was to go to plaintiffs. Fearing that the existence of litigation respecting the title might interfere with the sale, it was agreed that plaintiffs should facilitate matters by giving to defendants a quitclaim deed to said property and by stipulating that a decree might be entered in said suit to quiet title in favor of defendants and against themselves, all of which was done. But defendants failed and refused to execute and/or deliver the necessary deed in escrow or at all.

The court in this behalf found that defendants acted fraudulently, in that their design was to procure said decree and said quitclaim deed without any intention on their part of ever executing the conveyance necessary to complete the sale. The evidence is amply sufficient to support this finding. Among other circumstances shown by the record, the real estate broker in the transaction testified that Jones "put his hand in his pocket like this and he says, 'I am sitting pretty; I am all right now; the property is mine.'"

The court in an admirably incisive manner sought and found the basis of the transaction, stripped it of the entanglement surrounding it, and gave the clear-cut decree summarized above. Defendants have appealed and assigned various technical grounds of error, which we shall now consider.

[2-5] The court permitted, "over the objection of defendants," the filing at the opening of the trial of an amended complaint. A general objection of this kind is an insufficient claim of error. It is urged, however, that a new cause of action was introduced. This is not the case. Both complaints count upon the same state of facts; the difference is in the prayer for relief, the original prayer being for a money judgment and the amended prayer being for the equitable relief given. There is but one form of action in this state, and a plaintiff may not be dismissed by the court merely because he is mistaken in the nature of the relief to which he is entitled. *Zellner v. Wassman*, 184 Cal. 80, 88, 193 P. 84.

A change by amendment from one kind of relief to another is not a change in the cause of action, if the transaction is the same. *Frost v. Witter*, 132 Cal. 421, 64 P. 795, 84 Am. St. Rep. 53; *Doolittle v. McConnell*, 178 Cal. 697, 174 P. 305; *Cox v. McLaughlin*, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164; *Schaad v. Barceloux*, 42 Cal. App. 337, 183 P. 716; *Ford v. Ford*, 44 Cal. App. 415, 186 P. 164. The fact that the change is from legal to equitable relief is immaterial. *J. I. Case T. M. Co. v. Copren Bros.*, 45 Cal. App. 159 187 P. 772; *Walsh v. McKeen*, 75 Cal. 519, 17 P. 673. Nor does such change from the law to the equity side of the court bring about an election of remedies, if the change involves no prejudice to the opposing party. *Roulard v. Rosenberg Bros. & Co.*, 193 Cal. 360, 366, 224 P. 449, and cases therein cited. Here not only was no such objection made, but no showing of injury is attempted.

[6] It is next urged that the complaint failed to state a cause of action, because the compromise agreement, the quitclaim deed, and the decree quieting title, all or either of them, constituted, if valid, a cancellation of all previous contracts and covenants, and could not be canceled without an allegation of a previous notice of rescission and offer to restore, as contemplated by section 1691 of the Civil Code. Certain exceptions to this general rule of the Code have been specified in actions in equity. In *Kelley v. Owens*, 120 Cal. 502, 510, 511, 47 P. 369, 371, these exceptions are stated as follows:

"There are exceptional cases where restoration or an offer to restore before suit brought is not necessary—as, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties; or where the plaintiff has merely received the individual promissory note of the defendant; or where the contract is absolutely void; or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore; or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties—and it will be found that such instances, or others similar to them in principle, are those to which the authorities cited by appellants generally relate. The substance of the distinction will be found to be based, not upon the form of the action, but upon the difference between the cases which are within the rule, and those which, owing to peculiar facts, are exceptions to the rule. And the real facts and rights arising thereon cannot be kept out of sight by the device of a particular form of action. Sections 3406-3408 of the Civil Code do not establish any new rule upon the subject."

These exceptions are approved and others

added in California, etc., *Co. v. Schiappa-Pietra*, 151 Cal. 732, 739-741, 91 P. 593, 596, and the court there finally says: "Another exception recognized by this court is that of the case where the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself. In such a case, as the plaintiff cannot determine in advance of the suit the amount by him to be repaid, an offer to refund such sum as shall be decreed is a sufficient offer to do equity. (*Sutter-St. R. R. Co. v. Baum*, 66 Cal. 44, 4 P. 916.) The authorities fully sustain the proposition that an offer to restore before action is not essential where the rights of the other party can be fully protected by the decree, and such restoration cannot be made without injuriously affecting the rights of the party seeking rescission, or the relative rights of the parties in the event of a rescission cannot be determined without an accounting. The statute itself dispenses with the necessity of such an offer where the other party is himself unable to restore what he has received. In such event an offer on the part of the rescinding party would be a vain thing, and the respective rights of the parties can be fully guarded by the decree."

Enough appears to conclusively show that a notice of rescission and offer to restore prior to suit was not necessary in this case, as the plaintiffs received absolutely nothing under any of the writings sought to be annulled. The institution of the suit or the allowance of the amendment was sufficient notice of rescission in a case such as this. *Zeller v. Milligan*, 71 Cal. App. 617, 236 P. 349. This is especially true in equity, where fraud is the basis of the claim, and no legal prejudice to the defendants could have resulted.

[7-9] It is next urged that the transaction is at most but a resulting trust in which the defendants are trustees, and error has resulted because the decree does not so declare and provide a time within which the amount due from plaintiffs must be paid, and that failure to pay would work a forfeiture of plaintiffs' rights, and thus obviate the possible necessity of a foreclosure proceeding. The transaction is not a mortgage, it is said, because conveyance to defendants was made by the bank and not by plaintiffs. This is not the test. It is quite possible for a transaction to be at one and the same time a mortgage and a resulting trust. *Campbell v. Freeman*, 99 Cal. 546, 34 P. 113; *Banta v. Wise*, 135 Cal. 277, 279, 67 P. 129; *Windt v. Covert*, 152 Cal. 350, 353, 93 P. 67. But, so long as the transaction

retains the features of a mortgage, foreclosure is ordinarily necessary, even though the transaction may also give rise to a resulting trust. *Byrne v. Hudson*, 127 Cal. 251, 59 P. 597; *Windt v. Covert*, supra; *Lockhart v. McDougall Co.*, 190 Cal. 308, 212 P. 1; *Campbell v. Freeman*, supra. The fact that the deed was not made directly by plaintiffs, but by the bank, which held the legal title, does not alone make the transaction a resulting trust instead of a mortgage. *Prefumo v. Russell*, 148 Cal. 451, 83 P. 810; *Lockhart v. McDougall Co.*, supra; *Campbell v. Freeman*, supra. Moreover, this feature of the present case seems unimportant, as under the decree the plaintiffs may not have the relief they seek, except upon payment of all sums due defendants.

[10] It is also urged that the evidence does not support the finding that, in queering the efforts of plaintiffs to sell the property by failure to co-operate with them by depositing a properly executed deed in escrow, defendants were acting fraudulently. This claim deserved little discussion. Repudiating the trust by conveying the property to defendant corporation and the institution of the suit to quiet title was acting fraudulently. Demanding exorbitant interest and bonuses in violation of the trust were acts of the same character. No sufficient reason whatever appears other than an intention to defraud for refusing to deposit the deed in escrow. In fact the contention now made that the quitclaim deed and decree are and were binding notwithstanding their failure to comply with covenants on their part to make them binding is proof abundant that defendants were acting fraudulently.

[11] The claim that the evidence is insufficient to justify the finding that the deed was a mortgage deserves no further discussion than is contained in the recital of facts. The same observation applies to the claim that usury was not present in the transaction, and that it did not forfeit the right to interest. *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725. The defendants Jones and wife are in no position to claim error in directing them to join in the deed of reconveyance because they had theretofore decided away their interest in said property to a corporation in their control. *Jones v. Jones*, 140 Cal. 587, 591, 74 P. 143.

Further discussion we deem unnecessary.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

OATMAN v. NIEMEYER. (Sac. 4110.)★

Supreme Court of California. June 25, 1929.

Rehearing Denied July 25, 1929.

Reformation of Instruments §§ 11, 13(1)—Deed could be reformed by inserting description of property omitted by mistake and by correcting grantee's name (Civ. Code, § 3399).

Where deceased grantor endeavored to execute deed in accordance with agreement to convey property to plaintiff in consideration for her services, and deed signed and witnessed purported to grant certain lot in city of W., county of Y., but through mistake no description appeared and grantee's name was misspelled, such deed could be reformed by inserting description of property and by correcting grantee's name under Civ. Code, § 3399.

In Bank.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Alice Lee Oatman against H. A. Niemeyer, as administrator of the estate of A. N. Garrison, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Superseding opinion in 273 P. 567.

W. P. Rich, of Marysville, for appellant.

Lawrence Schillig, of Yuba City, for respondent.

PER CURIAM. On rehearing in bank, we adopt the statement of facts as set forth in the department opinion:

"This is an appeal from the judgment of the trial court in favor of the plaintiff granting reformation of an instrument purporting to be a deed, by inserting therein a description of certain real property which was owned by the deceased, but which, it was claimed, was omitted by mistake from said instrument, and also quieting plaintiff's title to the real property after said purported deed had been reformed. The appeal was taken on the judgment roll alone.

"The facts found by the court show: That on the 4th day of June, 1922, in the city of Wheatland, county of Yuba, state of California, one A. N. Garrison employed plaintiff to care for him, nurse him, and keep house for him at his residence in said city of Wheatland, county of Yuba, state of California, which service was to be continuous to the date of his death; that said A. N. Garrison was of the age of 80 years or thereabouts, at said time. In consideration of such service, said Garrison, promised and agreed to and with plaintiff that he would give her all his property, both real and personal, on hand at the time of his death. In pursuance of such agreement plaintiff, on said 4th day of June, 1922, began such service and continued to and did render all of such service to be given by her to said A. N. Garrison to the date of his death, to wit, on the 18th day of October, 1926. On the 4th day of October, 1926, the

said A. N. Garrison informed plaintiff that he wished to comply with his said agreement and execute the necessary papers giving her his property and sent for one S. D. Hicks, who was then and there and for some time previous had been a justice of the peace of the territory in which the said city of Wheatland was situated; that thereupon the said S. D. Hicks went to the residence of said A. N. Garrison in said city of Wheatland and the said A. N. Garrison then and there instructed the said S. D. Hicks to draw the necessary papers which would invest plaintiff with all of his property and thereupon the said S. D. Hicks prepared a deed and the same was signed and executed by the said A. N. Garrison and the said A. N. Garrison requested said S. D. Hicks and one Ira Rowland to sign as witnesses thereto; that, after the signing and witnessing of said deed, the same was then and there by the said A. N. Garrison delivered to said plaintiff Alice Lee Oatman. The deed so signed and witnessed is set out in the findings. It purports to grant, bargain and sell to the plaintiff, her heirs and assigns forever, 'all the certain lot, piece or parcel of land situate, lying and being in the city of Wheatland, County of Yuba, State of California, and bounded and particularly described as follows, to wit.' No description of the property sought to be conveyed appears in the deed. The trial court found that the real property intended to be conveyed was the only real property owned by said A. N. Garrison, and the same constituted one compact piece or tract of land which was fenced and on which was a dwelling house where the said A. N. Garrison resided and where the plaintiff rendered such services. The description of the property is inserted in the findings of the court.

"It was also found that through the mistake of the scrivener, the plaintiff's name was improperly spelled and the description of the property intended to be conveyed was omitted and that such mistake and omission was not brought to the attention of the plaintiff until after the death of A. N. Garrison on the 18th of October, 1926. It was further found that the plaintiff had not been paid by the said A. N. Garrison, for her services aforesaid nor has she been paid since his death therefor, except by the conveyance of said real property hereinbefore described and which was intended by the said A. N. Garrison to convey to said plaintiff the real property described in the findings in payment for such services. The plaintiff is now and ever since the date of the delivery of said deed or instrument to her has been in the actual possession of said real property hereinbefore described, together with the dwelling house thereon and all things therein.

"The trial court entered a decree reforming and correcting the said deed so that plaintiff's name would appear therein properly and

inserted the description of the property which had been omitted, and quieted plaintiff's title against the administrator of the estate of A. N. Garrison, deceased, to the property so described."

Appellant contends that the lack of description in the instrument before the court, or of any reference to the property by which it could be located, constituted a patent ambiguity, and that it was error for the trial court to hear extrinsic evidence by which it was sought to locate and describe the property, that the purported deed was wholly inoperative and void because of the want of any description or designation of subject-matter, and that, being void, it cannot be reformed.

There can, of course, be no question but that the deed was void in law, that is, that it failed wholly as a conveyance of property, since no property was described. But the contention that, for that reason, it cannot be reformed, fails to distinguish between a contract which is void for some fundamental reason and an instrument or writing which is void because of mistake in its preparation. If the contract itself is void, as, for example, because it is immoral or because the parties have not agreed on all of its terms, and there is, for that reason, no final contract or understanding between them, or, because the contract lacks consideration, reformation is impossible, since there is no valid contract to reform. But this is entirely different from a case where there is a valid contract and the parties have endeavored to put it in writing, and have made a mistake in writing down its terms, or have endeavored in accordance with the contract to execute an instrument, such as a deed, for the purpose of carrying it out and, through mistake in the preparation of the instrument, the document fails, either wholly or partially, to accomplish such purpose. The instrument may be void in such a case because of the mistake, but there is still a valid contract; and, the contract being valid, equity will reform the instrument to make it what it should be, and would have been except for the mistake. There is no making of a new contract in such a case. There is but the making of a new instrument, either to correctly express the contract or to carry it into effect. Civ. Code, § 3399; *House v. McMullen*, 9 Cal. App. 664, 100 P. 344; *Merkle v. Merkle*, 85 Cal. App. 87, 258 P. 969.

The judgment is affirmed.

207 Cal. 438

RANKIN v. MILLS. (L. A. 10004.)

Supreme Court of California. June 26, 1929.

1. Physicians and surgeons ⇨18(8)—Facts showing physician's treatment of injured hip held to sustain inference that physician did not exercise reasonable care in treating patient.

Facts showing physician was called to treat and attend woman 69 years of age for injury to

hip, which he diagnosed as dislocated hip and for which he treated her about three months and at no time caused X-ray picture to be taken to determine nature of injury, and patient on failure to improve sought other medical advice and had X-ray pictures taken, which revealed fracture of hip bone which had made fibrous instead of bony union, resulting from improper treatment, held to sustain inference that physician did not exercise reasonable and ordinary care and diligence in treating patient and in applying such learning and skill to case.

2. Physicians and surgeons ⇨18(4)—Complaint in action for malpractice charging improper diagnosis and treatment without using word "negligent," but alleging facts constituting negligence, held sufficient.

In action for malpractice in treating injury to hip, complaint charging improper diagnosis and treatment by physician and fully setting forth facts constituting negligence held sufficient without using word "negligent," which is immaterial.

3. Trial ⇨296(3)—Instruction, in action for malpractice, not limiting skill and care required to that of physicians in same locality, held not reversible error under evidence and in view of another instruction.

In action for malpractice, giving instruction which did not limit requirement of skill and care of physician to that possessed by persons practicing profession in same locality, though improper, held not reversible error, where persons testifying as experts and reciting usual practices were all practicing profession in immediate vicinity and all testimony on subject had relation to that vicinity, and in another instruction jury was told physician was required to exercise skill and diligence ordinarily exercised by those practicing under same conditions.

In Bank.

Appeal from Superior Court, San Luis Obispo County; T. N. Norton, Judge.

Action by Christina Rankin against Charles F. Mills. Judgment for plaintiff, and defendant appeals. Affirmed.

Hartley F. Peart, of San Francisco (Charles V. Barfield, of San Francisco, of counsel), for appellant.

S. V. Wright, of San Luis Obispo, for respondent.

LANGDON, J. This is an appeal by defendant from a judgment against him for \$1,200 in an action in which the plaintiff alleged she had employed defendant as a physician to treat and attend her after an injury to her hip, and that, by reason of improper diagnosis and treatment by said defendant, plaintiff had become a cripple for life.

It is argued by appellant that the evidence does not sustain the verdict; that the evidence fails to disclose that the defendant was guilty of any negligence in diagnosing or in the methods employed by him in arriving at his diagnosis of plaintiff's condition.

Plaintiff, a woman 69 years of age, while running with children at her home at Atas-

cadero, Cal., fell and injured her hip. She was in great pain and could not put her foot upon the ground. She was carried to her home and the defendant was called. He administered an anæsthetic and the following day he treated her for a dislocated hip. Defendant testified that after administering the anæsthetic, and after proper manipulation, he reduced the dislocation and the limb went back into its natural position with no shortening of the leg, and he advised the patient to be quiet in bed. He also told her that she had merely a dislocation of the hip and that she would be walking about within nine days. There is a sharp conflict in the testimony with reference to what was said about X-ray pictures. Plaintiff and her family testified that defendant said he was glad that no X-ray pictures would be necessary, because the nearest apparatus was at San Luis Obispo, a distance from Atascadero of about 25 miles, and its use would necessitate a long, hard, expensive journey for plaintiff. Defendant testified that he advised X-ray pictures, but the suggestion was resisted by the family of plaintiff because of the expense involved. Since this matter is vital to the findings and verdict, we must accept the testimony in the record with reference to it which is in accord with the conclusion reached by the jury. For about three months defendant treated plaintiff for a dislocated hip and had her walking about, pushing a chair before her, and later had her walk with crutches, and he at no time caused an X-ray picture to be taken, nor did he cause the hip to be incased so as to restrain its movement and keep broken bones in place. After this period of time had elapsed, plaintiff became apprehensive, because of her failure to improve, and sought other medical advice. X-ray pictures were taken, which revealed that there had been a fracture of the hip bone, which had made a fibrous instead of a bony union; that the leg was shortened; and that it was then too late to secure a bony union of the broken bones. It is also in evidence, on behalf of defendant, that, due to the age of the patient, a bony union was very unlikely under any form of treatment and that the majority of patients under the same conditions become crippled for life regardless of the treatment used. On the other hand, the record contains the testimony of the physicians who took the X-ray pictures to the effect that the pictures revealed a fractured hip which had been improperly treated; that "the leg was in a position of external rotation and was shortened and it would not have been that way if it had been properly treated." This testimony we must accept, also, rather than the testimony offered by defendant upon this question, in view of the conclusion of the jury. This testimony comes from an expert; the witness giving it was a graduate physician and surgeon from the medical school of Stanford

University, state of California, and with a large and varied experience in the study and practice of taking X-ray pictures.

Appellant contends that because the expert medical witnesses for plaintiff did not testify that the defendant failed to use the degree of skill and care ordinarily possessed and exercised by members of his profession in good standing, practicing in the same or similar localities, the verdict cannot stand; and that the testimony that the treatment employed was improper is insuticient. Reliance is placed upon the case of *Hesler v. California Hospital Co.*, 178 Cal. 764, 174 P. 654. That case contains the following language: "The law, as above stated, does not require that the instructions and advice given by a physician to a patient should be at all events and beyond question 'proper,' or that his treatment should be certainly such as to obtain an approximately perfect result. It requires only, first, that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in that locality; and, second, *that he shall exercise reasonable and ordinary care and diligence in treating the patient and in applying such learning and skill to the case.*"

[1] Conceding that the record does not disclose, affirmatively, that the defendant did not have the required degree of skill and learning, it is certainly sufficient to sustain the inference that he did not "exercise reasonable and ordinary care and diligence in treating the patient and in applying such learning and skill to the case." For if we accept the testimony favorable to respondent, as we must do, we are forced to the conclusion that the defendant, knowing an X-ray machine was to be had in the place where the injury occurred, did not make use of it nor mention its existence to plaintiff and her family because he had had some unpleasant or unfriendly relations with the institution controlling this apparatus, and that he did not advise a journey to San Luis Obispo where another X-ray machine could have been found. We must also accept the testimony that plaintiff complained constantly of pain and of a sensation as though a "lot of little bones were sticking into" her, and of a grating of the bones when she attempted to move, and that when plaintiff's leg was placed upon a pillow on the bed, the foot would fall outward repeatedly, indicating a broken bone in the leg. Expert testimony appears in the record to the effect that, under such conditions, and in view of the fact that no improvement occurred in the limb under the treatment for dislocation of the hip, the next step, logically and scientifically, was to investigate further the nature of the injury by taking X-ray pictures. Indeed, this would seem so obvious as to be a permissible inference without expert testimony on the subject, as would be the conclusion that a failure to do this was negligence.

[2] But it is objected by appellant that the

complaint does not charge negligent treatment, but only improper diagnosis and treatment, by defendant. While the complaint does not use the word negligent, that circumstance is immaterial. The facts constituting the negligence are what is required in a pleading, and they are fully set forth in the complaint.

[3] It is also contended that error was committed in giving a certain instruction to the jury. The instructions, as a whole, fairly state the law applicable to the facts. The instruction under attack by appellant is to the effect that "the law requires one who holds himself out as a practicing physician and surgeon to possess and bring to the work he performs as such the care and skill ordinarily possessed by persons following such profession, and the law also requires one who practices such profession to exercise in the practice thereof that skill and care and good judgment which is ordinarily possessed and exercised by persons following that profession." It is objected that the foregoing instruction should have limited the requirement of skill and care to that possessed by persons practicing the profession in the same locality. The objection is well taken, but it does not compel a reversal of the judgment, because it does not appear nor seem likely that the jury was misled by the omission to so qualify the instruction. The persons testifying as experts and reciting the usual practices were all practicing their profession in Atascadero or in the immediate vicinity and all testimony on the subject has relation to that vicinity; and also in another instruction, the jury was told that the defendant was required to exercise such reasonable skill and diligence as is ordinarily exercised and used in the practice of the profession of defendant by those who practice *under like conditions*.

There are no other matters involved upon the appeal that require discussion, and the judgment is affirmed.

We concur: WASTE, O. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.

LAYNE v. KIRBY. (Civ. 6817.)★

District Court of Appeal, First District, Division 2, California. June 11, 1929.

Rehearing Denied July 11, 1929. Hearing Granted by Supreme Court Aug. 8, 1929.

1. United States §36—Secretary of War, having power to appoint, in absence of statute to contrary may remove appointees (10 USCA § 187).

The Secretary of War having power, under 10 USCA § 187, to appoint employees in his department, in the absence of statute to the contrary has power to remove any of appointees.

2. United States §36—Clerks in United States engineer's office though civil service employees, could be removed for cause if served with written reasons and preferred charges and allowed reasonable time for answering in writing (5 USCA § 652).

Although clerks in United States engineer's office were civil service employees, they could be removed for cause upon being served with writing stating reasons and with charges preferred against them, and if allowed reasonable time for answering same in writing as provided by 5 USCA § 652.

3. United States §36—Department head of United States government has duty from time to time to determine fitness of his appointees.

It is duty of heads of different departments of United States government from time to time to determine fitness of appointees in department.

4. Libel and slander §39—Letter written by clerk in United States engineer's office to proper superior calling attention to dereliction in duties of another clerk held "privileged" (Civ. Code, § 47, as amended in 1874).

Where one of clerks in United States engineer's office wrote and transmitted extended letter concerning superior clerk in office, some of statements which were to effect that superior clerk was derelict in performance of duties, correspondence where addressed to proper party for its purpose was step in official proceeding authorized by law, and was therefore privileged within contemplation of Civ. Code, § 47, as amended in 1874, rendering sender not liable in action for libel.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Privileged Communication.]

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Charles H. Layne against Edmund Kirby. Judgment for defendant, and plaintiff appeals. Affirmed.

John Ralph Wilson and Everette C. McKeage, both of San Francisco, for appellant.

George R. Andersen, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff filed a complaint in which he alleged that the defendant had published a libel against him. The defendant appeared and filed a general demurrer. The demurrer was sustained, the plaintiff declined to amend, and from a judgment entered in favor of the defendant the plaintiff has appealed and has brought up the judgment roll.

[1-3] Prior to January 31, 1928, there was maintained in San Francisco a United States engineer office. The plaintiff, Charles H. Layne, was chief clerk. The defendant, Edmund Kirby, was a subordinate clerk. Colonel T. H. Jackson, Corps of Engineers, was the superior officer. Commencing on the 21st

day of December, 1927, a correspondence was commenced between the defendant and his superior officers regarding an order placing the defendant on furlough without pay. Under date of January 30, 1928, the defendant wrote and transmitted an extended letter and inclosed therewith several inclosures. The alleged libel is based on statements contained in that letter. Some of the statements were to the effect that the ruling about to be enforced would deprive this defendant of his statutory rights; that the plaintiff was derelict in the performance of his duties; that he used government property for his own personal use; that he was engaged in private enterprises when he should have been rendering official service; that plaintiff at one time ordered defendant to render a false statistical report; and that the plaintiff knowingly allowed false statistical reports to be rendered to his superior officers. Both the plaintiff and the defendant hold their appointments from the Secretary of War. U. S. Code Ann. title 10, § 187. The Secretary of War, having the power to appoint, in the absence of a statute to the contrary has the power to remove. U. S. v. Taft, 24 App. D. C. 95, 98-99. Although civil service employees, either could be removed for cause, and it is the duty of the head of the department from time to time to determine the fitness of his appointees. U. S. v. Taft, supra. Before a civil service employee may be removed for cause, he is entitled to be served with a writing stating the reasons and of the charges preferred against him, and to be allowed a reasonable time for answering the same in writing. U. S. Code Ann. title 5, § 652. It appears that the letter was addressed to the person who had the right to hear and determine all of those charges.

One of the points presented by the record is the element of privilege. The plaintiff contends that the communication, if privileged at all, was only qualifiedly privileged. So contending, he claims that the trial court could not rule on the subject until the evidence was all in. If, on the other hand, the communication was absolutely privileged, it will be unnecessary to discuss any other point. In 1860 the Supreme Court of New York wrote an exhaustive opinion on the subject before us in the case of Perkins v. Mitchell, 31 Barb. 461. On page 471 the court said: "These cases leave no room to doubt that in England and in the courts of this state, the rule has been very steadily adhered to which protects parties and witnesses for statements pertinently made by them in the assertion of their rights, or the discharge of their duties as such. I see no reason why this protection should be confined to the trial of issues in suits or indictments, or to oral examinations, so as to exclude affidavits even if voluntarily made, if otherwise regular and pertinent. The phrase employed by the judges and the

text writers, in speaking of this sort of privileged communications, is 'judicial proceedings.' This is not confined to trials of civil actions or indictments, but includes every proceeding before a competent court or magistrate in the due course of law or the administration of justice, which is to result in any determination or action of such court or officer." When the commissioners were preparing our Codes, which were adopted in 1872, basing their action in part on what was said in that case, they framed section 47 of the Civil Code. As adopted, the section at that time, among other things, provided: "A privileged communication is one made: * * * 2. In testifying as a witness in any proceeding authorized by law to a matter pertinent and material, or in reply to a question allowed by the tribunal. * * *" Following the rule in the Perkins Case, it will be noted that the statute is limited to sworn statements, and, furthermore, that it is not limited to court proceedings. In 1874 the statute was amended to read as follows: Sec. 47. "A privileged publication is one made: * * * 2. In any legislative or judicial proceeding, or in any other official proceeding authorized by law. * * *" Since that date that language has not been changed.

A statute similarly worded was under consideration in Sanford v. Bennett, 24 N. Y. 20. At page 26 Mr. Justice Denio said: "I am persuaded that the transactions embraced in the purview of the statute are such as resemble judicial and legislative proceedings; such as the transactions of administrative boards in which the subjects dealt with are liable to be considered, deliberated upon, discussed and determined." (Italics ours.) In the case of Public Service Com'n v. Iroquois Natural Gas Co., 103 Misc. Rep. 587, 170 N. Y. S. 692, the question arose as to when the "proceeding" might be said to be pending. Commencing at the bottom of page 695, 170 N. Y. S. (103 Misc. Rep. 593), the court said: "The defendant files schedules providing for an increased rate; a complaint is made by the mayor of the city of Buffalo, and steps are taken through the Public Service Commission to investigate the reasonableness of the suggested new rate. Of course, there might well be occasions in which a 'proceeding' would be initiated by a written complaint as to the price of gas, etc., when no schedule of proposed new rates had been filed. However, in the situation here involved, even though the schedule of new rates was filed before any complaint was made and such filing was the cause of the complaint, and even though the effectuating time of such schedule has been postponed from time to time, a complaint has been made, and an investigation is under way, and a 'proceeding' is therefore on, which in this instance, as it appears to me, was initiated and caused by the filing of the schedule of proposed increased rates." In Duncan v.

Atchison, T. & S. F. R. Co. (C. C. A.) 72 F. 808, the language complained of was contained in an answer which the defendant had filed with the Interstate Commerce Commission. On the trial of the alleged libel the defendant claimed the publication was privileged. The court so found. On appeal to the Ninth Circuit Court of Appeals that finding was attacked. At page 811 the court held that it was privileged, at least under Civil Code, § 47, subd. 2. Oklahoma has a statute which is almost a verbatim copy of our statute. In *Tuohy v. Halsell*, 35 Okl. 61, 128 P. 126, 43 L. R. A. (N. S.) 323, Ann. Cas. 1916B, 1110, the Supreme Court of Oklahoma was considering the contents of an affidavit made in Oklahoma to be used before one of the committees of the United States Senate. The court quoted with approval from *Sanford v. Bennett*, supra, and held that the affidavit fell within the language "any other proceeding authorized by law." Continuing, the court said: "No case can be found exactly in point, but in *Duncan v. Atchison, T. & S. F. R. Co.*, 19 C. C. A. 202, 44 U. S. App. 427, 72 F. 808, the court said: 'Section 47 of the Civil Code of California declares that "a privileged communication is one made * * * (2) in any legislative or judicial proceeding, or in any other official proceeding authorized by law." In *Ball v. Rawles*, 93 Cal. 222, 236, 28 P. 937, 941 (27 Am. St. Rep. 174), the Supreme Court, in construing this section, said: "The effect of this provision is to make a complaint, in a court of justice which has jurisdiction of the offense charged, an absolute privilege, for which the complainant is not liable in a civil action. *Hollis v. Meux*, 69 Cal. 625, 11 P. 248, 58 Am. Rep. 574." Tested by the provisions of this statute, the conclusion of law arrived at by the circuit court, "that all of the matters and things herein complained of were and are privileged," and the judgment rendered thereon, were clearly correct; for, conceding that the Interstate Commerce Commission is not a court of civil jurisdiction, it is nevertheless manifest that the pleadings herein complained of were filed in an "official proceeding authorized by law"'. And in the syllabus: 'Alleged libelous statements contained in an answer filed in proceedings before the Interstate Commerce Commission are absolutely privileged, under the California statute, which declares a privileged communication to be "one made * * * in any legislative or judicial proceeding, or in any other official proceeding authorized by law."'"

In the case of *Burgess v. Turle & Co.*, 155 Minn. 479, 193 N. W. 945, the Supreme Court of Minnesota was considering a case involving the following facts: Plaintiff was the vendee and defendant was the vendor in a contract for the sale of land in North Dakota. The vendee defaulted in his payments. By the statutes of North Dakota the vendor was

authorized to terminate the contract by giving the vendee a certain notice. Under the statute, if the defaulting party was outside of the state, provision was made for the publication of the notice. The vendor published the notice. The vendee filed an action charging the vendor with libel. The statute on libel in the state of Minnesota contained a clause regarding privilege which was in the same language as the California statute. The court held that the notice was given in a "proceeding authorized by law" and that, "The alleged defamatory statements were absolutely privileged, and cannot be made the foundation for an action for libel."

In *Harris v. Huntington*, 2 Tyler, 129, 4 Am. Dec. 728, the Supreme Court of Vermont had under consideration a charge of libel based on a petition which the defendants had addressed to the Legislature asking for the removal of the plaintiff as justice of the peace. On page 733, 4 Am. Dec. (2 Tyler 138), the court said: "An absolute and unqualified indemnity from all responsibility in the petitioner is indispensable from the right of petitioning the supreme power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects, and then punish them for the use of it. And it would be equally destructive of the right, for the courts of law to support actions of defamation grounded on such petitions as libelous. Petitions for redress of grievances will generally point to officers of the government, who have, or may be supposed to have abused its confidence by maladministration; and although the government should refrain from prosecuting the petitioners criminally, yet it would operate as effectual a restraint upon them to expose them to an action for damages at the suit of those of whose conduct they have complained to government."

[4] In *Larkin v. Noonan*, 19 Wis. 82, the alleged libel was addressed to the governor, asking the removal of the plaintiff as sheriff. It was shown that it was the statutory duty of the governor to receive such a charge, hear the facts, and determine the truth or falsity and act thereon. On page 88 the court said: "Upon this question we cannot better express our views than by adopting the just and forcible language of Senator Clinton, used by him in giving his opinion in *Thorn v. Blanchard*, 5 Johns. [N. Y. 508] 507-530: 'There is a certain class of cases where no prosecution for a libel will lie, when the matter contained in it is false and scandalous; as in a petition to a committee of parliament; in articles of the peace, exhibited to justices of the peace; in a presentment of a grand jury; in a proceeding in a regular course of justice; in assigning, on the books of a Quakers' meeting, reasons for expelling a member; in an exposition of the abuses of a public institution, as in the case of the deputy governor of Green-

wich hospital, addressed to the competent authority to administer redress. The policy of the law here steps in and controls the individual rights of redress. The freedom of inquiry, the right of exposing malversation in public men and public institutions, to the proper authority, the importance of punishing offenses, and the danger of silencing inquiry and of affording impunity to guilt, have all combined to shut the door against prosecutions for libels, in cases of that, or of analogous nature.'” It thus appears that there is authority to the effect that the facts of the instant case might justify a ruling that the defendant's correspondence was a step in a “judicial proceeding,” but be that as it may, it clearly appears that it was a step in “an official proceeding authorized by law.” The trial court did not err in sustaining the demurrer.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

99 Cal. App. 510

PALMER et al. v. McARTHUR et al.
(Civ. 6813.)

District Court of Appeal, First District Division 2, California. June 19, 1929.

1. Appeal and error ⇨1011(1)—Evidence as to making of payment on land contract held so conflicting as to require acceptance of trial court's finding.

In vendor's suit to quiet title as against purchasers on theory that contract had been forfeited, evidence as to alleged payment by defendant on contract held so conflicting that appellate court must accept finding of trial court as controlling.

2. Vendor and purchaser ⇨101—When course of conduct amounts to waiver of provisions as to time, vendor cannot forfeit without giving reasonable notice of election.

When entire course of conduct between vendor and purchaser has amounted to waiver by vendor of portion of contract making time of the essence, vendor may not declare forfeiture unless vendee has been given reasonable notice of election to insist upon terms of contract.

3. Vendor and purchaser ⇨100—Reasonable time before forfeiture after waiver of provisions as to time is question of fact.

Reasonable time to be given purchaser before forfeiture of contract after waiver by vendor of provisions of contract making time of the essence is primarily a question of fact for the trial court, and dependent upon particular facts.

4. Appeal and error ⇨1071(5)—Number of days within which notice of election to forfeit demanded compliance was of no significance when court found willful and intentional breach (Civ. Code, § 3275).

Under Civ. Code, § 3275, denying relief from forfeiture under contract for purchase of real

estate if forfeiture was result of willful or fraudulent breach of duty, number of days within which notice of election to forfeit demanded compliance with terms of contract was of no significance, where trial court found that breach of contract was willful and intentional.

5. Appeal and error ⇨1040(10)—Error in overruling general demurrer held harmless, when question was put in issue by cross-complaint and fully tried.

In vendor's suit to quiet title as against purchasers on theory of forfeiture of contract, any error in overruling general demurrer to complaint on ground that it did not allege land was worth price paid or that price was in fair proportion to value was harmless, where question of value was put in issue by cross-complaint and fully tried without objection.

6. New trial ⇨101—Motion for new trial for newly discovered evidence was properly denied, when evidence was known to moving parties before cause was determined.

In vendor's suit to quiet title as against purchasers, motion for new trial for alleged newly discovered evidence as to alleged payment on contract was properly denied for lack of diligence, where evidence was known to defendants long before the cause was determined.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Suit by R. J. Palmer and another against Susan McArthur and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Henry Holsinger, of Sacramento, for appellants.

Herbert V. Keeling, of Lakeport, Clarence W. Morris, of San Francisco, and W. D. L. Held, of Ukiah, for respondents.

NOURSE, J. Plaintiffs sued to quiet title to certain real property on the theory that the defendants had forfeited their interest under a contract of sale. The cause was tried before the court without a jury and resulted in a judgment for plaintiffs, from which the defendants have appealed on type-written transcripts.

The plaintiff Palmer, who is the real plaintiff in interest, was doing business under the fictitious name of the Clear Lake Beach Company. On November 29, 1924, this company executed with the defendants a contract of sale of lot 141 in the town site of Lucerne, Lake county, for the sum of \$2,000. On August 19, 1925, a similar contract for the sale of lot 140 in the same townsite was executed by the same parties. Both contracts called for the payment of \$733.33, with the balance to be paid, with interest, at the rate of \$50 a month. Both contracts contained the usual stipulations as to time being of the essence, delivery of possession, and the manner and conditions under which the seller might exercise the right of forfeiture in case of default

in payment. Both contracts also contained a stipulation that the buyer could not assign his interest without the seller's consent. The original payments were made as required and subsequent payments of \$50 followed generally within the times specified during the first eight months, and four or five of these monthly installments were received after the due dates fixed in the contracts.

On August 9, 1926, defendant York assigned to his codefendant his interest in lot 140, and, at the same time, the defendant McArthur assigned her interest in lot 141 to him. Both assignments were made without the consent of the seller and at a time when the buyers were actually in default. Both assignments were made for the express purpose of enabling each defendant to obtain exclusive title to a single lot. On the same day that these assignments were made, the defendant York deposited with the Lake County Title & Abstract Company the sum of \$700 to clear his title to lot 141. The title company deducted \$10 for expenses and forwarded to the seller \$690, which was the full amount then due upon the purchase of that lot. The seller credited this amount on its books as paid upon the contract covering lot 140, but nevertheless noted lot 141 as paid in full and thereafter issued its deed conveying to defendant York clear title to lot 141.

[1] The disputed question of fact arises from the testimony of the defendant McArthur that on August 28, 1926, she left Lucerne for Los Angeles, arriving there on the 29th; that on the 30th she personally appeared at the main office of the Clear Lake Beach Company in Los Angeles and paid over the counter \$690 in cash on lot 140. There was received in evidence a printed receipt bearing the printed signature of the company and the typewritten signature of A. J. Dixon, who was a company employee. This receipt acknowledged payment of \$690 on the contract covering lot 140 and was dated August 30, 1926. Opposed to this is the testimony on the part of the employees of the company that the money was not paid into the Los Angeles office, or at all; that only one payment of \$690 was received at any time on account of the contracts for both lots; and that the receipt was not issued to Mrs. McArthur by Mr. Dixon or by any one in the company's employment. The trial court found adversely to defendants on this issue, and the testimony is in such conflict that we must accept the finding as controlling on this appeal.

If this payment had been made, as claimed by the defendants, the subsequent tender of the balance, which would then have been due, would have protected defendants' interest in the property; but without that payment the defendants were unquestionably long in default and the plaintiffs were entitled to enforce the forfeiture clause of the contract. With the court's finding on the issue of pay-

ment it follows as of course that the tender was insufficient in amount, notwithstanding any question as to the time within which it was made, and it is unnecessary to discuss the attack upon this finding.

[2-4] It is argued that the seller had waived its right to claim a forfeiture by accepting numerous payments on both contracts after such payments were due. The rule is that when the entire course of conduct between the parties has amounted to a waiver by the vendor of the portion of the contract making time of the essence, the vendor may not declare a forfeiture unless the vendee has been given reasonable notice of the election to insist upon the terms of the contract. *Adams & McKee Land Co. v. Dugan*, 68 Cal. App. 226, 231, 228 P. 681. But what is a reasonable time is primarily a question of fact for the trial court, the determination of which must depend upon the facts of each particular case. *Hoppin v. Munsey*, 185 Cal. 678, 684, 198 P. 398. In making its finding adverse to appellants on this issue the trial court had before it all the facts and circumstances of the business transactions between the parties, including the asserted claim of the appellants that they had paid on the contract \$690 on August 30, 1926. Having found that this payment was not made, and that appellants' breach of the terms of the contract was willful, intentional, and with full knowledge of the amount actually due, the inference naturally follows that the matter of days within which the notice of election demanded compliance with the terms of the contract was of no significance. We may not, therefore, say that the trial court was in error in holding that a reasonable time for compliance had been given the appellants, or in refusing to relieve them from the forfeiture under the authority of section 3275, Civil Code, because the facts here show that the forfeiture was the result of appellants' willful or fraudulent breach of duty, in which case relief from forfeiture is expressly denied by the terms of that section.

[5] Complaint is made of the order of the trial court overruling appellants' general demurrer to the complaint on the ground that it did not allege that the land was worth the price paid, or that such price was in fair proportion to the value of the land. Cases supporting the rule that such allegations are necessary in actions for specific performance of contracts for purchase of land are cited to the point. If this rule were applicable in any sense to an action to quiet title, such as we have here the appellants have not been harmed by the ruling, because the question of value was put in issue by their cross-complaint and was fully tried without objection on their part. *Tietke v. Forrest*, 64 Cal. App. 364, 367, 221 P. 681; *Stein v. United R. R.*, 159 Cal. 368, 370, 113 P. 663.

[6] Finally, it is argued that the trial court should have granted appellants' motion for

a new trial on the ground of newly discovered evidence. The motion was based on affidavits alleging that two affiants entertained Mrs. McArthur in Los Angeles August 29th and 30th; that she showed them a large roll of bills, totaling in all "about \$690"; and that on August 30th she showed them a receipt of the Clear Lake Beach Company for payment of \$690 "on account of contract No. 5366." The affidavits of the appellants disclosed that this evidence was known to them long before the cause was determined. Aside from the fact that the proffered evidence was merely cumulative, and came in such a way as to be viewed with grave suspicion, the appellants failed to show the diligence in producing the evidence which the cases require must be shown.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

99 Cal. App. 423

OLSEN v. J. J. JACOBS MOTOR CO. et al.*
(Civ. 3812.)

District Court of Appeal, Third District, California. June 13, 1929.

Rehearing Denied July 13, 1929. Hearing Denied by Supreme Court Aug. 12, 1929.

1. Automobiles ⇨245(80)—Contributory negligence of automobile driver, having right of way in crossing intersection, without stopping for approaching car, held for jury (Motor Vehicle Law, § 131, as amended by St. 1925, p. 412, § 15).

Contributory negligence of automobile driver, having right of way, under Motor Vehicle Law (St. 1923, p. 517) § 131, as amended by St. 1925, p. 412, § 15, over approaching car, and proceeding across intersection without stopping to permit other car to pass ahead of him, held for jury.

2. Continuance ⇨51(6)—Denial of second continuance on simple request of counsel held not erroneous (Code Civ. Proc. § 595).

Denial of second application for continuance, made on simple request of counsel, without compliance with Code Civ. Proc. § 595, requiring affidavit showing materiality of evidence, held not erroneous, particularly in absence of showing or attempt to show any efforts to secure presence of witness or affidavit setting forth or stating any facts which could be substantiated by testimony of absent witness.

3. Evidence ⇨222(10)—Statement of motorist at time of collision was admissible as against him.

Statement made by driver of automobile at time of collision relative to speed at which he was driving, and to effect that he was trying the car out for purpose of locating certain noises or squeaks, was admissible as against him, when properly limited as applicable only to him, and not as to codefendant employer.

4. Automobiles ⇨246(58)—Evidence warranted instruction that choosing unsafe way in emergency was not negligence.

Evidence in action to recover damages for injuries received in automobile collision held to warrant instruction that person in imminent danger is not negligent in case he chooses the wrong or unsafe way.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by O. J. Olsen, also known as Carl Julius Olsen, against the J. J. Jacobs Motor Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Butler, Van Dyke & Desmond, of Sacramento, for appellants.

Frank L. Murphy, George E. McCutchen, and Ralph H. Cowing, all of Sacramento, for respondent.

PLUMMER, J. Plaintiff had judgment against the defendants for injuries received in an automobile collision, from which judgment the defendants appeal.

Upon this appeal the defendants assigned four grounds upon which reversal is asked: First, that the plaintiff was guilty of contributory negligence as a matter of law; second, that the court abused its discretion in refusing a continuance of the date of trial; third, that the court erred in admitting certain testimony; fourth, that the court improperly instructed the jury.

The transcript discloses that between the hours of 2 and 3 p. m. on the 12th day of March, 1927, the plaintiff was driving westward on that certain street in the city of Sacramento, known as and called W street, and that Howard Brown, an employee and agent of the defendant, J. J. Jacobs Motor Company, was driving southerly on that certain street in the city of Sacramento, known as and called Fifteenth street, which street intersects the street just mentioned and known as W street. Fifteenth and W streets intersect at right angles, each street being 50 feet in width. The measurements mentioned in the transcript and the distances referred to by the witnesses relate to the center line of the intersection of said streets. At the time mentioned there were no buildings or obstructions on the quarter block adjoining the northeast corner of the intersection of the streets mentioned. The injury upon which the plaintiff obtained judgment resulted from a collision between an automobile driven by Olsen and an automobile belonging to the J. J. Jacobs Motor Company, driven by Howard Brown, the collision occurring at the intersection of the two streets mentioned. The record shows that as the plaintiff was driving westward, at a speed of between 12 and 15 miles per hour, and when he was at a point about 75 feet from the center of the two

streets mentioned, which would place the plaintiff about 50 feet east of the easterly curbline of Fifteenth street, he observed the defendant's car coming from the north on Fifteenth street at a distance northerly from the intersection of approximately 350 feet, and that the defendant's car appeared to be traveling at a speed of between 35 and 40 miles per hour; that the plaintiff paid no further particular attention to the defendant's car until he, the plaintiff, had reached the easterly line of the intersection of Fifteenth street with W street, when he again observed the defendant's car at a distance of about 175 feet from the intersection; that the plaintiff proceeded westerly until he reached the center of the intersection of the two streets, when he again paid attention to the defendant's car, and then observed that the driver of the defendant's car "was driving at an enormous speed, like a maniac, at an awful speed, at least 40 or 45 miles an hour"; and that at this instant of time the plaintiff, to use his expression, stepped on the accelerator of his car and moved westerly sufficiently far to escape a direct impact, but that the rear of his car was struck by the automobile belonging to the J. J. Jacobs Motor Company, with the result that the injuries, on account of which this action is prosecuted, ensued. No question is raised as to the judgment being excessive, nor would a further detail of the incidents of the collision aid in elucidating any of the issues raised upon this appeal.

Upon plaintiff's own testimony it is insisted that the plaintiff was shown to be guilty of contributory negligence as a matter of law. While the testimony of the plaintiff is set out extensively in the briefs, the point in issue is contained in a very few questions and answers, to wit: That the car driven by the defendant Brown was 350 feet from the intersection when first observed by the plaintiff, at which time the plaintiff was 50 feet east of the east line of Fifteenth street, or 75 feet from the point of intersection; that the second time the plaintiff observed the car driven by Brown, the plaintiff was at the east line of Fifteenth street and the car driven by Brown was 175 feet away; that the third time the plaintiff took note of the Brown car was, when the plaintiff was at the center of the intersection of the two streets as stated, he observed the manner in which the car was being driven. The transcript further shows that the plaintiff was not watching the car being driven by Brown, continuously from the time he first saw him until the time of the collision. The terrific rate of speed at which the plaintiff states that the car was being driven by Brown was at the instant just preceding the actual collision.

At the time of the occurrences with which we are dealing, section 131 of the Motor Vehicle Law read as follows: "When two vehicles approach an intersection of public high-

ways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed." St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15. Under this section, while the defendant's car was approaching from the right, the circumstances show that the plaintiff had the right of way. At the instant of time when the plaintiff reached the east line of Fifteenth street where it intersected W street, the defendant's car was 175 feet distant from the center line of W street, where it intersects Fifteenth street. This would give the plaintiff the right of way if we disregard the additional fact that the defendant's car was being driven at an unlawful rate of speed, which, under the terms of the section referred to, would itself exclude the defendants from any claim of having the right of way. However, admitting that under ordinary circumstances the plaintiff would have the right of way, with cars placed in the position indicated by the foregoing, it is insisted that, by reason of the fact that the plaintiff observed the defendant's car being driven southerly at a rate of between 35 and 40 miles an hour, when it was distant 350 feet from the intersection, and again observed the defendant's car when it was only 175 feet from the intersection, and also in view of the fact that he might have observed the car between the two points just referred to, the plaintiff was guilty of contributory negligence as a matter of law in entering the intersection and proceeding westerly, and therefore cannot recover.

[1] As a matter of law the plaintiff had the right of way; as a matter of law the plaintiff had a right to presume that the driver of the car belonging to the motor company would observe the law; as a matter of law the plaintiff had a right to enter the intersection at the time he did; as a matter of law the motor company's car was at all times being driven at an unlawful rate of speed and had no right to enter the intersection at the time it did. As a matter of fact, we think it was a question for the jury in this case to determine whether the plaintiff exercised such reasonable diligence for his own safety as the law requires one to exercise when so circumstanced, and if the jury, upon the facts which we have just recited, had reached the conclusion that the plaintiff was guilty of contributory negligence in not stopping his car and remaining without the intersection of the two streets until after the car driven by Brown had passed by, we would feel bound to uphold such verdict. In the recent case of *Flores v. Fitzgerald* (Cal. Sup.) 268 P. 369, we have circumstances almost identical with the case at bar. In the *Flores* Case a motorcyclist was traveling southerly on Buchanan street at its intersection with Fulton street in the city of San Francisco. The motorcyclist "did not stop before entering the intersection but was traveling at a speed of about 8 miles per

hour, and testified he could have stopped his machine at any time within one foot; that just before he entered the intersection he noticed appellant's machine about 150 feet westerly on Fulton street approaching the intersection at a rapid rate of speed, between 35 and 40 miles per hour; that he proceeded to cross the intersection but did not look toward appellant's machine until he was 10 feet beyond the center of the intersection, when he looked to his right and appellant's automobile was right on him." Thus the respondent in that case had the right of way, notwithstanding the fact that the appellant's machine was approaching from the right, just as is the case before us. In the Flores Case the appellant was driving at an unlawful rate of speed, between 35 and 40 miles per hour. The respondent in that case saw the appellant's machine when it was 150 feet distant, and noticed the speed, but did not notice it again until it was right upon him in the intersection. The court then proceeds in its opinion to detail the circumstances of what resulted from the collision, which are immaterial to be mentioned. Just as in this case, the results of the collision have no bearing upon anything we are called upon to decide, but, after stating the results of the collision, the court disposes of the legal questions involved as follows: "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury" (citing *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125; *Smith v. Southern Pacific Co.*, 201 Cal. 57, 255 P. 500). "In all other cases the question of contributory negligence is a question of fact for the jury" (citing *Wahlgren v. Market Street Ry. Co.*, 132 Cal. 656, 62 P. 308, 64 P. 993; *Jansson v. National S. S. Co.*, 189 Cal. 192, 208 P. 90).

The court, in its opinion in the Flores Case, supra, also quotes from the case of *Donat v. Dillon*, 192 Cal. 426, 221 P. 193, as follows: "A motorist must at all times use due care to avoid colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him. Assuming, therefore, that the defendant had the right of way, he was required to proceed across the intersection in a careful and prudent manner, ever watchful of the direction in which danger was most likely to be apprehended. He could not close his eyes so far as south-bound traffic on Chester avenue was concerned. To the contrary, having observed Riddle's car approaching at an exceedingly fast rate of speed for that vicinity, the defendant was no longer entitled to rely upon the presumption that the driver of this machine would comply with the rules of the road, and he was bound to take

such reasonable measures as he could, under the circumstances, to prevent the injury. It was, therefore, a question [of fact] for the trial court to determine upon all the evidence and the reasonable deductions therefrom whether the defendant, after having seen the approaching machine, continued to exercise the care and prudence which a reasonable man would have exercised under the circumstances. And as we cannot say that the trial court reached an unreasonable conclusion we are bound by its finding of the ultimate fact which determined the proximate cause of plaintiff's injury." This statement of the law taken from the case of *Donat v. Dillon*, supra, is peculiarly applicable to this case, and shows that the question of the plaintiff's contributory negligence was a question of fact to be determined by the jury. The plaintiff in the case at bar would correspond to the position of the defendant as referred to in the opinion of *Donat v. Dillon*.

In the case of *Whitelaw v. McGilliard*, 179 Cal. 349, 176 P. 679, we find language which we think applicable here upon the question as to whether the plaintiff was guilty of contributory negligence as a matter of law. It is there said: "The plaintiff could not be expected to yield the right of way to one so far away, whose duty it was to slow down in crossing the intersection. When the defendant's son drove the vehicle upon that space he was going at an unlawful rate of speed, which he maintained. The rule regarding right of way does not impose upon the person crossing the street the duty of assuming that the other will continue across an intersecting street without slowing down, as required by law. It is clear that if the defendant's son had been going at a lawful rate of speed, or had slowed down as required by law, there would have been ample opportunity for the safe passage of the motorcycle." Under section 113 of the Motor Vehicle Act it was lawful for the parties involved in this proceeding to drive a motor vehicle at a speed not exceeding 20 miles per hour at the intersection of Fifteenth and W streets, and if the driver of the Motor Company's car had observed this requirement, there would have been no collision. It is true that had the plaintiff stopped his car and allowed the Motor Company's car to be driven past him, there would have been no collision, but the plaintiff was where he had a legal right to be, and whether, under the circumstances, his being where he had a legal right to be was the result of contributory negligence on his part, as a matter of fact was a question for the jury to determine.

As bearing upon the questions here involved in supporting the view which we have here stated, we may cite the cases of *Commonwealth Insurance Co. v. Riverside-Portland Cement Co.*, 69 Cal. App. 165, 230 P. 995, and *Carbaugh v. White Bus Line*, 51 Cal. App. 1,

195 P. 1066. Other cases might be cited, but the foregoing establish the rule which we think applicable to this case, to wit, whether the plaintiff was guilty of contributory negligence was a question of fact for the jury to determine, and having been determined adversely to the appellant's contention, we are bound by the verdict of the jury.

[2] Was it an abuse of discretion for the trial court to deny the defendant's motion for a new trial? The record discloses that the denial of the defendant's motion for a continuance was a denial of the second application which was presented to the court about ten days subsequent to the granting of the first continuance. Upon the making of the second application for a continuance, counsel for appellants stated to the court, in substance, the following: "The driver of his car, Mr. Howard Brown, who is also one of the defendants here, was in the employ of the Jacobs Motor Company, and some time before the trial was set, I believe, about ten days, a week or so before, that we had been under the impression that Mr. Brown was working for the Powell Machinery Company, where he had been employed for four or five months succeeding the date of this accident, and we had been communicating with him off and on, and he assured us that he would not change his address or depart from the city without letting us know where he would be located. However, he did not do that, and I am afraid that Mr. Brown is financially irresponsible and perfectly willing to slide out of the picture. We endeavored to locate him, and being unable to do that, we asked for a continuance which was granted by the court." This was a recital of what occurred at the first continuance of the trial based upon the motion of the defendant.

Upon the present motion, counsel stated that they had employed a man to search for Mr. Brown; that they had not been able to locate him; that the testimony of Mr. Brown was very important in behalf of the defendants. The motion for a continuance was not supported by any affidavit. There is nothing in the record to show what the defendants expected to prove by Howard Brown. There is nothing in the record to show that the defendants had subpoenaed Howard Brown as a witness, or had made any endeavor to subpoena him as a witness. There is nothing in the record to show that Howard Brown would have testified to anything helpful to the cause of his codefendants. The motion does not appear to have been made in behalf of the defendant Mr. Brown, for any reason that he could not be present. There was nothing before the court to show that Howard Brown would be present if a continuance of the trial was granted. If the motion had been made on the ground of the absence of a party, the case of *Beckman v. Waters*, 161 Cal. 581, 119 P. 922, would constitute a complete answer,

where it is said: "It is also claimed that the court erred in denying the motion for a continuance on the ground of the absence of the plaintiff. The court did not abuse its discretion in this ruling. The affidavits offered to support the motion showed, at most, that the plaintiff was unable to be present at the time set for the trial. But there was nothing to indicate that he would be able to appear at any later time, nor was there any sufficient showing of an excuse for the failure to take his deposition in proper form before the trial."

Section 595 of the Code of Civil Procedure, so far as pertinent here, reads as follows: "A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it." The motion having been made upon the simple request of counsel, it would seem that, in view of the section of the Code to which we have referred, citation of cases showing the correctness of the ruling of the trial court would be unnecessary. However we may refer to the following: *Canty v. Pierce & Anderson*, 173 Cal. 205, 159 P. 582; *Sheldon v. Landwehr*, 159 Cal. 778, 116 P. 44; *Harper v. Lamping*, 33 Cal. 641; *Watson v. Columbia Basin, etc., Co.*, 22 Cal. App. 556, 135 P. 511; *Marcucci v. Vowinkel*, 164 Cal. 693, 130 P. 430.

It may be further stated that the record shows that the defendants' motion for a new trial was not supported by any affidavits showing, or attempting to show, any efforts to secure the presence of Howard Brown, nor any statement to the effect that he would probably be present if a new trial was granted; nor was the motion for a new trial supported by any affidavit setting forth or stating any facts which could be substantiated by the testimony of Howard Brown. Under similar circumstances it was held in the case of *Pilot Rock, etc., Co. v. Chapman*, 11 Cal. 161, that an appellate court would not interfere with the discretion of the trial court in denying a new trial nor in denying a continuance. This rule was followed in the case of *People v. De Lacey*, 28 Cal. 590, where it was held that the rule should apply to criminal as well as civil cases. The record in this case, we think, conclusively shows that the trial court did not err in refusing to grant the second postponement of the trial.

[3] The third ground urged for reversal relates to the order of the trial court admitting in evidence statements made by the defendant Howard Brown. This statement related to the speed at which Brown was driving the motor company's car, and also that he was trying it out for the purpose of locating certain noises or squeaks. When this testimony was offered the defendants objected thereto and the court, in admitting the testi-

mony, limited the same to the defendant Howard Brown, and instructed the jury as follows: "Ladies and gentlemen of the jury: There are two defendants in the case, a man named Jacobs and a man named Brown. Now, as to Jacobs, this objection is sustained, but as to Mr. Brown, one of the parties to the action, who made the statements and who was present, the objection is overruled; as to him, you may consider it as evidence, but not as to Jacobs." In support of their contention that the statements of Brown, one of the codefendants, should not have been admitted in evidence as against him, a number of cases are cited where a principal only is sued, and it was sought to introduce statements of employees made after the occurrences involved and not constituting a part of the res geste.

We do not need to review the cases cited by appellant for the simple reason that while they state the law applicable to the circumstances involved in the respective cases cited, they are not pertinent here. In the case at bar, Howard Brown is and was one of the defendants. Any statement made by him was admissible as against him and properly limited as admissible against him by the court in this case. Instead of quoting from the cases supporting this statement, we will simply cite them. *Lampton v. Davis Standard Bread Co.*, 48 Cal. App. 116, 191 P. 710; *Voorman v. Voight*, 46 Cal. 392; *Vallejo, etc., Ry. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 P. 238; *Keyes v. Geary St. P. & O. R. Co.*, 152 Cal. 437, 93 P. 88; *Jeslow v. Duncan*, 125 Wash. 492, 216 P. 868. Other cases might be cited, but those referred to establish the rule in California applicable to circumstances similar to those involved in the case at bar. It therefore follows that the trial court did not err in admitting the testimony referred to, limiting it as applicable only to the defendant Howard Brown.

[4] It is finally contended that the trial court improperly instructed the jury in that the following portion of the charge was not pertinent to any of the issues presented. The instruction just referred to is numbered 5 and reads as follows: "The jury is instructed that when a person is in imminent danger he is not called upon to exercise that intelligence and judgment he would be expected to exercise, were he not in such danger; so if a party in imminent danger has two ways open to him, but has not the time to stop and investigate, and determine which is the right or safe way, and which is the wrong or unsafe way, his choosing of the latter is not, under the circumstances, negligence on his part." Prior to giving this instruction the trial court had fully advised the jury as to the law relating to contributory negligence. In fact, the instructions given to the jury by the court are singularly clear and free from any ambiguity, conflict, or uncertainty,

and fully advised the jury as to the law involved in this case. Appellants do not complain that the portion of the charge just quoted is not a correct statement of the law, but simply question its applicability. The testimony of the plaintiff in this case was to the effect that he did not appreciate the danger which threatened him until he had reached the center of the intersection of Fifteenth and W streets. At this moment of time he observed that he was about to be run down by the rapidly approaching automobile belonging to the motor company, and that in order to escape he stepped on the accelerator in the hope of getting his car entirely free from the path of the motor company's automobile.

Two courses were open to the plaintiff: He might have set the brakes with all the force possible, or he might attempt, by speeding up his own machine, to get out of the way. Either course was hazardous. If the plaintiff set the brakes of his automobile, he was confronted with the possibility of stopping in the path of the defendant's automobile and being crushed by the force of the impact. On the other hand, if he speeded up his machine, so that he at least partly escaped the force of the impact, and as actually resulted in this case, his machine received the force of the blow to the rear of his machine, the consequences that would ensue would probably be less serious. With these circumstances in view, which we think should be reasonably considered by an automobile driver circumspect as the plaintiff was in this case, it makes the instruction which we have quoted applicable. Up until this moment of time we think the plaintiff by his testimony showed that he had a right to assume that the driver of the Motor Company's car would observe the law. As was said in *Moreno v. Los Angeles Transfer Co.*, 44 Cal. App. 551, 186 P. 800: "Contributory negligence cannot be predicated upon an omission to assume that another will violate the law" (citing *Medlin v. Spazier*, 23 Cal. App. 242, 137 P. 1078; *Raymond v. Hill*, 168 Cal. 473, 143 P. 743).

Again, the appellants' contention in this case is that the plaintiff was guilty of contributory negligence in not observing that the car driven by Howard Brown would not be slowed down as it approached the intersection, so as to admit of a safe crossing by the plaintiff, and that it was the duty of the plaintiff, under the circumstances, to have stopped his car before reaching the point where the paths of the two machines would intersect, and that his failure to do so constituted contributory negligence. The jury, of course, found against this contention on the part of the appellants; but this statement shows that even if the charge of the court, as to one acting in an emergency, be held inapplicable, section 4½ of article 6 of the Constitution would prohibit reversal on that ac-

count, for the reason that it could not have worked any prejudice to the appellants because the question of contributory negligence on the part of the plaintiff, urged by the appellants, and found adversely to them by the jury, rested upon incidents, occurrences, and opportunities preceding the time when the plaintiff found himself in imminent danger.

Finding no cause for reversal, the judgment of the trial court is affirmed.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

99 Cal. App. 602

WHITE v. TULLETT et ux. (Civ. 6765.) ★

District Court of Appeal, First District, Division 1, California. June 26, 1929.

Rehearing Denied July 23, 1929.

Appeal and error ⇨ 1011 (1)—Weight and inferences from conflicting evidence held for trial court, whose conclusions could not be disturbed on appeal.

Where evidence was conflicting, and conclusions other than found by trial judge might reasonably have been drawn therefrom, weight to be given evidence as well as inferences to be deduced were questions for trial court, and its conclusions could not be disturbed on appeal.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by W. J. White against A. Tullett and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Otto G. Kuklinski, of San Francisco, for appellants.

Aaron Turner, of Oakland, for respondent.

PER CURIAM. An action by a broker to recover a commission for services alleged to have been rendered in procuring an agreement for the exchange of certain real estate owned by defendants. Defendants denied that plaintiff performed his agreement or that they agreed to exchange on the terms alleged, and averred fraudulent representations by the plaintiff and the party procured by him. Judgment was entered for plaintiff, from which defendants appealed.

According to the findings, defendants, on January 14, 1925, employed the plaintiff to procure a sale or exchange of their property, for which service they agreed to pay a commission. On April 3, 1925, C. R. Scott was the owner of certain real property in Oakland, Cal., and from him the plaintiff procured an offer in writing to exchange this property for that of defendants, which offer the latter accepted. Defendants independently of plaintiff examined the Oakland property before they accepted the offer, and knew its value, condition, and the income therefrom, which the

plaintiff at no time misrepresented. The offer from Scott contained a provision that the same should not be effective if within ten days from its date he should exchange the Oakland property for certain property owned by a third person with whom he was then negotiating. This prospective exchange was not made, and defendants were so advised. Scott thereupon tendered to them a conveyance sufficient to convey title in accordance with the exchange agreement, which defendants refused, stating that they declined to perform. It was further found that defendant A. Tullett read and fully understood the contract; that neither its contents nor legal effect was misrepresented to defendants; that all statements made to them by Scott and another were true; that Scott was at all times ready, willing, and able to perform the exchange agreement; and that plaintiff had performed his contract.

Defendants, as grounds for their appeal, claim that portions of the above findings are unsupported. After a careful examination of the record, we are satisfied that the findings are fully sustained. While the evidence was conflicting and other conclusions might reasonably have been drawn therefrom, the weight to be given thereto, as well as the inferences to be deduced, were questions for the trial court, and its conclusions cannot be disturbed on appeal. *Sherman v. Sandell*, 106 Cal. 373, 30 P. 797; *Waer v. Waer*, 189 Cal. 178, 207 P. 891; *Aronson & Co. v. Pearson*, 199 Cal. 295, 249 P. 191.

The judgment is affirmed.

99 Cal. App. 515

PEOPLE v. COHEN. (Cr. 1752.) ★

District Court of Appeal, Second District, Division 1, California. June 19, 1929.

Rehearing Denied July 1, 1929.

1. Criminal law ⇨ 741 (6)—Whether or not particular evidence or circumstance was necessary link in state's chain of circumstantial evidence was question for jury.

Whether or not a special piece of evidence or circumstance was a necessary link in state's chain of circumstantial evidence tending to connect defendant with commission of crime was matter for jury to decide.

2. Criminal law ⇨ 787 (2)—Requested general instruction on effect of defendant's failure to testify was properly refused, where defendant took stand for limited purposes only.

Requested instruction that defendant was not required to testify, and fact that he had not testified, was not to be taken into consideration, was properly refused, where defendant took the stand for limited purposes only, since it was not duty of judge to rewrite instruction to make it conform to facts of case.

3. Criminal law ☞169(5)—Admission of evidence was not prejudicial, in view of court's subsequent withdrawal thereof and admonition to disregard it, which jury is assumed to have heeded.

Admission of evidence cannot be said to have prejudiced defendant, where after lapse of some time trial court ordered evidence stricken from record and admonished jury to disregard it, as it is to be assumed that jury heeded admonition and disregarded evidence.

4. Indictment and information ☞37—Information following statutory form was sufficient to charge murder (Pen. Code, § 951, as amended by St. 1927, p. 1043).

Information following form prescribed by Pen. Code, § 951, as amended by St. 1927, p. 1043, held sufficient to charge crime of murder.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Morris Cohen was convicted of murder, and he appeals. Affirmed.

Grant B. Cooper and Herman D. Greenschlag, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

YORK, J. Appellant was convicted of the crime of murder and sentenced to life imprisonment, and he appeals from the order denying his motion for a new trial and from the judgment of conviction.

The record discloses sufficient circumstantial evidence to sustain the conviction of the defendant by the jury, and in his appeal brief appellant raises the following points:

(1) That the evidence is insufficient to sustain or justify the verdict.

(2) That the court erred in refusing to give a certain instruction requested.

(3) That the court erred in allowing testimony as to weight and contents of certain cans of cyanide.

(4) That the court erred in permitting the prosecution to give evidence of the contents of a certain stomach, in absence of legal evidence to identify it.

(5) That the information fails to charge the crime of murder.

[1] 1. Appellant maintains, in connection with the first point, that there was an absolute break in the state's chain of circumstantial evidence, in that it failed to connect the defendant with the whisky or sack found by Mr. Lipsitz, and that the evidence discloses an equal or greater opportunity on the part of Lipsitz to have placed poison in the whisky, and that thus, as a matter of law, the evidence is insufficient to sustain the verdict.

It was a matter for the jury to decide whether or not this special piece of evidence or circumstance was a necessary link in the chain. *People v. Ah Jake*, 91 Cal. 98, 100, 27 P. 595.

[2] 2. The court refused to give the fol-

lowing instruction requested by appellant: "The defendant is not required by law to testify on his own behalf, nor is he bound to explain his actions or conduct. The strongest presumption of law is that the defendant is innocent and he may rest upon this presumption. The fact that the defendant has not testified on his own behalf in this case is not, according to the law, any evidence at all as to his guilt or innocence, and you will not take such fact into consideration nor draw any inferences therefrom in arriving at your verdict."

Appellant assigns refusal of the court to give this instruction as error. As a matter of fact, appellant did take the stand. It is true, it was for a limited purpose only—in order to identify and prove his signature to certain hospital records—but it was not the duty of the court to rewrite the instruction requested in order to make it conform to the facts in the case. Under the circumstances, it was not error for the court to refuse to give the instruction.

[3] 3. In connection with appellant's third point, he maintains that the only evidence by which guilt could have been inferred by the jury in this case was the alleged possession of the cyanide by the defendant. Over the objection of appellant, the trial court admitted into evidence the testimony of one Forster, foreman of the Western Wholesale Drug Company, to the effect that he had, within 10 days preceding the trial, opened 17 cans of cyanide, counted the number of eggs in them, and weighed them, and that these cans were similar to the can in evidence; the purpose of this testimony being to show that the can of cyanide returned by appellant to the druggist had been opened for the express purpose of extracting a portion of its contents. In other words, it was just another link in the chain of circumstantial evidence by which it was sought to connect the defendant with the crime. However, the trial court ordered this evidence stricken from the record, after a lapse of some time, and admonished the jury to disregard it. As it is to be assumed that the jury heeded the admonition of the court and disregarded the evidence, we are of the opinion that no prejudice resulted to appellant.

4. The appellant contends that there was not sufficient identification of the body of deceased to admit in evidence the testimony of the autopsy surgeon or the testimony of the chemist who examined the stomach.

After a careful examination of the record, we are of the opinion that there was sufficient identification of the body of deceased, and that no error was committed by the admission of the evidence complained of.

[4] 5. The information in the instant case follows the form prescribed by section 951 of the Penal Code. In the case of *People v.*

Coen, 271 P. 1074, the Supreme Court in passing upon the sufficiency of the information there, which was in the same form as the one used in the instant case, recognized the force and effect of section 951 of the Penal Code, as amended in 1927 (St. 1927, p. 1043), and held that an information, which followed substantially the language of the code section in question, was sufficient to charge the crime of murder.

For the reasons hereinabove set forth, the order denying the motion for a new trial and the judgment of conviction are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

99 Cal. App. 641

FERGUSON v. GREEN. (Civ. 6426.)

District Court of Appeal, First District, Division 1, California. June 27, 1929.

1. Animals §23(2)—Plaintiff, in action for failure to redeliver cattle pastured for him by defendant and claimed by defendant to have been destroyed, held required only to allege and prove their delivery and failure to return on demand.

Notwithstanding the contractual relations between the parties, plaintiff, in action for failure of defendant to redeliver part of the cattle which he agreed to pasture for plaintiff, was not required to allege or prove performance of contract, which required payment by him for pasturage, but it was enough to allege and prove delivery with failure to return on demand; defendant having at all times claimed that the animals were destroyed without his fault, and not that he refused to redeliver till his demands for pasturage were paid.

2. Animals §23(2)—Defendant who received cattle to pasture must show their loss or destruction occurred through cause consistent with his due care.

Defendant, seeking to justify his failure to redeliver cattle which he had received from plaintiff to pasture by showing that they were lost or destroyed, had the burden of showing that this occurred through some cause consistent with due care on his part.

3. Animals §23(2)—Finding of destruction of animals through fault of one who had received them to pasture held supported by evidence.

Conclusion that destruction of animals which defendant received to pasture was through his fault held supported by the evidence.

4. Appeal and error §1011(1)—Findings of trial court on conflicting evidence cannot be disturbed.

Findings of trial court having sufficient support in the evidence cannot be disturbed on conflicting evidence.

5. Animals §23(2)—Allowance of defendant's claim for pasturage held not inconsistent with conclusion that he had not excused failure to redeliver part of cattle.

Allowance of claim of defendant for pasturage in action for his failure to redeliver part of the cattle delivered to him to pasture held not in conflict with the conclusion that he had failed to excuse noncompliance with his obligation to redeliver, he in any event being entitled to payment for services rendered under the contract.

6. Appeal and error §117, 713(1)—Order striking affidavit from reporter's transcript is not appealable, and affidavit, though in clerk's transcript, will be disregarded.

An order that affidavit be stricken from the reporter's transcript is not appealable, and the affidavit, though included in the clerk's transcript, must be disregarded.

7. Appeal and error §533(1)—Trial court's statement of theory of decision at close of argument for new trial is not properly part of record on appeal.

Statement by trial court as to theory on which case was decided, made at close of argument on motion for new trial, is not properly a part of the record on appeal.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by W. R. Ferguson against C. E. Green. Judgment for plaintiff, and defendant appeals. Affirmed.

Theodore M. Stuart, of Fresno, for appellant.

G. L. Aynesworth and Frank Kauke, both of Fresno, for respondent.

PER CURIAM. This action was brought to recover damages for the failure to redeliver certain cattle, being part of a herd owned by the plaintiff which the defendant agreed to pasture. The latter filed a counterclaim for pasturage and commissions together with labor furnished and money expended for plaintiff's benefit.

According to the findings the defendant failed to redeliver or account for 57 head of stock of the value of \$2,233.25. It was also found that defendant was entitled to \$844.75 under his counterclaim, and judgment was entered in favor of plaintiff for the difference, viz., \$1,388.50.

The defendant, who has appealed from the judgment and an order denying a motion to set aside the judgment and enter a judgment upon the findings in his favor, contends that the findings in favor of the plaintiff are unsupported; that the theory on which the case was tried and decided was erroneous; and also that the court erred in striking a certain affidavit from the reporter's transcript on appeal.

The complaint alleged the delivery of the cattle to the defendant pursuant to a contract in writing whereby the latter, in considera-

tion of the payment of certain amounts per head, agreed to keep the cattle on a range where they would have sufficient to eat and drink, and to return and account for them in a manner satisfactory to the plaintiff. It further alleged performance by the plaintiff, a demand, and defendant's failure to return a number in excess of that found by the court. Defendant admitted the receipt of the missing cattle, which were shipped to him from New Mexico, but alleged that when received they were suffering from disease from which they later died, and that he had fully performed the contract.

The plaintiff, after adducing evidence in support of the allegations of his complaint, with the exception of that of performance of the contract on his part, rested. Defendant contends that the action stated was one in contract; that in order to recover it was necessary that the latter allegation be proved; and that sums being due for pasturage and commissions at the time of the demand, as found by the court, he was within his rights in refusing to redeliver the missing cattle.

[1-4] In view of the undisputed facts the allegation and proof of performance by the plaintiff were not essential to a recovery, the record showing that the defendant at all times claimed that the missing cattle were destroyed without his fault, not that he refused to redeliver until his demands for pasturage and commissions were paid. This defense he undertook to prove, and the case was tried on the theory that the question of his negligence was an issue. Under the circumstances, and notwithstanding the contractual relations between the parties, it was only necessary for the plaintiff to allege the delivery with a failure to return the property on demand (*Dieterle v. Bekin*, 143 Cal. 683, 77 P. 664), and the presumption arising from the proof of these facts was sufficient *prima facie* to sustain the action (*Wilson v. Southern Pacific Co.*, 62 Cal. 164). Upon such proof being made it was then incumbent upon the bailee to excuse his failure to redeliver (*Kier Singh Doot v. Skirving, etc., Co.*, 202 Cal. 75, 259 P. 81); and where he sought to justify the failure by showing that the cattle were lost or destroyed the burden was upon him to show that this occurred through some cause consistent with due care on his part (*Wilson v. Crown Transfer, etc., Co.*, 201 Cal. 701, 258 P. 596). The defendant adduced evidence in support of his defense; but, on the other hand, there was evidence showing that the stock were placed in a pasture several thou-

sands of acres in extent, in which it was difficult to care for or water them and from which escape was easy; that the range was traversed by deep canyons into which the cattle if they became sick would probably fall, and into which in several cases the evidence tends to show that they did fall; that the pasture, to the knowledge of the defendant, contained growths of poisonous buckeye and black fern which were likely to be eaten by cattle strange to the locality. It was also shown that the defendant neglected for considerable periods to visit the cattle, and in addition to the above there was evidence tending to impeach the accuracy of entries claimed to have been made at various times in defendant's books of account with respect to the number of cattle which died from disease. The record also contains other evidence tending to support the case for the plaintiff which it will be unnecessary to review. Sufficient appears to support the conclusion of the trial court, and the evidence being conflicting its findings cannot be disturbed. 2 Cal. Jur., Appeal and Error, § 543, p. 921.

[5] Appellant contends that the court having allowed his claims for pasturage and commissions, this was tantamount to a finding that he had fully performed the contract, and consequently was not liable for the loss of the cattle, and that judgment should have been entered upon the findings accordingly.

We find no merit in this contention as the defendant was in any event entitled to payment for services rendered under the contract, and the finding to that effect was not in conflict with the conclusion that appellant had failed to excuse noncompliance with his obligation to redeliver the stock and his consequent liability for their value.

[6, 7] Appellant sought to have incorporated in the transcript on appeal an affidavit filed by his attorney setting forth certain statements made by the judge of the trial court at the close of the argument upon appellant's motion for a new trial as to the theory on which the case was decided. The affidavit upon motion was ordered to be stricken from the reporter's transcript, and it is claimed that this order was erroneous.

The order was not appealable, and the affidavit, although included in the clerk's transcript, must be disregarded. *Lake v. Harris*, 198 Cal. 85, 243 P. 417. Nor was the statement by the trial court properly a part of the record on appeal. *De Cou v. Howell*, 190 Cal. 741, 214 P. 444.

The judgment is affirmed.

99 Cal. App. 607

GLENSOR, CLEWE & VAN DINE v. ANDRIANO et al., Board of Sup'rs. (Civ. 6731.)★

District Court of Appeal, First District, Division 2, California. June 26, 1929.

Rehearing Denied July 26, 1929. Hearing Denied by Supreme Court Aug. 22, 1929.

1. Municipal corporations. C-177—Board of election commissioners is department of city government, which cannot function independently from other city departments.

The board of election commissioners of the city and county of San Francisco is a department of city government, and its powers are not such as to make it function independently from other departments of city government.

2. Municipal corporations. C-214(3)—Board of election commissioners held unauthorized to employ attorney in controversy with board of supervisors as to expenditures for election purposes.

The board of election commissioners of city and county of San Francisco was without authority to employ special counsel to represent board in suit to compel board of supervisors to allow in annual budget amount estimated to be necessary by board of election commissioners for the then ensuing year, and attorney so employed cannot recover fees and costs from city.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action for writ of mandamus by Glensor, Clewe & Van Dine, a copartnership consisting of H. W. Glensor, Ernest Clewe, and Melvin E. Van Dine, against Sylvester Andriano and others, composing and comprising the Board of Supervisors of the City and County of San Francisco. From a judgment for defendants, plaintiffs appeal. Affirmed.

Harold H. Price, of San Francisco, for appellants.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

KOFORD, P. J. This is an appeal from a judgment for defendants following the sustaining of a demurrer to plaintiffs' complaint. The action was for a writ of mandamus to compel the payment by the city and county of San Francisco of a claim of plaintiffs for attorney fees and costs. The board of election commissioners had employed plaintiffs to represent it in a proceeding by which it was sought to compel the board of supervisors to allow in the annual budget the amount estimated to be necessary by the board of election commissioners for that department for the then ensuing year. That action was unsuccessful. *Griffin v. Boyle (Jackson v. Badaracco)* 202 Cal. 95, 259 P. 729.

The question presented on this appeal is whether the board of election commissioners

had authority to employ attorneys in that proceeding and make the expense thereof chargeable against the treasury of the city.

The city attorney, having ruled against the contention of the board of election commissioners, appeared for and represented the respondents in that proceeding. The appellants cite the provisions of law and the charter giving the election commissioners general management and power over registrations and the holding of elections. They cite authorities which sustain the power of general legislative bodies of various municipal corporations (such as city councils, boards of supervisors, and we may add in some cases boards of education) to employ special counsel in certain cases. No direct authority is cited supporting the action of the board of election commissioners in employing plaintiffs as counsel to represent it, but it is claimed that the board has this power as an implied one.

[1, 2] The authorities cited by appellants we deem not to be in point because not dealing with controversies between two departments of the same municipality. This is not a case where counsel were employed to represent the municipality in an action with another party, but is an interdepartmental controversy. The board of election commissioners is a department of the city government, and its powers are not such as to make it function independently from the other departments of the city government. *Griffin v. Boyle (Jackson v. Badaracco)* supra, and *Fitzgerald v. Badaracco*, 202 Cal. 18, 258 P. 937, illustrates this point. While there are authorities which permit the employment of special counsel instead of the city attorney or district attorney under special circumstances making such action necessary, we have been referred to none which apply that rule to a controversy between two departments of the same municipal corporation. Cases in which implied power to employ special counsel has been denied one department in a controversy with another are *Rafael v. Boyle*, 31 Cal. App. 623, 161 P. 126; *State v. Gorman*, 117 Minn. 323, 136 N. W. 402; *Higginson v. City of Fall River*, 226 Mass. 423, 115 N. E. 764, 2 A. L. R. 1209.

If it should be conceded that in certain emergencies the board of election commissioners could employ special counsel to represent itself as a board as distinguished from the city and make the expense chargeable against the city treasury, the petition in this case does not show such an emergency. The controversy appears to have been only a difference of opinion or judgment as to how much money would be necessary for election purposes for the fiscal year. The amount necessary to be allowed in the budget has been held to be a matter which is by law confided to the board of supervisors rather than to the other departments of the municipality. *Griffin v. Boyle (Jackson v. Badaracco)* supra;

Fitzgerald v. Badaracco, 202 Cal. 18, 258 P. 937. In the case last cited it is said: "To hold otherwise would be not only to nullify in a large measure the provisions of the charter with relation to the preparation of the annual budget by the Board of Supervisors, but would also be to place it within the power of the Board of Public Works and certain other departments of the city government to provide for expenditures within their several departments in excess of the tax limit provided for in the * * * charter, and in so doing to be and act beyond the control of the legislative body of said city, whose duty it is to keep the expenditures of its government within such limit of taxation."

The judgment is therefore affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

99 Cal. App. 576

Ex parte MONTAGUE. (Cr. 1815.) ★

District Court of Appeal, Second District, Division 1, California. June 24, 1929.

Rehearing Denied July 1, 1929. Hearing Denied by Supreme Court July 22, 1929.

Automobiles ⚙️ **359—Vehicle Act prohibits court from imprisoning defendant under probation order for longer period than fixed by jury's verdict (California Vehicle Act, § 112, as amended by St. 1927, p. 1436; Pen. Code, § 1203).**

Under California Vehicle Act, § 112 (St. 1923, p. 553, as amended by St. 1927, p. 1436), providing that court shall have no authority to impose sentence greater than that recommended by jury, *held* that court is without authority to imprison defendant for longer time than period fixed by jury, either by direct judgment of sentence, or under guise of a probation order, under Pen. Code, § 1203.

Application by John I. Montague for writ of habeas corpus prayed to be directed to the Sheriff of Los Angeles County to secure the release of the petitioner from custody. Petitioner discharged.

Wm. Christensen and J. H. O'Neill, both of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CONREY, P. J. By section 112 of the California Vehicle Act (St. 1923, pp. 517, 553, as amended by St. 1927, p. 1436) penalties are imposed upon persons violating the provisions of said section. These penalties include either fine or imprisonment, within certain stated limits. It is further provided: "And upon every verdict of 'guilty' under this section, the jury shall recommend the punishment and the court in imposing sentence shall have no

authority to impose a sentence greater than that recommended by the jury." Section 1203 of the Penal Code contains an elaborate series of provisions of law relating to admission of convicted persons to probation. It is provided that the court may suspend the imposing of sentence, and (among other things), in the order granting probation, and as a condition thereof "may imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law in the instant case."

In the present proceeding it appears that the petitioner, Montague, was tried upon a charge of violation of section 112 of the California Vehicle Act, and that the jury, as a part of its verdict of guilty, fixed the penalty as imprisonment in the county jail for a period of 90 days. Thereafter on the 21st day of January, 1929, the court granted probation, and ordered "that proceedings herein be suspended and the defendant granted probation for a period of five years under the following conditions: the first year of said probation period, defendant shall serve at the county road camp. * * *" Under this probation order the defendant remained in the county road camp until the 20th of February, when he escaped, but was arrested on the following day, and has since remained in the custody of the sheriff. In the meantime, he was prosecuted and convicted of the crime of escape, on which conviction he was admitted to probation, without any order of imprisonment. In this proceeding the writ of habeas corpus was issued on the 25th day of April, 1929.

It is manifest that at the time of the issuance of the writ the defendant had been in custody for the full period of 90 days under the probation order, unless the district attorney is correct in his contention that the time during which defendant was in custody under the additional charge arising out of his escape should not be counted as a part of the period of confinement under the probation order. But at all events the defendant now has been in custody for more than 90 days under the probation order, and we think this matter can properly be determined solely upon one question; that is to say, whether or not, in view of the terms of the statutes to which we have referred, the superior court in its probation order, had jurisdiction to subject the defendant to a term of imprisonment beyond the 90-day period fixed by the jury. It is pointed out by the district attorney that the limitation upon the authority of the court in the language of section 112 of the said Vehicle Act is stated as a limitation of the court's authority "in imposing sentence." It is also true that the authority given the court in section 1203 of the Penal Code, to impose imprisonment in the county jail for a limited term in connection with

granting probation, is part of a proceeding in which the court "may suspend the imposing, or the execution of the sentence." The power to admit to probation may be exercised upon application of the defendant, or of the people, or upon its own motion. Taking all of these statutory provisions together, it is manifest that, where the court in granting probation orders the imprisonment of a defendant in the county jail, such imprisonment is involuntary on the part of the defendant, just as much as if he were held in custody under direct judgment of imprisonment. It is our opinion that the Legislature, in enacting section 112 of said Vehicle Act, intended that, when the jury, in a case coming under that section, recommends a definite limit of imprisonment, the court shall thereby be left without authority to imprison the defendant for a longer period of time, either by direct judgment of sentence, or under the guise of a probation order. In other words, we think that the phrase, "authority to impose a sentence," in section 112, as amended, includes not only the technical judgment, which is the usual form of sentence, but also includes a sentence contained in a probation order.

The petitioner is discharged from custody.

We concur: HOUSER, J.; YORK, J.

99 Cal. App. 501

HELBUSH v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6974.)★

District Court of Appeal, First District, Division 1, California. June 19, 1929.

Rehearing Denied July 19, 1929. Hearing Denied by Supreme Court Aug. 15, 1929.

1. Appeal and error $\S$ 74—Generally order refusing to vacate final judgment is not appealable, if grounds therefor were available on appeal from judgment.

Generally, order refusing to vacate final judgment is not appealable, if grounds on which party sought to have judgment vacated existed before entry of judgment, and were available on appeal from judgment, since appeal, if allowed from such order, would in effect allow two appeals from same ruling.

2. Appeal and error $\S$ 74—Appeal lies from order refusing to set aside final judgment, if appellant has no other method of presenting case to appellate court.

Appeal from order refusing to set aside final judgment will lie where there is no method by which right of appellant to relief sought can be presented to appellate court, and facts on which he bases his claim to relief do not appear from an inspection of the judgment roll.

3. Divorce $\S$ 175—Wife could move to set aside final decree of divorce and appeal from order denying motion, where appeal from final decree would be valueless, and was not entitled to certiorari to review order granting final decree (Code Civ. Proc. $\S$ 953a, 1068, 1086; Judicial Council Rule 26).

Where final decree of divorce was merely restatement of interlocutory decree, and was granted ex parte without opportunity to wife to resist same or to make record for appeal under Code Civ. Proc. $\S$ 953a, and alleged error in granting final decree or want of jurisdiction did not appear from judgment roll, since affidavit required by Judicial Council Rule 26 need not be made part of judgment roll, and record of proceedings pursuant to interlocutory decree could not be made part of record on appeal from final decree, appeal from final decree would be valueless, since record would not show alleged error or want of jurisdiction, but wife could move to set aside final decree, and, if motion was denied, could appeal from order denying motion, and hence wife was not entitled to writ of certiorari to review order granting final decree of divorce under Code Civ. Proc. $\S$ 1068, 1086, limiting right of certiorari to case where there is no appeal.

4. Certiorari $\S$ 5(1)—Certiorari lies only where there is no appeal nor adequate remedy (Code Civ. Proc. $\S$ 1068, 1086).

Under Code Civ. Proc. $\S$ 1068, 1086, certiorari lies only where there is no appeal, nor, in judgment of court, any plain, speedy, and adequate remedy.

Certiorari by Gwyneth Helbush to review an order of the Superior Court in and for the City and County of San Francisco, and Hon. T. I. Fitzpatrick, Judge thereof. Writ denied.

Harry I. Stafford, of San Francisco, for petitioner.

PER CURIAM. Petitioner has applied for a writ of certiorari to annul a final decree of divorce granted ex parte on April 10, 1929, by the superior court in and for the city and county of San Francisco. The facts upon which the application is based, as they are set forth in the petition, are as follows: On January 18, 1924, petitioner obtained an interlocutory decree of divorce from her husband upon the ground of extreme cruelty. After a lapse of five years, to wit, on February 15, 1929, she presented a motion to vacate said decree upon the ground, as stated in the affidavit filed in support of the motion, that shortly after the entry of the interlocutory decree the parties became reconciled, and afterwards cohabited with each other openly, notoriously, and continuously as husband and wife from July, 1924, until January, 1929, a period of nearly five years. The motion was contested, and on April 5, 1929, was denied. Five days thereafter, to wit, on April 10, 1929, petitioner's husband, being at the time represented by counsel who had not thereto-

fore appeared of record in the divorce proceeding, applied ex parte to another department of said court for a final decree of divorce. At that time the record of the proceeding to set aside the interlocutory decree was brought to the court's attention, including the contents of the affidavit filed therein, showing that the parties had become reconciled and lived together for a period of nearly five years immediately preceding January, 1929; and counsel for petitioner's husband then stated that, for the reasons set forth in said affidavit, their client was unable to comply with rule 26 of the Judicial Council regulating the business of superior courts, which provides, in substance, that, as a prerequisite to the granting of a final decree of divorce, the applicant shall file and present an affidavit setting forth that since the rendition of the interlocutory decree the parties have not become reconciled, nor lived or cohabited together; but it was claimed that it was beyond the power of the Judicial Council to adopt such a rule. The final decree of divorce was granted, and petitioner now contends that, by reason of the court's knowledge, imparted by said affidavit, as to the reconciliation of the parties, and the non-compliance with said rule 26 of the Judicial Council, the court was without jurisdiction to grant said final decree.

With reference to the exercise of the power of this court to grant a writ of certiorari, it is pointed out by the case of *Stoddard v. Superior Court*, 108 Cal. 303, 41 P. 278, that, even though a court be without jurisdiction to make an order or decree, if such order or decree "is appealable, certiorari will not lie, because it lies only where 'there is no appeal.' Code Civ. Proc., sec. 1068. In this respect," says the court, "it differs from mandamus and prohibition, which lie 'in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law' (Code Civ. Proc., secs. 1086, 1103). With respect to certiorari, the language of the code is: 'when * * * there is no appeal, nor in the judgment of the court, any plain, speedy, and adequate remedy' (Code Civ. Proc., sec. 1068). In *Stuttmeister v. Superior Court*, 71 Cal. 322 [12 P. 270], the authorities on the point are collated; and it was there declared that: 'the writ (certiorari) will not lie when there is an appeal from the action complained of;' and 'the writ is not given in lieu of an appeal, but only to review errors in excess of jurisdiction, for which an appeal does not lie.' (See cases cited in opinion of Searles, C., also *In re McConnell*, 74 Cal. 217, 219 [15 P. 746]; *Hayne on New Trial and Appeal*, sec. 307)."

The determinative question presented by the petition herein is, therefore, whether petitioner has a remedy by appeal either from the final decree of divorce or from any adverse order which might be made pursuant to a motion to set aside the final decree. That an ap-

peal will lie generally from a final decree of divorce was held in the case of *Reynolds v. Reynolds*, 191 Cal. 435, 216 P. 619. There the trial court concluded from the facts found that neither party was entitled to a divorce, and entered its decree accordingly; subsequently, on motion of the defendant, and after the time for appeal from the decree had expired, the court vacated the decree, set aside its conclusions of law, and granted defendant an interlocutory decree of divorce; and at the expiration of one year entered the final decree in accordance with the terms of the interlocutory decree. Thereafter the plaintiff in the action moved to vacate both the interlocutory and final decrees upon the ground that the decree denying the divorce became final before application was made to set it aside, and that consequently the court lost jurisdiction to alter said decree. The motion was denied, and plaintiff appealed. It was held that the order denying the plaintiff's motion was not appealable "because both the interlocutory and final decrees were appealable"—citing among other authorities *Estate of Baker*, 170 Cal. 578, 150 P. 989. A qualified rule is declared in the case of *Huneke v. Huneke*, 12 Cal. App. 199, 107 P. 131 (hearing by Supreme Court denied). There it was held that, if the final decree is in effect merely a restatement and reaffirmance of the provisions of the interlocutory decree, no appeal lies from the final decree, because the interlocutory decree is appealable. In this regard the court said: "The mere fact that the final decree restated and reaffirmed the previous judgment made and entered at the time of the trial and included in the interlocutory judgment, conferred no right of appeal as to matters involved and finally determined by the original interlocutory judgment, even though it should be said that the effect of section 131, Civil Code, is to hold in abeyance the execution of the final judgment as to the property rights until the entry of the final decree of divorce."

[1, 2] It is a general rule also that an order refusing to vacate a final judgment is not appealable, if the grounds upon which the party sought to have the judgment vacated existed before the entry of the judgment, and were available on an appeal from the judgment, the main reason for the rule being that, if such an appeal be allowed, it would be virtually allowing two appeals from the same ruling, one from the judgment and the other from the negative action of the court declining to disturb the judgment. 2 Cal. Jur. 164. But, as indicated by the statement of the rule, there are certain exceptions to its general application, one of them being that an appeal from an order refusing to set aside a final judgment will lie, where there is no method by which the right of the appellant to the relief sought by him can be presented to the appellate court and the facts on which he bases his claim to relief do not

appear from an inspection of the judgment roll. *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; *Estate of Baker*, supra. In the former case, which was one for divorce, wherein the decree was obtained upon a constructive service of summons and the trial court made certain provisions as to the care and custody of the minor children, the Supreme Court said: "It is also claimed that no appeal lies to this court from an order refusing to set aside the judgment because the judgment was appealable. To this proposition many decisions of this court are cited. I do not care to review these cases. No doubt it has been held, and I think correctly, that when a motion is made to vacate an order under such circumstances that it merely calls upon the court to repeat or overrule the former ruling on the same facts, the last order is not appealable, not because the last order is not within the terms of section 963 of the code [Code Civ. Proc.] allowing appeals, for it may be; but because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing contrary to the intent of the statute. Nor will such practice be allowed merely to permit a litigant to take an exception, or get a bill of exceptions, which he has neglected to do at the proper time. But I see no reason why this appeal should not be entertained. It is plainly within the terms of the statute allowing appeals, and no other method is suggested in which the right of the appellant to the relief sought could be considered here. An appeal upon the judgment roll would not present all the facts upon which the motion is based—even if one may have a bill of exceptions when he has not been in court, and has taken no exceptions. Besides, it is a case in which it was eminently proper, if not necessary, that relief should first be asked from the trial court. Its action could not have been asked in any other mode. The defendant was not in court, and had no opportunity to be heard."

The *Estate of Baker*, supra, which, as will be noted, was cited in *Reynolds v. Reynolds*, supra, in support of the rule there announced, is to the same effect. In that case the contestant to a will died before the trial of the contest, and on the day set for trial the fact of her death was made known to the court, whereupon the proponents of the will moved for and obtained a dismissal of the contest upon the ground that the right to contest a will did not survive the death of the contestant. About two months later an administrator of the estate of the deceased contestant was appointed, and he moved for an order vacating the judgment of dismissal and for a substitution of himself as the contestant. The motion was denied, and he appealed from the order of denial. The proponents of the will then moved for the dismissal of

the appeal upon the ground that said order was not appealable, contending that the only appeal afforded was one from the judgment of dismissal, and that, since no such appeal was taken, an appeal from the subsequent order would not lie. In ruling adversely upon the motion, the court first recognized the existence of the general rule that no appeal lies from an order refusing to vacate an order or judgment, stating that, if the rule were otherwise, a losing litigant would be afforded two appeals, one from the final judgment and the other from the order denying the motion to vacate said judgment. "But," says the court, "there are a large number of cases arising under an entirely different state of facts where the reason for the rule being otherwise, the rule itself is otherwise. In those cases two appeals are not permitted, but, to the end that justice may be done, one appeal is permitted from an order refusing to vacate a judgment or decree when, for reasons involving no fault of the appealing party, he has never been given an opportunity to appeal directly from the judgment or decree. These are cases where one's rights or interests are injuriously affected by a judgment or by an appealable order in litigation to which he is not formally a party, or in which, if a party, he has not received due notice, so that as to him the judgment or appealable order is made ex parte. In such cases it is always permissible for the one injured to make himself a party to the litigation, if he has not been a party, and, after he has thus submitted to the jurisdiction of the court, to move the vacation of the decree or appealable order injuriously affecting his interest, and to appeal if the motion be denied. The same right is open to one who is a party to the litigation and against whom such an order or decree has been given improperly and ex parte. These cases, of course, arise when the motions are made after the time limited by law for the appeal has expired. The moving parties, for the indicated reasons, have not been able to avail themselves of the right to appeal. And only by this method can they be protected in this valuable right. Our cases so holding are numerous. Says this court in *Elliott v. Superior Court*, 144 Cal. 501, [77 P. 1109, 103 Am. St. Rep. 102]: 'He may make himself a party by moving to set aside such judgment or order, and, if his motion is denied, may, on appeal from that order, have the proceeding of which he complains reversed, not only for excess of jurisdiction, but for error.' And in *Pignaz v. Burnett*, 119 Cal. 157 [51 P. 48], this court further declares: 'As to every order finally disposing of the rights of the parties, as to any matter involved in the litigation—orders, final in the sense that the question cannot be again considered in the case—the parties affected have a right to be heard. When they are made ex parte, the right to move to vacate the order, and upon such motion to show

cause against the order, is implied. In such case, the only appeal which can avail is an appeal from the order refusing to vacate. In no other way, where evidence is submitted, can the appellant present to this court his showing against the order. To say he cannot do this is to deny him his right of appeal.'” Continuing, the court says that the class of cases above mentioned “* * * is so widely different from the generality of cases that it may not even be fairly said to constitute an exception to the general rule. * * *”

A case which might be cited as not falling within the foregoing exception is *Spitzer v. Superior Court*, 74 Cal. App. 494, 241 P. 270 (hearing denied by the Supreme Court). There the petitioner sought a writ of prohibition to prevent the granting of a final decree of divorce, but, it having appeared from the facts that petitioner had made a showing in opposition to the granting of the final decree, the writ was denied upon the ground, among others, that, if the final decree were granted, he would be afforded a full remedy by appeal therefrom.

[3] Summarizing the situation in the present case, it appears, first, from a comparison of the terms of the final decree with those of the interlocutory decree, that the former is merely a restatement and reaffirmance of the latter; secondly, that, owing to the fact that the final decree was granted *ex parte*, petitioner was given no opportunity to resist the granting of the same, and consequently was afforded no opportunity to lay a record for an appeal to be taken by way of a bill of exceptions or pursuant to the alternative method provided by section 953a of the Code of Civil Procedure; thirdly, that the alleged error or want of jurisdiction does not appear from the judgment roll, because there is no statutory requirement that the affidavit which shall be made pursuant to rule 26 of the Judicial Council as a prerequisite to obtaining a final decree of divorce shall be made a part of the judgment roll; and, fourthly, that the record of the proceeding had pursuant to the motion to set aside the interlocutory decree cannot serve as a record on appeal from the final decree because the motion upon which that proceeding was based was directed against a different decree, and was heard before and determined by a different judge. In that state of the record, it is evident that any appeal which might be taken from the final decree of divorce would be valueless, because, without fault on petitioner's part, there would be no record showing the alleged error or want of jurisdiction in granting such final decree. That being so, and in view of the rule declared in *De la Montanya v. De la Montanya*, *supra*, and *Estate of Baker*, *supra*, we are of the opinion that petitioner may, if she has not already

done so, move to set aside the final decree upon the grounds urged herein for its annulment, and, if the motion be denied, may appeal from the order made in that behalf. Therefore, being given such right of appeal, she is not entitled to a writ of certiorari to serve the purpose of such appeal.

[4] In further support of the application herein, it is alleged that, unless the latter be granted, petitioner's husband will dissipate, secrete, and dispose of the community property, valued at more than \$1,000,000, and that as a consequence petitioner will be deprived of her legal right to share therein. But, as held in the case of *Stoddard v. Superior Court*, *supra*, it is only where “there is no appeal, nor in the judgment of the court, any plain, speedy, and adequate remedy,” that a writ of certiorari will lie. Therefore, since, as shown, petitioner is afforded such a remedy, the question of whether it may or may not be a speedy and adequate remedy becomes an immaterial matter.

For the reasons stated, the application for the writ must be denied, and it is so ordered.

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207 Cal. 521

YUBA RIVER POWER CO. v. NEVADA IRR. DIST. et al. (Sac. 4157.)★

Supreme Court of California. July 5, 1929.

Rehearing Denied Aug. 1, 1929.

1. Quieting title ☞19—Word "property" in statute authorizing action to determine adverse claims includes every species of estate, real and personal, and everything which can be owned and transferred (Code Civ. Proc. § 738).

Term "property," used in Code Civ. Proc. § 738, authorizing action to determine adverse claims to property and defined in Civ. Code, §§ 654, 655, is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another, and extends to every species of right and interest capable of being enjoyed as such, upon which is practicable to place a money value, and, as applied to lands, comprehends every species of title, inchoate or complete, embracing those rights which lie in contract, whether executed or executory.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Property.]

2. Waters and water courses ☞133—Since granting of permit to appropriate water is merely confirming evidence of right theretofore existing, application cannot be arbitrarily rejected (Water Commission Act).

Under Water Commission Act (St. 1913, p. 1012), granting of a permit to appropriate water for power and irrigation purposes is not the right itself, but merely confirming evidence of the right theretofore existing, and application for permit cannot be arbitrarily rejected, since to do so would deprive applicant of valuable property right without due process of law.

3. Waters and water courses ☞133—Alleged right to arbitrarily deny water permit, existence of water subject to appropriation, and priority among permittees, are judicial questions (Water Commission Act).

Under Water Commission Act (St. 1913, p. 1012), alleged right to arbitrarily deny issuance of permit to appropriate water for irrigation and power purposes, existence of water subject to appropriation under permit, and priority among permittees, whatever the stage of operations thereunder, are judicial questions.

4. Quieting title ☞19—Power company, prior to issuance of permit to appropriate water, held entitled to bring action to determine adverse claims to water rights (Water Commission Act; Code Civ. Proc. § 738).

Where power company had fully complied with every provision of Water Commission Act (St. 1913, p. 1012), entitling it to receive preferential right to appropriate water from river for beneficial use, and there was unappropriated water sufficient to comply with applications, power company prior to issuance of permit acquired valuable property right, and was authorized, under Code Civ. Proc. § 738, to bring action in equity in nature of suit to quiet title to determine adverse claims to use of water so sought as between itself and upper claimant threatening to invade right of priority claimed.

In Bank.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action to quiet title by the Yuba River Power Company against the Nevada Irrigation District and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

William F. Humphrey and Hadsell, Sweet & Ingalls, all of San Francisco, for appellant.

C. F. Metteer and H. J. March, both of Sacramento, and Thos. J. Straub and Leo H. Susman, both of San Francisco (Orrick, Palmer & Dahlquist, of San Francisco, of counsel), for respondents.

PRESTON, J. This case arises under the Water Commission Act (St. 1913, p. 1012) now being administered by the department of public works, division of water rights. To the issue made by the complaint, a demurrer was interposed and sustained without leave to amend, followed by judgment for defendants. Three propositions are to be taken as true in disposing of the question in controversy: First, that appellant has fully complied with each and every provision of the above-mentioned act entitling it to receive preferential right to appropriate certain amounts of water from the Yuba river; second, that unappropriated water sufficient to comply with the applications flows in the stream; third, that appellant is prepared to put the water sought to be appropriated to a beneficial use.

[1-4] The question, then, for decision, is this: Is appellant, who seeks to appropriate available water and in the status above described, authorized under section 738 of the Code of Civil Procedure, prior to the issuance of a permit, to bring an action in equity in the nature of a suit to quiet title to determine the adverse claims to use of the water so sought as between itself and an upper claimant who threatens to invade the right of priority thus claimed?

Admittedly plaintiff has four applications pending and in good standing, one dated February 17, 1920, one dated September 10, 1920, and two dated April 9, 1923, to appropriate large quantities of the water of the Yuba river to be used for power and irrigation purposes. The allegations of the complaint are that the waters claimed are available in the stream, and that plaintiff has the ability to make beneficial use of them; that defendants assert the right to appropriate and use said waters by diverting them from the stream at a point above plaintiff's points of intended diversion; that defendants assert and claim said rights in hostility and priority in time and right to plaintiff's applications, but that said rights, if any such exist, are subsequent and subject to the applications of plaintiff; that said defendants are proceeding

to divert and use the waters of said Yuba river sought by plaintiff, claiming that their rights are prior in time and right to said applications of plaintiff; that there are not enough unappropriated waters in said stream to satisfy the applications of plaintiff and at the same time to satisfy the asserted rights of defendants to appropriate and use said waters.

Section 738 of the Code of Civil Procedure provides: "An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim. * * *" The word "property," found in this section is a broad term, and is specifically defined in sections 654 and 655 of the Civil Code. The word is also defined as follows: "The term 'property' is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. As applied to lands the term comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract—those which are executory as well as those which are executed." 22 R. C. L. p. 43, § 10.

In *McKeon v. Bisbee*, 9 Cal. 137, 142 (70 Am. Dec. 642), dealing with a mining claim upon public lands, this court as early as 1858, said: "Property is the exclusive right of possessing, enjoying, and disposing of a thing; it is 'the right and interest which a man has in lands and chattels, to the exclusion of others,' and the term is sufficiently comprehensive to include every species of estate, real or personal." The court there sustained the execution sale of the interest of a miner in his mining claim.

In *People v. Eddy*, 43 Cal. 331, 336, 337 (13 Am. Rep. 143), it is said: "The word 'property' is used in that section of the Constitution in its ordinary and popular sense, and this is the general rule in the interpretation of Constitutions and statutes, unless the context shows that the words are used in a technical or in some arbitrary sense."

Respondents admit that, by the filing of said applications, plaintiff received "procedural priority," and conceded that this "procedural priority" may itself be property, in that it may be assigned or transferred, but it is insisted that such property right is a different right from an interest or estate in the use of the water applied for. This concession goes a long way towards demonstrating that the position of appellant herein is the correct one. But respondents contend that, inasmuch as a broad discretion is reposed in the division of water rights by the statute in the matter of applications of this character, having the power at will, it is said, to approve, mod-

ify, or reject them, the mere filing of an application is insufficient upon which to claim a right in either real or personal property. Moreover, it is contended that were a court of equity in a suit of the character here to attempt to determine the rights of a mere claimant, it would assume to itself administrative functions, which it cannot constitutionally do.

The effect of an application in proper form has been declared by the statute to be as follows: "* * * And any application so made shall give to the applicant a priority of right as of the date of said application to such water or the use thereof until such application shall have been approved or rejected by said commission; provided, that such priority shall continue only so long as the provisions of law and the rules and regulations of the water commission shall be followed by the applicant. * * *" Section 17, Water Commission Act (St. 1913, p. 1022).

Respondents seem clearly to have mistaken the status of appellant, who has complied with all the requirements of law and has found available water to appropriate. The granting of a permit is merely confirming evidence of the right theretofore existing. It is not the right itself. The application cannot be arbitrarily rejected. This is the plain holding of this court in *Tulare Water Co. v. State Water Com.*, 187 Cal. 533, 537, 202 P. 874, 876, wherein this court sustained a proceeding in mandate to compel the state water commission to entertain a complaint having the purpose to direct the commission to issue the permit, saying that: "To conclude the rights of would-be appropriators by the extrajudicial and perhaps arbitrary action of a board of water commissioners would be to deprive such applicant of a valuable property right without due process of law." See, also, *Rich v. McClure*, 78 Cal. App. 209, 248 P. 275.

The court in said cause (*Tulare Water Co. v. State Water Com.*, supra) further clearly intimated that neither the question of priority between claimants nor the existence or nonexistence of unappropriated waters in a stream were questions to be finally determined by the water commission. The effect of this holding was sought to be obviated by the enactment of a new section, known as 1b (St. 1923, p. 162), providing for a hearing by the superior court upon applications for permits to appropriate water. This court, in *Mojave River Irr. Dist. v. Superior Court*, 202 Cal. 717, 262 P. 724, declared said enactment invalid and sustained the pronouncements of the court in *Tulare Water Co. v. State Water Com.*, supra, to the effect that no judicial power had been or could be lawfully conferred upon the state water commission or its successor. This doctrine is also set forth in *Department of Public Works v. Superior Court*, 197 Cal. 215, 239 P. 1076.

From the admitted facts of the complaint

before us, plaintiff could have compelled the issuance of a permit, and certainly, by virtue of section 17 of the act, is entitled to enjoy for all practical purposes, pending the action upon its application, the status of a permittee. In fact the allegations of the complaint, if true, show a trespass upon the preferential rights of appellant.

From another standpoint we have a precedent sufficient to control our action in this case. Prior to the enactment of the Water Commission Act, we had in existence sections 1410-1422, inclusive, of the Civil Code, which furnished a method of controlling the question of priority in the appropriation of unappropriated waters of the state. The present law was not enacted to abolish the right of appropriation of water. No attributes are added to constitute the right. The new legislation is designed "merely to regulate and administer this privilege." Therefore the pronouncement of this court on the question of priority in the appropriation of waters should and does shed light upon, if not control, the issue before us.

In the case of *Inyo Cons. Water Co. v. Jess*, 161 Cal. 516, 119 P. 934, where the court had under consideration the rights of a claimant by virtue of five notices of appropriation, posted and recorded as provided in section 1415 of the Civil Code and appellant brought an action under section 738 of the Code of Civil Procedure to determine conflicting claims between himself and defendant to the right to use the waters of Cottonwood creek in Inyo county, the court sustained the demurrer to this count of the complaint upon the theory that it did not show that plaintiff owned any subsisting interest in or right to said water or the use thereof. It was respondent's contention that the right was not a vested right and was not property, and that it would not be protected against adverse claimants by a statute of this character. The court said, in discussing certain previous California cases:

"They lay down the rule that a right to the use of running water does not vest in possession at common law, until there has been an actual diversion and beneficial use of the water. But they all recognize, and some of them declare, that, before any actual diversion or use of the water, a claimant may acquire an incipient, incomplete, and conditional right to the future use of the water, by beginning the construction of the works necessary for such diversion and use, and, in good faith, diligently prosecuting the same toward completion. * * *

"The purpose of the code was to afford a more perfect protection for such rights and to facilitate the subsequent acquisition of the title to the use. Previously, the incomplete right could be acquired only by some open, visible work to that end, upon the ground, accompanied by a declaration of the

intent. Disputes would naturally arise as to priority between different diversions from the same stream at places far apart. The code endeavors to avoid this by providing for the posting of a notice at the proposed dam, and declaring that such notice secures a prior right, without any work, for the period of sixty days thereafter. (*Wells v. Mantes*, 99 Cal. 586, 34 P. 324). Thus there is given that which it is said did not exist before (*Kelly v. Natoma Water Co.*, 6 Cal. 105), a constructive right to the use of the water, a right existing only by publicly declared intent, and which may be made a perfect and complete title, as against all except prior users and riparian owners, by beginning the work within sixty days, diligently prosecuting it to completion, and thereupon actually using the water. This incomplete right, although not as yet a title, is an interest in the realty. Under section 738 of the Code of Civil Procedure the person who has an interest in real property may maintain an action to determine the validity of a conflicting claim which is adverse to his own claim. It follows that the first count states a cause of action and that the general demurrer thereto should be overruled."

In the case of *Merritt v. City of Los Angeles*, 162 Cal. 47, 120 P. 1064, the court, referring to the same subject and in discussing the form of relief allowable, used this language: "Such judgment, of course, should not declare the plaintiff absolutely entitled to the water, nor enjoin the defendant from taking or using it during the intervening time prior to the completion of plaintiff's works to a stage which will enable him to divert and use it. It should only declare and describe the plaintiff's contingent right to use the water and enjoin adverse claims or uses injurious thereto. If the plaintiff's right shall have terminated at or before the time of trial, the judgment should be for the defendant. If the defendant's right is paramount, but does not include all the waters of the stream, the judgment may so declare and fix the plaintiff's contingent right in the surplus at such time as there is an excess over defendant's use."

We cannot distinguish these cases from the situation before us. The right being protected and administered is the same. A period of priority was provided, and the protection given there was during such statutory period and prior to any actual construction of diversion works.

If it be conceded that all the division of water rights may do is of a ministerial and not of a judicial character, it does not follow that justiciable questions may not arise from the action or inaction of that body as well as from the rights conferred by the statute itself. We have already seen that the alleged right to arbitrarily deny the issuance of a permit raises a judicial question; also

that the existence of water subject to appropriation under a permit is a judicial question. Priority among permittees is also a judicial question, whatever the stage of operations thereunder. These deductions follow because of the plain provisions of our general remedial law.

Counsel is confusing the power of the division, which of necessity is not judicial, with the rights conferred by the statute, which give rise to judicial questions.

The determination of the issues tendered by this complaint may be of incalculable value to both sets of litigants; likewise through this action information useful to the division of water rights may be acquired. Not only may the question of priority be determined, but upon the issue, if controverted, may also be determined the amount of water subject to appropriation flowing in the stream, as well as the restrictions, if any, which surround its use. The division of water rights can finally dispose of none of these questions. Neither can it act judicially upon any of them.

The judgment is reversed, with directions to the court below to overrule the demurrer and to permit defendants to join issue on the allegations of the complaint.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; RICHARDS, J.

207 Cal. 443

IN RE CATE. (Cr. 2734.)

Supreme Court of California. June 26, 1929.

1. Statutes ☞263—Statutes are not given retrospective operation, unless it is clear such was legislative intention (Civ. Code, § 3).

Under Civ. Code, § 3, statutes are not to be given retrospective operation, unless it is clearly made to appear that such was legislative intention.

2. Attorney and client ☞61—Statute giving board of governors of state bar power to pass on petitions for reinstatement as attorneys did not divest court of jurisdiction to determine pending application (State Bar Act, § 26; Civ. Code, § 3).

State Bar Act (St. 1927, p. 38), § 26, giving board of governors of state bar power to pass upon all petitions for reinstatement as attorneys at law, held not to divest court of jurisdiction to further entertain, hear, or determine pending application for reinstatement in view of Civ. Code, § 3, providing that no part of statute is retroactive unless expressly so declared.

3. Attorney and client ☞61—Statute giving board of governors of state bar power to pass on petitions for reinstatement as attorneys applies only to proceedings thereafter initiated before board (State Bar Act, § 26).

State Bar Act (St. 1927, p. 38), § 26, giving board of governors of state bar power to pass

upon all petitions for reinstatement as attorneys at law, applies only to such proceedings relative to reinstatement of disbarred attorneys as should thereafter be initiated before board of governors of state bar.

4. Attorney and client ☞61—Finding of board of bar examiners regarding moral and social rehabilitation of petitioner for reinstatement, supported by evidence, should be affirmed.

Finding of board of bar examiners touching moral and social rehabilitation of petitioner applying for reinstatement as attorney at law, supported by evidence, should be affirmed.

In Bank.

In the matter of the application of Clyde E. Cate, a disbarred attorney, for readmission as an attorney at law. Referred to Board of Bar Examiners.

Alfred E. Cate, of Los Angeles, for petitioner.

Hewitt, McCormick & Crump, of Los Angeles (Guy Richards Crump, of Los Angeles, of counsel), for respondent Los Angeles Bar Ass'n.

RICHARDS, J. This matter is before this court for determination after a decision by the District Court of Appeal in and for the Second Appellate District, Division 2, denying the application of the petitioner herein for reinstatement and readmission to practice as an attorney and counselor at law, filed in said court on September 26, 1928 (see 270 P. 968; 273 P. 617), and upon which a petition for hearing herein was granted. Clyde E. Cate was admitted to practice his said profession after examination by said District Court of Appeal on June 14, 1912, and thereupon entered and for some years engaged in the practice of the law. On or about April 23, 1918, an accusation was filed against him, on behalf of the Los Angeles Bar Association, in the superior court in and for the county of Los Angeles, wherein he was charged with certain violations of his oath and duties as an attorney and counselor at law, and an order for his disbarment was sought, and on June 6, 1918, after due hearing, obtained by a judgment to that effect, duly made and entered in said court. Thereafter, and during the year 1921, the petitioner filed an application for reinstatement in said court, which was, by order of said court, denied. 54 Cal. App. 401, 201 P. 964. During the year 1922 the petitioner renewed his application for reinstatement before said court, which application was also denied. 60 Cal. App. 279, 212 P. 694. In the year 1924 he again applied to said court for reinstatement, which application was referred by said court to the then existing board of bar examiners to take testimony thereon and report to the court. Upon receiving the report of the board of bar examiners, which apparently was favorable to the applicant, upon the matter of his rehabil-

itation as to his moral status, said court nevertheless denied his application for reinstatement upon the ground that he had presented no formal application for re-examination as required by one originally seeking admission to practice under the provisions of sections 276 and 279 of the Code of Civil Procedure. In so doing said court erroneously relied upon and applied certain expressions in the case of *Danford v. Superior Court*, 49 Cal. App. 303, 193 P. 272. A petition for hearing in this court in that matter, and also in the companion proceeding entitled *In re Stevens*, also pending similarly decided in that court, was granted, and both of these matters came before this court for determination in the latter part of the year 1925; the decision in the *Stevens* Case, which constituted the main opinion, being handed down on November 6, 1925 (197 Cal. 409, 241 P. 88); the decision of the *Cate* Case (197 Cal. 796, 241 P. 95), briefly adopting the *Stevens* opinion, being filed on the same date. In deciding these two matters this court disapproved the language in the *Danford* Case upon which the aforesaid appellate tribunal had placed reliance, holding that the requirement of a re-examination as to the mental qualifications of applicants for restoration to practice was not an indispensable prerequisite to such restoration to the profession, but was a matter which rested in the discretion of the judicial tribunal finally passing upon such application, depending upon the circumstances of the particular case. This court thereupon made an order in the *Cate* Case (197 Cal. 796, 241 P. 95), based upon the *Stevens* decision, to the effect "that the matter be transferred to the District Court of Appeal, Second Appellate District, Division Two, for further proceedings in accordance with the terms therein expressed." The said court thereupon resumed jurisdiction over the *Cate* application and on April 20, 1926, again referred the matter to the state board of bar examiners for further investigation and report. The said board held the matter under investigation for more than a year, during the course of which hearings were had and much evidence elicited which, it should be frankly conceded, largely preponderated in the petitioner's favor as to his moral rehabilitation. The report of said board of bar examiners was filed in said District Court of Appeal upon August 18, 1927, and after certain recitals of fact it embraced the following findings:

"From all the evidence we find:

"First: Applicant is possessed of such moral qualifications as entitle him to reinstatement.

"Second: There is such doubt as to the mental qualifications of applicant that an examination is necessary to determine them; and the nature and extent of the examination should be the same as is given other applicants seeking to be admitted to practice

law in this state upon examination. Dated August 8, 1927."

Thereafter, and on or about April 9, 1928, the petitioner moved said court that the cause be submitted for decision upon the aforesaid report and findings of the board of bar examiners, which motion was granted by said court. In the meantime, and on July 29, 1927, that certain act of the Legislature known as the "State Bar Act" (Stats. 1927, p. 38) became effective, whereupon a question arose in said court as to whether it still had jurisdiction over this matter in view of the provisions of said State Bar Act or any further power to make any order in the premises. The said court gave its earnest and most exhaustive consideration to that subject, and on September 26, 1928, handed down its decision thereon (270 P. 908), wherein it was held that it still possessed jurisdiction over the subject-matter of the proceeding, notwithstanding the provisions and the taking effect of the State Bar Act. It is not, for reasons hereinafter to be stated, necessary that this court should enter upon a review of the basic principles undertaken to be set forth in said opinion and to be given application to the instant proceeding. The said court, however, holding that it had jurisdiction so to do, denied the petitioner's application, whereupon two petitions for a hearing in this court upon the merits of said decision were presented to this court, one on behalf of the petitioner, assailing the conclusion of said court in denying his petition, and one on behalf of the Los Angeles Bar Association, representing in interest, if not expressly, the board of governors of the state bar of California, created under the terms of said act and charged with its administration, assailing the position taken by said District Court of Appeal in upholding its jurisdiction to further consider and determine said proceeding after the effective date of the State Bar Act. Both of said applications for a further hearing in this court were granted, and after such further hearing the merits of each have been submitted to this court for decision.

Addressing ourselves to the consideration of these questions thus submitted to us for decision in the inverse order of their foregoing statement, we may state upon the threshold thereof that if it shall be determined that the District Court of Appeal retained jurisdiction to finally hear and determine this matter after the adoption and effective date of the State Bar Act, this court has also jurisdiction to hear and determine this matter upon the granting by it of the petition for such hearing under the powers with which it is invested by the Constitution as expounded in the case of *In re Stevens*, 197 Cal. 408, 414, 241 P. 88, holding that a proceeding of this character was a "cause" which, if pending and decided in a District Court of Appeal, this court was given jurisdiction under

section 4 of article 6 of the Constitution to transfer for hearing and determination in the Supreme Court.

[1-3] We thus address ourselves to the question as to whether by the passage, provisions, and occurrence of the effective date of the State Bar Act, the said District Court of Appeal was thereby divested of jurisdiction to further entertain, hear, or determine the application of Cate for reinstatement as an attorney and counselor at law, which application upon the effective date of the State Bar Act was, and, for several years prior thereto had been, properly pending before said tribunal, and which upon said date had been so far advanced as to be practically ready for submission and determination by and before said tribunal. The solution of this primary problem rests, in our opinion, upon the answer to the inquiry as to whether the State Bar Act is to be interpreted as being retroactive in respect to the particular provision which relates to the matter of the reinstatement of attorneys and counselors at law who have theretofore been disbarred. The sole provision in the State Bar Act which directly relates to the subject of reinstatement is that single sentence embodied in section 26 of the act, wherein, after setting forth in general terms the power with which the board of governors of the state bar is invested to disbar or to discipline the members of the State Bar Corporation, to be formed under the provisions of the act, proceeds to state that "The Board shall have power to pass upon all petitions for reinstatement." We have examined most carefully the provisions, separately and in their entirety, of the State Bar Act for this as for other purposes, and we look in vain through its provisions, as we also vainly seek in the general intent and purposes of said act, to find anything in either indicating any intent upon the part of the state Legislature to provide that the act was to be retroactive in either its general operation or in its particular effect upon the matter of the reinstatement or readmission to practice of those members of the legal profession who had suffered disbarment under previously existing laws, and who had made timely application for such reinstatement or readmission prior to the law becoming effective. It is a canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intention. Our Civil Code contains the express provision that "No part of it is retroactive, unless expressly so declared" (Civ. Code, § 3), and this court has frequently decided that a like rule is to be applied generally to statutory construction. *Bascomb v. Davis*, 56 Cal. 152; *Estate of Richards*, 133 Cal. 524, 65 P. 1034; *Estate of Frees*, 187 Cal. 150, 156, 201 P. 112, and cases cited; *Cooley, Const. Limitations* (7th Ed.), p. 539; *Endlich, Interpretation of Statutes*, p.

362. Applying this well-established principle to the terms in general of the State Bar Act, and particularly to the foregoing very briefly worded provision thereof, we deem it most unreasonable to conclude that the Legislature thereby intended to so far divest judicial tribunals of a power and jurisdiction which from time almost immemorial they had exercised over the matter of the reinstatement of members of the legal profession as to snatch from their hands the disposition of causes of this character over which such courts had actually acquired and were then engaged in exercising jurisdiction. The embarrassing, if not positive evil, results of such an interpretation of this brief and very general sentence in the State Bar Act could not have a better illustration than that afforded by the facts of the instant proceeding as above seriatim set forth and with respect to which a deprivation of jurisdiction of said court to crown its years of investigation of the facts and law from time to time developed in the cause pending before it by a decision upon the merits thereof, would involve an entire loss to the court and all parties concerned of the time, cost, and labor expended in the endeavor to reach a righteous conclusion in this long-pending controversy. And a like result would attend other causes of a similar nature over which the appellate courts, or even this court, had already acquired jurisdiction and which were in their several stages of procedure toward final disposition. We are entirely satisfied that no such consequences were in the contemplation of the Legislature in its adoption of the State Bar Act, and that, at least as to this provision thereof, it is entirely prospective in its operation, having application only to such proceedings relative to the reinstatement of disbarred attorneys as should thereafter be initiated before the board of bar governors.

[4] The conclusion thus arrived at relieves the instant proceeding of its most serious and perplexing problems and places this court in a position to pass upon the merits of the application of the petitioner herein for reinstatement or readmission to the ranks of the legal profession. We have given careful consideration to the record before us in its entirety, including the reported transcripts of the several investigations into the merits of the petitioner's several applications for readmission to practice law. We are satisfied from such examination that the final finding of the board of bar examiners, which is above set forth, touching the moral and social rehabilitation of the petitioner herein, is fully supported by the evidence educed before said board and that such finding should be, and the same is hereby, sustained and adopted by this court. As to the other finding of the said board of bar examiners to the effect that the petitioner herein should be required to submit himself to an examination as to his

mental qualifications to be again admitted to the practice of the legal profession, whatever procedural difficulties might have arisen in giving effect to this finding in view of the changed conditions created by the adoption of the State Bar Act, these we think have been removed by the expressed satisfaction of the petitioner with such finding and his declared willingness to submit himself to its suggested recourse of the like examination as to mental qualifications as that which those seeking original admission to the bar are required to undergo. This expressed attitude places the petitioner in the category of an original applicant for admission upon examination whose qualifications as to moral character have been satisfactorily shown.

It is therefore ordered that the further proceedings in this matter be, and they are hereby, referred to the board of bar examiners as presently constituted, for action by said board in accordance with the views expressed in this opinion.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

207 Cal. 515

NEWPORT et al. v. HATTON et al.*
(Sac. 4047.)

Supreme Court of California. July 1, 1929.

Rehearing Denied July 29, 1929.

1. Appeal and error $\S$ 1195(1)—Appellate court's decision respecting essential matter became law of case binding on trial court in subsequent proceedings, in absence of different pleading and proof.

Where question of law as to whether judgment in another case was void on its face was essential to decision on a former appeal, decision of appellate court in that regard became law of case binding on trial court in all subsequent stages of the case, in absence of pleading and proof of an entirely different state of facts.

2. Judgment $\S$ 660½—Judgment not void on its face cannot be assailed as fraudulently obtained without showing that subsequent purchasers took with knowledge of fraud.

Judgment quieting title which is not void on its face, but merely voidable, cannot be assailed by those who insist that it was fraudulently obtained, in absence of showing that subsequent purchasers of property involved took property with knowledge of the fraud.

3. Appeal and error $\S$ 1050(1)—Any errors in admitting evidence to explain uncertainties in deed, though former appeal determined judgment involving title was not void on face, held not to require reversal.

Any errors committed by trial court in admitting evidence to explain uncertainties in description in deed on ground that judgment in another case involving such title was void on its face because of such uncertainties, though

law of case established on former appeal that said judgment was not void on its face, held not to require reversal, where trial court found that defendants took property in good faith and for valuable consideration without knowledge of fraud.

4. Railroads $\S$ 81—Deed excepting and reserving land for railroad purposes held to reserve fee, not easement.

Where deed from railroad of land granted to railroad in fee under patent from United States excepted and reserved for railroad purpose a strip of land, held, that it excepted and reserved to grantor a fee, and not an easement.

In Bank.

Appeal from Superior Court, Stanislaus County; George F. Buck, Judge.

Action by Clara E. Newport and others against W. H. Hatton and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Superseding, on rehearing, opinion in 271 P. 471.

Grant & Zimdars, Beverly L. Hodghead, Henry E. Monroe, C. F. Humphrey, and Chas. A. Shurtleff, all of San Francisco, and L. J. Maddux and Nathan B. McVay, both of Modesto (Cushing & Cushing, of San Francisco, of counsel), for appellants.

Frank Thunen, Herbert Chamberlin, Redman & Alexander, and James F. Peck, all of San Francisco, D. M. McLean, S. P. Elias, of Modesto, Leslie K. Floyd, of Los Angeles, Thomas M. Anaya, W. J. Brown, H. L. Chamberlain, L. E. Jones, A. J. Carlson, Dennett & Zion, Griffin, Boone & Boone, Hawkins & Hawkins, T. B. Scott, Joseph M. Cross, and J. M. Walthall, all of Modesto, Albert L. Johnson, of Oakland, and F. O. Hoover, of Modesto (J. W. Coleberd, of South San Francisco, of counsel), for respondents.

Pillsbury, Madison & Sutro, Alfred Sutro, and Eugene M. Prince, all of San Francisco, amici curiæ.

WASTE, C. J. This is an appeal from the judgment of the trial court in and for the county of Stanislaus, upon the merits, and in favor of the defendants in the action. Alleging themselves to be the owners in remainder of a quarter section of land in Stanislaus county, subject to a life estate in their mother, the plaintiffs instituted this action to establish their claim, remove an alleged cloud upon their title, and to recover the proceeds derived from sales of the land made by the adverse claimants. In support of their claim of ownership of the land in remainder, the plaintiffs set forth at length in their complaint certain events which transpired during their minority, and which culminated in a tax sale of the premises and the entry of a fraudulent and collusive judgment in an action entitled *Plato v. Newport*, and having for its purpose

the quieting of the title of the purchaser at the tax sale as against the mother, the life tenant, and the plaintiff remaindermen, these minors. The facts are so fully set out in the opinion of this court in *Newport v. Hatton*, 195 Cal. 132-157, 231 P. 987, that they need not be restated here.

The cause was before this court upon a prior appeal from a judgment rendered by the trial court after demurrer sustained without leave to amend. It was upon that appeal twice argued before this court, and twice decided. By the first decision the demurrer was held to have been properly sustained as to the defendants other than W. H. Hatton and Ora D. Hatton, upon the ground that the allegations of the complaint were insufficient to show that the subsequent purchasers of the property affected by the original judgment in the case of *Plato v. Newport* had notice or knowledge of the defects in that judgment and of the fraudulent means by which the same had been obtained. Upon petition for rehearing, the appellants strenuously contended that the judgment in the case of *Plato v. Newport* was void on its face by reason of certain alleged patent defects in the description of the property affected thereby, and that, for that reason, they were entitled to assail the present title of the respondents without reference to whether or not they were purchasers in good faith and without notice. A rehearing was granted for the purpose of dealing with the question thus presented and for a further consideration of the cause. Upon the rehearing this court held that the judgment in the case of *Plato v. Newport* was not void upon its face for the reason advanced by the appellants, the opinion in that regard reading as follows: "Applied to judgments, the rule is that the description in a judgment affecting real property should be certain and specific, and that an impossible, wrong, or uncertain description, or no description at all, renders the judgment erroneous and void. 33 Cor. Jur., p. 1209, par. 147. The same work is authority for the declaration that the judgment may be aided by intendments and additional data drawn from the pleadings and other parts of the records, or even, in some cases, by extrinsic documentary evidence. We do not see how a judgment can be pronounced a nullity for uncertainty of description unless the court can see that nothing is described. Those claiming under it must rely on the description, it is true, but whether or not the description is defective must be tested by rules of evidence ordinarily applied to the subject. *De Sepulveda v. Baugh*, 74 Cal. 468, 474, 16 P. 223, 5 Am. St. Rep. 455; *Smith v. Biscailuz*, 83 Cal. 344, 360, 21 P. 15, 23 P. 314; 14 Cal. Jur., p. 957; 15 R. C. L., p. 595. The plaintiffs in this case have not made it clear that the land described in the judgment quieting title is so uncertain that the property cannot

be identified and established with sufficient certainty, by the application of the ordinary rules of evidence, to define the rights of the parties." 195 Cal. at page 156, 231 P. 996.

[1] The court also held that the allegations of the complaint were sufficient to put in issue the question whether the defendants were purchasers in good faith and without notice. It will thus appear that the question of law as to whether or not the judgment in the case of *Plato v. Newport* was void upon its face was essential to the decision of the case upon that former appeal. This being so, the decision of this court in that regard became the law of the case, and binding upon the trial court in all subsequent stages of the case in the absence of pleading and proof of an entirely different state of facts. 2 Cal. Jur. p. 1042, par. 620 et seq. The case went back for a trial upon the merits, and resulted in the judgment from which this appeal has been taken.

In entering upon the trial of the cause upon the merits, the trial court disregarded the decision of this court to the effect that the judgment in the case of *Plato v. Newport* was not void upon its face, and, on the contrary, held that such judgment by reason of the uncertainties of the description of the property contained therein was void upon its face, and proceeded to take evidence for the purpose of eking out the purported uncertainties in the description of the land.

As certain of the defendants herein deraign title under the *Plato* judgment, the plaintiffs upon the trial urged that by reason of the fraud practiced in its procurement that judgment was and is void. The court below so found, but further found that the defendants claiming thereunder were bona fide purchasers for value without notice, and therefore entitled to protection in the assertion of their respective claims to the land. This latter finding is not assailed. Both upon the prior appeal and now, the plaintiffs concede that any person acquiring title to any part of the property in good faith, under a judgment not void upon its face, and without knowledge of the fraud, would be fully protected, notwithstanding the interests of the plaintiffs, whose rights to assail such judgment cannot prevail over those of innocent purchasers in good faith and for value. *Stern v. Judson*, 163 Cal. 726, 735, 127 P. 38; *Doyle v. Hampton*, 159 Cal. 729, 734, 116 P. 39.

[2, 3] The principal question presented upon this appeal is as to whether or not the trial court was in error in the admission of the evidence which it did admit for the purpose of showing that the description of the land contained in said original judgment was sufficient. We are of opinion that, in view of the former holding of this court to the effect that the judgment in the case of *Plato v. Newport* was not void upon its face, such conclusion became the law of the case. See the

comprehensive list of cases cited in note 17 to par. 620 of 2 Cal. Jur., supra. Whether right or wrong, it was binding upon the trial court, in the absence of a showing that the defendants, who were the subsequent purchasers and are the present owners of the property, had acquired the same with knowledge of the fraud which the plaintiffs alleged had been perpetrated in the procurement of such judgment. The trial court was therefore bound in the absence of such showing to follow the ruling of this court in that regard, and to apply the same to all stages of the trial of this cause upon the merits. Had the trial court done so, there would have been no occasion for the introduction of any evidence in the case with reference to the alleged latent uncertainties in the description of the real property in the judgment rendered in *Plato v. Newport*. A judgment which is not void upon its face, but merely voidable, cannot be assailed by those who insist it was fraudulently obtained, in the absence of a showing that the subsequent purchasers of the property took the same with knowledge of the fraud. This being so, any evidence that might have been introduced upon that subject was immaterial to the case as then presented. No matter what errors the trial court committed in that regard, they would not suffice to work a reversal of this judgment, in the presence of the law as laid down by this court in its former decision, that the judgment was not void upon its face, and on the facts as found by the trial court, that the aforesaid defendants took the property in good faith and for a valuable consideration, and without knowledge of the fraud.

[4] There is also an appeal by these appellants from the new and different judgment entered in favor of the defendant railroad companies. Section 29, about which this controversy has arisen, was acquired by the predecessors of the present railroad defendants in fee under patent from the United States. It was, in turn, granted by the predecessor of these respondents to James M. Conley, predecessor of appellants, by deed dated February 12, 1874. The deed excepted and reserved for railroad purposes a strip of land extending through the section and "four hundred feet wide lying equally on each side of the track of the railroad of said company [which track, we understand, had been constructed at that time] or any branch railroad now or hereafter constructed on said lands and the right to use all water needed for the operating and repairing of said railroad." Appellants claim that the judgment in favor of the railroad companies is erroneous, on the ground that they, the appellants, hold by adverse possession as against the railroads the remainder interest in a strip 150 feet wide, which is part of the four hundred-foot strip excepted by the above deed.

It seems to be well settled that the railroad company predecessor of the respondents acquired a fee, so long as the railroad should be maintained, through the congressional grant in aid of the construction of railways, and thereafter held in fee simple. *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 23 S. Ct. 671, 47 L. Ed. 1044. The clause in the deed to Conley, quoted above, excepted and reserved to the grantor a fee, and not an easement. The findings of the trial court support this view, and also the view that appellants are not entitled to claim any interest in this reserved fee by adverse possession.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; PRESTON, J.

207 Cal. 395

PEOPLE v. HAWLEY et al. LOS ANGELES ROCK & GRAVEL CO. v. CITY OF LOS ANGELES et al. SAME v. CRYER et al. (L. A. 9173-9175).★

Supreme Court of California. June 24, 1929.

Rehearing Denied July 22, 1929.

1. Nuisance ⇨75—In suit to abate excavating as public nuisance, court had power to enjoin such excavating (Code Civ. Proc. § 731).

In suit, under Code Civ. Proc. § 731, to abate as public nuisance excavations by defendants of rock, sand, and gravel from bed and banks of arroyo in residential district, court had power to render an injunction enjoining and prohibiting defendants from excavating upon such lands, if it was found that excavating would become public nuisance.

2. Appeal and error ⇨884—Defendants acquiescing in portion of judgment responding to allegations of complaint cannot contend complaint does not state cause of action (Code Civ. Proc. § 731).

In suit under Code Civ. Proc. § 731, to enjoin excavations of rock, sand, and gravel from bed and banks of arroyo in residential district as public nuisance, defendants, by acquiescing in portion of judgment which, in response to allegations of complaint, decreed abatement of nuisance, cannot contend that complaint does not state facts sufficient to constitute cause of action.

3. Nuisance ⇨75—Findings in suit to enjoin excavation of rock, sand, and gravel, as to protection of adjacent lands, held not inconsistent (Code Civ. Proc. § 731).

In suit under Code Civ. Proc. § 731, to enjoin defendants from excavating rock, sand, and gravel from bed and banks of arroyo in residential district as nuisance, general findings of trial court that defendants proposed to furnish adjoining land proper lateral support, and further finding that particular lands could not be excavated and adjacent land properly protected by

wall, *held* not inconsistent, since latter finding, which is a special finding, would control.

4. Nuisance $\S$ 75—In suit to enjoin excavating of arroyo, evidence *held* not to support finding that certain leased lands could not be excavated and adjacent lands protected by wall (Code Civ. Proc. $\S$ 731).

In suit, under Code Civ. Proc. $\S$ 731, to enjoin defendants from excavating rock, sand, and gravel from bed and banks of arroyo in residential district as nuisance, evidence *held* not to support finding that no regulation of excavation of portion of lands leased by defendant by means of steel and concrete walls or otherwise could be made which would afford protection to property in streets adjoining such leased lands equal to or superior to protection now afforded by the loose rock, sand, and gravel which defendants proposed to excavate.

5. Nuisance $\S$ 75—Defendant cannot recover in injunction suit damages sustained by reason of issuance of injunction.

Damages, if any, sustained by defendant by reason of issuance of injunction restraining it from excavating rock, sand, and gravel from bed and banks of arroyo in residential district, cannot be recovered in the injunction suit, but are recoverable, if at all, in independent action brought for that purpose.

6. Appeal and error $\S$ 781(4)—Defendant's appeal from judgment enjoining excavation of land under lease was not dismissed as moot because defendant's rights under lease had terminated.

Defendant's appeal from injunction restraining it from excavating land under lease will not be dismissed on ground that controversy has become moot because defendant's rights under lease had terminated by lapse of time, since it cannot be said that reversal of judgment granting injunction would prove fruitless.

7. Nuisance $\S$ 75—Pleading $\S$ 364(2)—Pleadings, findings, and evidence in suit to enjoin excavation of arroyo as nuisance as to Los Angeles flood control district should have been stricken out and excluded (Code Civ. Proc. $\S$ 731).

In suit under Code Civ. Proc. $\S$ 731, to enjoin defendants from excavating rock, sand, and gravel from bed and banks of arroyo in residential district as nuisance, pleadings, findings, and evidence, referring to the Los Angeles flood control district, and that lands involved were situated within such district, should have been stricken out and excluded.

8. Municipal corporations $\S$ 625—Ordinance forbidding excavating operations in residence districts established by zoning ordinance held unreasonable and void.

Ordinance enjoining and prohibiting excavation of rock, sand, and gravel in residential district established by zoning ordinance *held* void as unreasonable restraint on use by defendant of its property and unwarranted interference with right of defendant to carry on a lawful business, in view of trial court's finding that to permit defendant to continue its excavation operations subject to conditions imposed

would not result in any substantial injury to adjoining property or persons residing on or owning such property.

9. Municipal corporations $\S$ 601—Zoning must be reasonably necessary and related to health, safety, morals, or general welfare of community.

The right to zone may be resorted to by municipality on proper invocation of the police power, but such zoning must be reasonably necessary and reasonably related to health, safety, morals, or general welfare of community.

10. Municipal corporations $\S$ 63(1)—Ordinances regulating useful business enterprises are subject to judicial investigation to determine whether they are lawful exercise of police power.

Municipal by-laws and ordinances undertaking to regulate useful business enterprises are subject to investigation in courts with view to determining whether law or ordinance is lawful exercise of police power, or whether, under guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with right to carry on lawful business, to make contracts, or to use and enjoy property.

11. Municipal corporations $\S$ 622—Excavating rock and gravel by owner from lands is useful occupation which cannot be prohibited except where necessary for protection of legal rights of others.

The business of excavating rock and gravel by owner from lands belonging to him is a lawful and useful occupation, and cannot be prohibited by legislation except in cases where enactment of such legislation may be found necessary for protection of legal rights of others.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Separate actions by the People against H. W. Hawley and others, by the Los Angeles Rock & Gravel Company against the City of Los Angeles and others, and by the Los Angeles Rock & Gravel Company against George E. Cryer and others, tried at the same time and submitted on the same evidence. Judgment for plaintiff was entered in each case, and defendants appeal separately on one and the same transcript of evidence. Portion of judgment appealed from in first case reversed and judgments in second and third cases affirmed.

Superseding opinion in 272 P. 1076.

Jess E. Stephens, City Atty., Jerrell Babb, Deputy City Atty., and Frederick Von Schrader, Deputy City Atty., all of Los Angeles, for appellants.

Guy Eddie and Charles H. Mattingly, both of Los Angeles, for respondents.

CURTIS, J. These three actions were tried at the same time, and were submitted for decision to the trial court upon the same evidence. They are before us upon three separate

rate appeals, but upon one and the same transcript of the evidence. It is conceded that the facts governing these three cases, as well as the legal questions involved, are closely related, and that all three appeals may properly be decided in one opinion.

The first of these actions (No. 9173) was instituted by the city attorney of the City of Los Angeles under section 731 of the Code of Civil Procedure in the name of the people of the state of California to abate an alleged public nuisance maintained by the defendants, in said action. While there are other persons named in said actions as defendants, the principal defendant in interest is the Los Angeles Rock & Gravel Company. The defendant H. W. Hawley has no interest in said action, except as a stockholder in, and president of, said company. The other defendant is an employee or subcontractor of the company. The nuisance sought to be abated by this action was the result of certain operations and excavations then being carried on by the Los Angeles Rock & Gravel Company in the bed of the arroyo Seco in the city of Los Angeles. The arroyo Seco, as its name signifies, is a dry water course. It has a defined channel with steep banks, and, while dry a large portion of the year, in the winter months, and particularly in periods of heavy rainfall, a large amount of flood and storm waters flows in its channel. These waters originate from an extensive watershed in the mountains north and east of the city of Los Angeles, and are conducted through and in said water course in a southeasterly direction until they reach the Los Angeles river. The bed and banks of the arroyo Seco are of loose earth, sand, rock, and gravel, and, by reason of the large amount of flood water at times flowing therein and the character of the materials comprising its bed and banks, said flood waters cause the said banks and bed thereof to be undermined and washed away whenever the natural conditions of the surface and contour of said bed and banks are destroyed by digging, excavating, or otherwise removing the material thereof. The nature and character of the nuisance complained of in the complaint were, first: The smoke, noise, and dust created by a steam shovel engaged in excavation of the lands of the Los Angeles Rock & Gravel Company, situated in the bed and along the banks of the arroyo Seco; second, the nuisance resulting from stagnant pools of water which had gathered in certain excavations made by said company on its said lands, which pools of water, when left standing, bred mosquitoes and were otherwise detrimental to the health of those residing in the near vicinity; and, third, the danger from flood waters resulting from the excavations already made by said company and those which said company planned to make in the future. In its decree, the trial court ordered the stagnant water complained

of drained off or otherwise disposed of and the holes or depressions wherein this water had gathered filled up and the surface thereof made level with the adjoining land, and made the future operations of the company dependent upon a compliance with said requirements, and the substitution of an electric for a steam shovel, with the excavations to be kept sprinkled to avoid the smoke, dust, and noise complained of. Said decree further provided: "That said defendants shall at all times make any and all excavations permissible hereunder in such manner as to provide a channel in the bed of the Arroyo Seco sufficient to carry a flow of 19,000 second-feet of water, and in such manner as to provide complete and adequate protection to property adjoining said channel from erosion thereof, and so as to afford subjacent and lateral support thereto." As to this part of the decree the defendants make no complaint. The court further found, however:

Finding XI, "That the defendants are the owners of all the land described in the complaint and amendments thereto and Plaintiff's Exhibit 1, and designated as the 'McNeil Lease.' That defendants are in possession of said 'McNeil Lease' and by the terms of said lease have the right to excavate all rock, sand and gravel upon it during the period of said lease, in accordance with the terms thereof, without restriction. That said lease expires on September 16th, 1925. That according to the terms of said lease all rock, sand and gravel remaining upon said leased land at the expiration of said lease on September 16th, 1925, will be the property of the lessor, and will be forever lost to and forfeited by said lessee, the defendants herein."

Finding XIV, "The property constituting the McNeil lease described in the complaint and Plaintiff's Exhibit 1, both inside and outside of the channel of the Arroyo, is composed of loose rock, sand and gravel of the same general nature and character as that of all of the land along the bed and banks of the Arroyo Seco. The court finds there is no objection to the excavation of that portion of the McNeil lease constituting the channel of the Arroyo Seco, provided such excavation in, along and adjacent to such channel is of sufficient width and depth to carry at least 19,000 second-feet of water. The court further finds that no regulation of the excavation of the McNeil lease outside of the Arroyo Seco channel by means of concrete walls or otherwise, can be made which will afford protection to property and streets adjoining the McNeil lease outside of the channel, equal to or superior to the protection now afforded by the loose rock, sand and gravel which defendants propose to excavate down to the level of the channel of the Arroyo Seco, unless enjoined by the court."

Predicating its judgment upon these findings, the court further decreed that the de-

fendants, their successors and assigns, be restrained and enjoined from making any excavations in the earth, rock, sand, and gravel constituting the flat or table land known as the McNeil lease, which said land constitutes the easterly bank of the arroyo Seco.

To this portion of the judgment the defendants make most vigorous protest, and from this portion, and this portion alone, have they appealed, as appears from their notice of appeal herein.

[1] The first point made by appellants in their appeal is that the court is without jurisdiction to render any injunction whatever absolutely enjoining and prohibiting defendants from excavating upon their said lands. They base this contention upon the fact that the action is instituted and prosecuted by the city attorney of the city of Los Angeles in the name of the people of the state of California solely under the authority conferred upon said official by section 731 of the Code of Civil Procedure, and that this section of the Code confers no jurisdiction upon the court in which an action is brought under its authority to issue an injunction. In other words, appellants contend that the sole power given by the court in such an action is to abate a public nuisance, and that it confers no power upon the court to issue an injunction. It is true that this section of the Code refers only to an action brought "to abate a public nuisance," but it is often, and we might say generally, necessary, in order to abate a nuisance, to direct that those guilty of maintaining the same be enjoined from doing certain acts, which, if done, would amount to a continuance or maintenance of such nuisance. This precise question was decided adversely to appellants' contention in the case of *People v. Selby Smelting & Lead Co.*, 163 Cal. 84, 124 P. 692, 1135; Ann. Cas. 1913E, 1267. That action was brought by the district attorney of Solano county under a statute providing that "The district attorney of any county of this state in which a public nuisance may now or hereafter shall exist, may * * * bring a civil action in the name of the people of the state to abate said nuisance." St. 1899, p. 103. The language of said statute is to all intents and purposes the same as that found in section 731 of the Code of Civil Procedure. It was held by this court in that action that the court had power to enjoin the defendants maintaining a smelter from permitting the injurious fumes emitted from its works to blow over and upon the premises affected thereby, even though the remedy of abatement is the only one specifically provided by the statute. In that case the court stated that "An abatement of a nuisance is accomplished in a court of equity by means of an injunction proper and suitable to the facts in each case" and held that "The judgment rendered was within the power conferred by the statute in reliance upon which the district attorney instituted the ac-

tion." Appellants also assert, as all the nuisances complained of, such as the smoke, noise, and dust created by the use of the steam shovel, and the stagnant pools of water left standing by reason of the excavations, were abated by the decree and judgment and provision was further made therein that the channel of the arroyo Seco be left open so as to carry the largest amount of water ever known to have flown therein, that the court could not, in addition to the abatement of these nuisances, enjoin the defendants from excavating upon their lands, and particularly those within the McNeil lease. But among the nuisances complained of was that of danger from flood waters resulting from the excavations of appellants' land, and if such excavations upon proper and sufficient evidence were found by the court to result in exposing the private and public property in that vicinity to danger from flood waters, then such excavations would become a public nuisance and could be abated by said court, even to the extent of enjoining in said action all excavations upon appellants' said land. We are satisfied that the court in said action had the power to issue an injunction restraining the defendants from the commission of any act or acts which the evidence showed would contribute to or result in the maintenance or creation of the nuisance complained of.

[2] Appellants next contend that the complaint does not state facts sufficient to constitute a cause of action, and therefore their general demurrer should have been sustained. There is absolutely no merit in this contention, and we think appellants have conceded that to be so by their acquiescence in that portion of the judgment which in response to the allegations of the complaint decrees the abatement of the nuisances complained of.

[3] Appellants contend that the findings are inconsistent with, and do not support, the judgment, and that the evidence is insufficient to support the findings, and particularly said finding XIV. We will consider these objections together, and, in doing so, a few further details as to the facts may be recited in the interest of a better understanding of appellants' position. The Los Angeles Rock & Gravel Company is the owner of a rock-crushing plant situated in the arroyo Seco some distance, perhaps a mile or two, below the McNeil lease. The company is also the owner in fee of a number of irregular tracts of land, amounting in all to approximately 130 acres in the bed and along the banks of the arroyo Seco, which irregular pieces of land extend from said plant up to and beyond the McNeil lease. These lands do not include the McNeil lease. For some years prior to the commencement of this action, the company has obtained sand, gravel, and rock for the operation of its said plant from these lands located along and in the channel of said arroyo, and was so doing at the time of the com-

mencement of this action. The complaint was aimed, not particularly at the excavations which were then being made on the McNeil lease, but generally to all operations and excavations made by the company upon any of its holdings located in or along the channel of said arroyo and within the limits mentioned in the complaint. Upon the issues as made by the pleadings regarding the effect of these excavations, the court found:

Finding VI. "That as their excavations progress defendants propose to give to the adjoining land and streets the lateral subjacent support, which said land and streets received from defendants' adjoining lands, and defendants propose to give to all adjoining lands and streets, protection against flood waters and lateral support equal if not superior to that afforded said adjoining lands, property and streets by any and all lands excavated or removed by defendants. That defendants propose to conduct the business and excavations in such a way as to create no menace to public health, peace, safety or morals."

Finding VIII. "That the effect of the excavations defendants propose and intend to make in the operation of its said business will be to widen and deepen the channel of the Arroyo Seco. That all of the land described in the complaint is composed of loose rock, sand and gravel. That defendants propose to at all times and places furnish to adjoining land and streets ample protection, equal to or superior to that afforded such adjoining land and streets by any land excavated by defendants along such adjoining land and streets."

We think there is nothing necessarily inconsistent in the findings of the court taken as a whole. In the last two findings the court found that, in the work and excavations which the appellants planned to make in their said land, they proposed to give to adjoining property equal if not superior lateral support enjoyed by said lands in their natural state, while in finding XIV, above quoted, the court found explicitly that "no regulation of the excavations of the McNeil lease outside of the Arroyo Seco channel by means of concrete walls or otherwise, can be made which will afford protection to property and streets adjoining the McNeil lease outside of the channel, equal to or superior to the protection now afforded by the loose rock, sand and gravel." Findings V and VIII may be said to constitute general findings, and refer to the lands generally in which the appellants are carrying on their excavation operations, while finding XIV refers explicitly to those excavations being made upon the McNeil lease. In such a case the special findings would control, and there is no inconsistency. *Estate of Ross*, 187 Cal. 454, 202 P. 641; *McCormick v. National Surety Co.*, 134 Cal. 510, 66 P. 741. We are thus brought to the consideration of

finding XIV and to the evidence in the case in relation to its sufficiency to support said finding.

[4] This appeal is before us on the so-called alternative method, the reporter's transcript consisting of over 3,000 typewritten pages. The appellants in a supplemental brief have set forth the testimony of a number of witnesses, both lay and expert, upon the question of the size of the channel required to carry the flood and storm waters of the arroyo Seco and of the character of the walls or embankments necessary to protect adjoining lands. They have also printed in their said brief the joint report of four engineers, two representing each side of this controversy, upon these questions. The respondent makes no reference practically to any evidence in its brief, nor has it printed either in its brief or any appendix thereto any of the evidence taken during the trial. In the appeal taken in the other two cases, the appellants therein have presented a supplement to their brief, in which they have printed the judgment roll alone in said cases. No evidence, however, is printed in said supplement. The four engineers, who filed the joint report above referred to, acted, in preparing said report, at the suggestion of the trial court. The trial court had previously stated to the attorneys of the parties hereto that a much more satisfactory result might be obtained by the selection of two engineers by each of the parties to this action, who, after their selection, might confer among themselves and report to the court their joint conclusion upon the questions then before the court, than to proceed in the usual manner by the production and examination and cross-examination of witnesses for the purpose of establishing the contentions of the respective parties hereto. Acting upon this suggestion of the court, each side to this controversy selected two engineers, whose qualifications were admitted. These four engineers thereafter filed a written report signed by all four of them as to the size and character of the channel necessary to carry the flood waters of said water course and the character and height of the walls necessary to protect said channel and adjoining lands. One of said engineers, W. C. Steele, who represented the respondent herein, while signing said report, reserved the right to submit a supplemental report, which he afterward prepared and submitted, and which the appellants have printed in their supplemental brief. The pertinent portions of said joint report are as follows:

"Engineer's joint conclusion as to channel to safely carry for all time all flood waters of the Arroyo Seco.

"1. The channel should have a safe capacity of 19,000 second-feet.

"2. The general cross section of such a channel would be, 150 feet wide and 12 feet deep, the lower 6½ feet of the channel being

occupied by the water, and the upper 5½ feet 'freeboard.'

"3. The sides of the channel to be protected by proper walls. The depth of the foundations of the side walls to be such, from point to point, as safety shall prescribe having due regard to all local conditions and possible scour.

"4. The velocity in such channel would be such that the bottom would scour and require protective measures and maintenance."

Engineer Steele, while he signed this joint report as we have seen, reserved the right to submit a supplemental report. In the supplemental report submitted by him he disagreed with the joint report on the ground that it was "inadequate and therefore misleading." In this report he states that: "Nothing but a concrete-lined channel, continuous from the Devil's Gate Dam (a dam constructed in the upper reaches of the Arroyo Seco) to the Los Angeles River, or a channel lined with concrete on the bottom and riprap on the sides, will satisfy the requirement of permanence. A channel with concrete side walls and gravel bottom will inevitably erode and scour below the footings of the protective side walls and thus renew the problem presented to the court for settlement."

While the requirements specified by Engineer Steele are much more drastic than those proposed by the joint report, he nowhere in his report or elsewhere suggests that adequate provision cannot be made for confining the flood waters of said stream within its channel and thus affording permanent protection to adjoining lands and streets. There is no testimony of any witness to which our attention has been directed, or which is legally before this court for its consideration, which tends to establish the impossibility or impracticability of protecting adjoining lands and streets by means of concrete and steel walls from being injured or damaged by excavations made in lands within said channel. Neither is there any such evidence which tends to prove that such artificial support as may be given by walls of the character just described, may not be equal to the protection afforded said lands and streets by the natural rock, sand, and gravel in place prior to any excavation being made. All the evidence in the case goes to show that the bed and banks of the arroyo Seco are composed of rock, sand, and gravel of the same general character throughout the whole course of the channel as it runs through the lands in the possession of appellants. We have not been directed to any evidence, and we have been unable to find any ourselves that indicates that the character of the land embraced within the McNeil lease is any different in character from the lands owned by the appellants along the channel of said water course. We are at a loss to understand the reason which prompted the trial court in permitting excavations to be made in any and all of the lands owned by them, but

denied it the right to make such excavations on the land held by it under the McNeil lease and lying east of the channel thereof. We are therefore of the opinion that the record before us is without any evidence to support the finding of the trial court "that no regulation of the excavations of the McNeil lease outside of the Arroyo Seco channel by means of concrete walls or otherwise can be made which will afford protection to property and streets adjoining the McNeil lease outside of the channel equal to or superior to the protection now afforded by the loose rock, sand and gravel which defendants propose to excavate down to the level of the channel of the Arroyo Seco."

[5] Appellants make the further claim that the judgment is erroneous in that it fails to provide for the payments to the Los Angeles Rock & Gravel Company of the sum of \$675,000. This contention is made upon the following theory: The court found that the gravel deposits upon the land designated as the McNeil lease contains approximately 900,000 cubic yards of rock, sand, and gravel of the value of approximately 75 cents per cubic yard, or \$675,000. The McNeil lease was dated September 16, 1920, and was for a term of five years from its date. It therefore would expire on September 16, 1925. The company acquired it July 21, 1923, and began to make excavations upon the land covered by said lease in December, 1923. There was evidence to the effect that, if permitted to do so, the company could have taken all of the rock, sand, and gravel out of the McNeil lease in less than one year. The temporary injunction in this action was issued in January, 1924, and was followed by a permanent injunction. In each of these injunctions the company was restrained from making any excavations of rock, sand, or gravel upon the McNeil lease. Appellants therefore argue that, as the company was enjoined and restrained from excavating the rock, sand, and gravel upon the McNeil lease from January, 1924, to September 16, 1925, when the term for which the company held said lease expired, and as the deposits therein were of the value of \$675,000, said company was entitled to judgment for this sum against the city of Los Angeles. It is only necessary to say, in answer to this argument, that whatever damages, if any, the company has sustained by reason of the issuance of the temporary and permanent injunctions cannot be recovered in this action. Such questions must be determined, if at all, in an independent action brought for that purpose.

[6] Neither are we in accord with the contention of the respondent that, as the company's rights under the lease to the McNeil land has now terminated by lapse of time, this appeal should be dismissed. We are not prepared to say that a reversal of the judgment would prove fruitless and that therefore the controversy has become moot.

[7] The pleadings, findings, and evidence contain many references to the Los Angeles flood control district, and the claim is made that, as all the lands involved herein are situated within said district, that fact has a bearing upon the rights of the respective parties to this action. Such a claim is absolutely without any foundation in law or reason, and the trial court should have struck out of the pleading all allegations therein referring to said district and should have excluded all evidence that the lands involved herein were within said district. We think this disposes of all the questions arising in the action of *People v. Hawley et al.*, referred to in the briefs of counsel as the nuisance case.

[8] The other two actions involve the validity of certain provisions of two ordinances enacted by the city of Los Angeles, and, for the purpose of conveniently distinguishing them from the previous action, they will, as occasion requires, be referred to as the ordinance cases. The first of these two cases (No. 9174) was instituted by the Los Angeles Rock & Gravel Company against the city of Los Angeles and certain of its officers to enjoin them from interfering with plaintiff in its excavation and removal of rock, sand, and gravel from lands belonging to said company and located in the channel and along the banks of the arroyo Seco. The lands involved in this action are the same lands as those described in the nuisance case as belonging to or in the possession of the Los Angeles Rock & Gravel Company, including the lands covered by said McNeil lease. It was alleged in the complaint that the city of Los Angeles had enacted an ordinance numbered 32769, and that it was by reason of the provisions of this ordinance that the officers of the city of Los Angeles threatened to prosecute and arrest the officers, agents, and employees of the Los Angeles Rock & Gravel Company unless the latter ceased to make the excavations complained of and which were then being carried on by said company in its said lands in the arroyo Seco. The provisions of Ordinance No. 32769, in so far as they are pertinent to this action, are that: "It shall be unlawful for any person, firm, or corporation to dig, excavate, screen or dredge for sand, gravel, earth, rock, stone, minerals or any substance below the official grade of the abutting street upon any premises within the residence district as said district is described in the ordinance of the city of Los Angeles except only and so far as necessary for the erection, construction or alteration of a building thereon, and after first obtaining a building permit."

The second of these two actions (No. 9175) is substantially the same as action No. 9174. It asks for the same relief against practically the same set of officials, as is prayed for in action No. 9174. The only difference in the two actions is found in the allegations as to ordinances under which said officers are alleged to have been acting when they threaten-

ed the company with arrest and prosecution unless it ceased its excavation operations in the arroyo Seco. In the first of said two actions, as we have seen, it was alleged that the said officers were acting under Ordinance No. 32769, which purported to prohibit all excavations for rock and other materials within any residence district of said city. In the second of said two actions it was alleged that the said officers were acting under the authority given them by the terms of Ordinance No. 33761, and its various amendments. This was a so-called zoning ordinance, and by it there was established a residence district in said city of Los Angeles in which the lands hereinbefore referred to as belonging to and in the possession of the Los Angeles Rock & Gravel Company, including the lands within the McNeil lease, were included and made a part of said residence district. This last-mentioned ordinance further contained a provision prohibiting excavations for rock and other materials in any land within said residence district, substantially the same as that contained in Ordinance No. 32769, and which we have quoted above. It will thus be seen that the two actions are to all intents and purposes identical. The trial court held that each of said ordinances was void in so far as it purported to affect the said lands of which the Los Angeles Rock & Gravel Company was the owner, and enjoined the said officers of the city of Los Angeles from enforcing, or seeking to enforce, said ordinances against the Los Angeles Rock & Gravel Company, and enjoined and prohibited the city of Los Angeles and its officers from interfering with said company, its agents, servants, and employees in the operation of its excavations in the arroyo Seco "upon its land described in the complaint * * * with the exception of that portion of its leased land, described therein as the 'McNeil lease' lying east of the channel of the Arroyo Seco." It will thus be seen that in the first of these three actions the Los Angeles Rock & Gravel Company was enjoined from making any excavations upon that part of the "McNeil lease" lying east of the channel of the arroyo Seco, and that the officers of the city of Los Angeles were enjoined in the other two of said actions from interfering with the Los Angeles Rock & Gravel Company in making excavations upon any of its said lands except that part of the McNeil lease lying east of the channel of the arroyo Seco.

From the judgment declaring the provisions of said ordinances invalid and restraining and enjoining the city of Los Angeles and its officers from interfering with the excavation operations of said company, the defendants in each of said actions have appealed. It is apparent from the foregoing that the one question presented by the appeal in these two ordinance cases is the validity of the provisions of these ordinances making it illegal to excavate for rock, sand, gravel, or other

materials upon the lands of the Los Angeles Rock & Gravel Company within the residence district of the city of Los Angeles. If these provisions of said ordinances are valid, then it was the duty of the city officials of the city of Los Angeles to enforce the same, and no injunction would lie to restrain them from performing this duty. On the other hand, if said provisions of said ordinances are void, then the action of said city officials in attempting to enforce them against the Los Angeles Rock & Gravel Company was illegal, and the judgment enjoining such action was valid and binding upon said officials.

By the ordinances of the city of Los Angeles above referred to the lands of the company located in the channel and along the banks of the arroyo Seco are zoned as residence property, and excavations for rock, gravel, sand, and other materials are prohibited to be made therein. The court found that these lands were chiefly valuable for the deposit of rock, sand, and gravel contained therein, and that these deposits were of the value of approximately \$1,125,000. While it found that the territory in the vicinity of and contiguous to said arroyo Seco throughout the greater portion thereof was built up with homes, dwellings, and other buildings, it also found that the Santa Fé, Union Pacific & Pacific Electric Railways run in a northerly and southerly direction, being the same direction in which said arroyo Seco runs, "in close proximity to the property of the company described in the complaint, with the usual noise, smoke and dust accompanying such operation." The court further found that the excavations being carried on by the company under the conditions imposed in the case of *People v. Hawley* would have the effect of widening and deepening the channel along the arroyo Seco so as to permit the flood and storm water to flow freely through and down the same, that the company, in carrying on its excavation development, will provide adequate lateral support to adjoining lands, and that the company "proposes to conduct the business and excavations in such a way as to create no menace to public health, safety or morals." As conclusions of law, the court found that said ordinances were "unreasonable, oppressive, unconstitutional and void" in their application to the plaintiff and its said property. We think that there can be no question but that these findings of fact justify said conclusions of law, and that the judgments declaring said ordinances void in their application to the said lands of the Los Angeles Rock & Gravel Company are supported by said findings.

[9, 10] In this state the law governing the power of municipalities to enact reasonable zoning legislation has been definitely settled by the recent decisions of this court, notably the cases of *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479; *Zahn v. Board of Public Works*, 195 Cal. 497,

234 P. 388; *In re White*, 195 Cal. 516, 234 P. 396; and *Pacific Palisades Ass'n v. City of Huntington Beach*, 196 Cal. 211, 237 P. 538, 40 A. L. R. 782. These decisions, with others of this and the several District Courts of Appeal, establish without question that the right to zone may be resorted to by municipalities upon a proper invocation of the police power. "But such zoning must be reasonably necessary and reasonably related to the health, safety, morals, or general welfare of the community." *Pacific Palisades Ass'n v. City of Huntington Beach*, supra, 196 Cal. 216, 237 P. 539. Further, the court in the opinion in that case says (page 217 of 196 Cal. [237 P. 540]): "Ordinances having that effect must be reasonable, and must be for the purpose of protecting the public health, comfort, safety, or welfare. Every intendment is to be made in favor of the lawful exercise of municipal power making such regulations, and it is not the province of courts, except in clear cases, to interfere with the exercise of that authority. But, as was recently said by the Supreme Court of the United States, 'while property may be regulated to a certain extent if regulation goes too far it will be recognized as a taking.' (*Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415, 28 A. L. R. 1321, 67 L. Ed. 322, 43 S. Ct. 158; see, also, *Rose's U. S. Notes*.) Therefore, notwithstanding this general grant of power, it is a thoroughly well-settled doctrine that municipal by-laws and ordinances undertaking to regulate useful business enterprises are subject to investigation in the courts, with a view to determining whether the law or ordinance is a lawful exercise of the police power; or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the right to carry on a lawful business, to make contracts, or to use and enjoy property. (*Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169, [25] S. Ct. 18; *In re Application of Throop* [Ex parte Throop] 169 Cal. 93, 99, 145 P. 1029; *Curtis v. City of Los Angeles*, 172 Cal. 230, 234, 156 P. 462.)" This same doctrine is enunciated in the case of *Dobbins v. Los Angeles*, 195 U. S. 223, at page 238, 25 S. Ct. 18, 21 (49 L. Ed. 169), a case which arose in this state, in the following language: "It may be admitted as being a correct statement of the law as held by the California Supreme Court that, notwithstanding the grant of the permit, and even after the erection of the works, the city might still for the protection of the public health and safety, prohibit the further maintenance and continuance of such works, and the prosecution of the business, originally harmless, may become, by reason of the manner of its prosecution or a changed condition of the community, a menace to the public health and safety. In other words, the right to exercise the police power is a continuing one, and a business lawful today may in the future because of the changed situation, the growth of population

or other causes, become a menace to the public health and welfare, and be required to yield to the public good. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 [24 L. Ed. 1036]; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672 [6 S. Ct. 252, 29 L. Ed. 516]. But the exercise of the police power is subject to judicial review and property rights cannot be wrongfully destroyed by arbitrary enactment. It was averred that the works would be so constructed so as not to interfere with the health or safety of the people. No reasonable explanation for the arbitrary exercise of power in the case is suggested."

[11] No authority is required to support the proposition that the business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and cannot be prohibited by legislation except in cases where the enactment of such legislation may be found necessary for the protection of the legal rights of others. If authority were necessary, we have but to refer to a decision of this court. In *re Kelso*, 147 Cal. 609, 82 P. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178. That case we think sheds some light upon the general aspect of the present action. An ordinance of the city and county of San Francisco was there under consideration, wherein the attempt was made to prohibit the operation of any rock or stone quarry within certain prescribed limits of said municipality. This court, in declaring said ordinance unconstitutional and void, said (page 612 of 147 Cal. [82 P. 242]): "Applying these well-recognized principles to the ordinance before us, we are unable to perceive any ground upon which it may be sustained as a legitimate exercise of the police power. It is in no sense a mere regulation as to the manner in which rock or stone may be removed from the land by the owner thereof, but is an absolute prohibition of any such removal. However valuable the rock or stone may be if removed, and however valueless if not removed, the owner must allow it to remain in its place of deposit. Such a prohibition might be justified, if the removal could not be effected without improperly invading the rights of others, but it cannot be doubted that rock and stone may under some circumstances be so severed from the land and removed as not in the slightest degree to inflict any injury which the law will recognize. So far as such use of one's property may be had without injury to others it is a lawful use which cannot be absolutely prohibited by the legislative department under the guise of the

exercise of the police power." This court has even gone so far as to hold an ordinance void which prohibited the operation and maintenance of a rock crusher in this same arroyo Seco and situated only a short distance from the lands of the present plaintiff, the Los Angeles Rock & Gravel Company. *Ex parte Throop*, 169 Cal. 93, 145 P. 1029. It will be noted, however, that in the present action the rock crusher of the company is not located or operated upon any of the lands herein involved. The record shows that the company owns and maintains a rock crusher on land situated to the south of the lands involved in the present action, and that it only seeks to excavate by means of an electric shovel rock, gravel, and sand from its said land, which materials when so excavated are loaded upon trucks and transported to said rock-crushing plant of the company, where they are treated and prepared for commercial uses. We have already referred to the fact that, in the action of *People v. Hawley*, the trial court abated all nuisances of which complaint was made and which it was alleged and found were caused by the Los Angeles Rock & Gravel Company in their excavations upon the lands owned by it and comprising approximately one hundred and thirty acres. The trial court found that to permit the company to continue its excavation operations upon said lands subject to the conditions imposed upon said operations by the judgment and decree in *People v. Hawley et al.* would not result in any substantial injury to adjoining property or to persons residing or owning property in the near vicinity of the lands of said company. Any ordinance of said city which would enjoin and prohibit the company from thus using its property is therefore void, as an unreasonable restraint upon the use by it of its property and an unwarranted interference with the right of said company to carry on a lawful business and to use and enjoy its own property.

For the reasons expressed herein, that portion of the judgment in the case of *People v. Hawley et al.* (L. A. 9173), appealed from, is hereby reversed, and the judgments in *Los Angeles Rock & Gravel Co. v. City of Los Angeles et al.* (L. A. 9174), and *Los Angeles Rock & Gravel Co. v. George E. Cryer et al.* (L. A. 9175), are, and each of said judgments is, hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

PEOPLE v. LAZARUS et al. (Cr. 3189.)★

Supreme Court of California. July 1, 1929.

Rehearing Denied July 29, 1929.

1. Criminal law $\S$ 655(4)—Court's statement on voir dire examination that all participants in robbery wherein person is killed are equally guilty of murder held not erroneous (Pen. Code, $\S$ 1078, as amended by St. 1927, p. 1039).

Trial court's statement during voir dire examination of juror under Pen. Code, $\S$ 1078, as amended by St. 1927, p. 1039, that all participating in robbery in course of which a person is killed by one of them, even though accidentally, are equally guilty of murder, held not erroneous as creating impression in jurors' minds that defendants were to be held to same degree of punishment if found guilty of same degree of crime.

2. Criminal law $\S$ 1166½(12)—Court's statement on voir dire examination that all participants in robbery wherein person is killed are equally guilty of murder held not prejudicial, in view of prompt change of statement, and final instruction (Pen. Code, $\S$ 1078, as amended by St. 1927, p. 1039).

Trial court's statement during voir dire examination of juror under Pen. Code, $\S$ 1078, as amended by St. 1927, p. 1039, that all participating in robbery in course of which a person is killed, even though accidentally, are equally guilty of murder, held not prejudicial to defendants, even if erroneous as creating impression in jurors' minds that all defendants should be held to same degree of punishment, if convicted of same degree of crime, in view of court's prompt statement, when defendants' counsel objected, that all persons engaged in attempt to commit robbery, as result of which one of them kills an innocent person, are equally guilty of first degree murder, and final instruction entirely clarifying court's meaning and intent in use of word "equally."

3. Criminal law $\S$ 1166½(12)—Court's references to "demand" for death penalty during voir dire examination held not prejudicial error, in view of final instructions (Pen. Code, $\S$ 1078, as amended by St. 1927, p. 1039).

Trial court's references to district attorney's "demand" for imposition of death penalty in preliminary instructions and questions to jurors on voir dire examination under Pen. Code, $\S$ 1078, as amended by St. 1927, p. 1039, held not prejudicial error, in view of full and fair final instructions with respect to measure of punishment.

4. Criminal law $\S$ 1035(3)—Court's references, without objection, to demand for death penalty during voir dire examination, held not available error (Pen. Code, $\S$ 1078, as amended by St. 1927, p. 1039).

Prejudicial error, if any, in court's references to district attorney's demand for imposition of death penalty in preliminary instructions and questions to jurors on voir dire examination under Pen. Code, $\S$ 1078, as amended

by St. 1927, p. 1039, held not available to defendants on appeal, where no objection was urged thereto at the time.

5. Jury $\S$ 131(4)—Appellants whose counsel were offered opportunity to, and did extensively, examine prospective jurors, could not complain that they were not afforded adequate opportunity to examine them (Pen. Code, $\S$ 1078, as amended by St. 1927, p. 1039).

Defendants, whose counsel were offered opportunity to examine each prospective juror after trial court completed its own inquiry into their qualifications under Pen. Code, $\S$ 1078, as amended by St. 1927, p. 1039, and took advantage thereof by examination occupying better part of two days, in course of which court permitted him to proceed at length whenever any serious question arose as to whether juror had been sufficiently interrogated, could not complain on appeal that they were not afforded adequate opportunity to examine jurors.

6. Criminal law $\S$ 823(2)—Instruction to decide fact questions solely on evidence and instructions held not invading jury's province, in view of other instructions.

Court's admonition at inception of charge to decide all questions of fact solely on evidence in accordance with instructions as to law held not erroneous as invading jury's province in murder trial to determine both law and facts by general verdict, in view of other instructions, including charge that judge has nothing to do with questions of fact, weight of evidence, or credibility of witnesses, but that such matters are entirely within jury's province.

7. Homicide $\S$ 312—Form of verdict, "we * * * find the defendant * * * guilty of * * * murder in the first degree 'as charged in the indictment,'" held not erroneous.

Form of verdict, "we, the jury, * * * find the defendant * * * guilty of felony, to wit: murder in the first degree as charged in the indictment," held not erroneous; "as charged in the indictment" meaning no more than that jury are to render judgment conformable to particular offense and degree thereof with which defendant is charged.

8. Homicide $\S$ 338(1)—Admission of evidence of defendant's mental condition long before crime, under plea of "not guilty by reason of insanity" only, held not prejudicial error.

In murder trial, wherein one defendant tendered plea of "not guilty by reason of insanity," as well as plea of "not guilty," the court committed no prejudicial error in admitting evidence of his mental condition long before crime under former plea only.

9. Criminal law $\S$ 1213—Death penalty for first degree murder is not "cruel punishment."

Infliction of the death penalty for first degree murder does not constitute a cruel punishment within the meaning of the state and federal Constitutions.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Cruel and Unusual Punishment.]

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Louis Lazarus, George Costello, and William O'Brien, alias Joseph Murray, were convicted of first degree murder, and they appeal. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

RICHARDS, J. The defendants were convicted of murder in the first degree without recommendation by the jury and were each sentenced to suffer the extreme penalty of the law. The offense of which they were found guilty arose out of the following state of facts, which are practically undisputed: On the 25th day of July, 1928, at or about the hour of 11:40 a. m., the three defendants entered a branch bank situated on Seventh street, in West Oakland, within which at the time there were five persons who were either officials in charge of said branch bank or were engaged in the transaction of business with it. Upon entering the bank the defendant O'Brien drew a pistol, and, going to a window where one Charles McFarlin was acting as teller and was engaged in a business transaction with a customer, ordered McFarlin and the customer to throw up their hands. In the meantime the other two defendants exhibited weapons and gave like orders to the other employees and customers in the bank. McFarlin did not obey promptly the order of O'Brien, whereupon the defendant Lazarus fired a shot which penetrated McFarlin's head, from the effects of which he died. The three defendants immediately fled, but were presently apprehended while in flight and were positively identified as being the three men who had taken part in the attempted holdup of the bank. They were each charged with murder by an information filed by the district attorney of the county and were in due course brought to trial thereon jointly.

[1, 2] Upon the examination of the jurors upon their voir dire the trial court undertook to conduct an examination of the prospective jurors under the provisions of the recently enacted section 1078 of the Penal Code (St. 1927, p. 1039), and in the course of such examination to give such preliminary instructions to them as would enable them to respond intelligently to the questions touching their qualifications to be propounded to them by the court, and in the course thereof made the following statement to and inquiry of the jurors who were undergoing such examination in a body: "In all criminal cases the law is that all persons concerned in the commission of a crime are equally guilty whether they directly commit the offense or with guilty intent aid and abet it in any way. You

will follow that provision of the law, won't you?" The jurors responded, "Yes." A little later, while examining a particular juror, the court stated: "You heard me explain where there is an attempt to perpetrate a robbery, if in the course of the perpetration of the crime a person is killed, even though accidentally, by one of those participating in the robbery they are all equally guilty under the law of the crime of murder." To this statement counsel for the defendants offered an objection which apparently was aimed at the use of the word "equally" by the court; whereupon the judge thereof restated his question as follows: "Where two or more persons are engaged in an attempt to commit robbery and as a result of that attempt one of the defendants kills an innocent person, all are equally guilty of murder of the first degree." To the statement of the court as thus made, with a view apparently to conforming to the objection urged by defendants' counsel, no further objection was urged, and thereafter in the examination of such new jurors as were called to the box the court employed the latter form of statement, to which no further objection at the time was made. In its final instructions to the jury which tried the cause the court gave an instruction touching this subject which entirely clarified its meaning and intent in the use of the word "equally" in its earlier statement to the jury, and upon this particular subject the defendants offered no other or further instruction. Notwithstanding this state of the record, counsel for the appellants strenuously insists that the members of the jury were prejudicially affected by the use of the word "equally," and that they and each of them gained and retained the impression therefrom that it was the intent of the court to inform them by the use of said term that the defendants under that form of statement were to be held to the same degree of punishment in the event of being found guilty of the same degree of crime. We are entirely satisfied that no such intentment was reasonably derivable from the preliminary statement of the court to the jury in which the aforesaid term was employed, and that even had such intentment been possible it was entirely removed not only by the prompt change of statement made by the trial court, but was further obliterated by the final instruction given to the jurors, as well as by the very full and fair body of instructions which the court gave, and from which no such prejudicial injury could reasonably have resulted.

[3-5] Counsel for the appellants urges as a further objection to the language of the court in its preliminary instructions to and inquiries made of the jurors upon their voir dire examination that it made frequent reference to what it stated to be the "demand" of the district attorney for the imposition of the death penalty in the event the jurors should find the defendants to be guilty of the

crime of murder in the first degree. It is true that the trial court did at times refer to the attitude of the prosecution upon that subject as a "demand." But it is also true that such was the attitude and insistence of the prosecution with respect to this aggravated and indefensible crime. It is also true that no objection was urged at the time by counsel for the defendants against the use of that term by the trial judge, and we are unable to perceive how any prejudicial error could be predicated thereon or could now be available to the defendants under the fully proven circumstances of this particular case. With respect to the measure of punishment to be meted out to them by the verdict of the jury or sentence of the court, the final instructions of the trial judge were eminently full and fair to these defendants, and whatever erroneous impressions the jury, or any member thereof, might have gained in the course of their voir dire examination, we are satisfied were entirely explained and removed. The foregoing statement has particular application to the objection which is now urged by the appellants to the general form and course of the voir dire examination, but which was not presented and urged while such examination was in progress, which is that the defendants were not afforded an adequate opportunity to conduct an examination on their own behalf of the prospective jurors. An examination of the record, however, discloses that after the trial court had conducted and completed its own inquiry into the qualifications of the jurors through a series of questions directed to them as a whole, and also through a series of particular inquiries addressed to each individual juror, counsel for defendants was offered an opportunity to examine each prospective juror as to his or her qualifications, and that he took advantage of that opportunity by an examination which occupied the better part of two days and in the course of which whenever any serious question arose as to whether the juror had not been sufficiently interrogated the trial court permitted counsel for the defendants to proceed at length with his examination of the juror, and that in no instance was he unduly hampered or interfered with in the course of such examination. With respect to any other objections which the appellants now urge to the conduct of the voir dire examination, we do not deem them to be of sufficient importance or significance to require particular designation or treatment in this opinion.

[6, 7] The further objections which the appellants urge to the proceedings under the defendants' plea of "not guilty," and the trial thereon, related to the instructions which were finally given by the trial court. It is urged that the court at the beginning of its charge to the jury admonished it "to pass upon and decide all questions of fact solely and entirely upon the evidence in accordance with the instructions as to the law." It is argued

that by this statement at the inception of its charge the trial court undertook to invade the proper province of the jury in the course of a murder trial to determine by its general verdict both the law and the facts. We do not, however, find that the instructions of the trial court, when read as a whole, are subject to this obnoxious criticism, since the trial judge again and again instructed the jury not only that it was the exclusive province of each member thereof to pass upon the facts of the case, but that as to the law of the case the trial court was more than fair to the defendants in allowing the jury the fullest latitude in determining the extent to which they would give application of the law to the facts in their verdict. This is exemplified by the following statement of the court to the jury: "Gentlemen of the jury: It is my duty to state to you the law applicable to this case. It is your duty, as jurors, without any suggestion from me, to pass upon and decide all questions of fact, solely and entirely upon the evidence in accordance with these instructions as to the law. The judge of this court has nothing to do with the questions of fact, the weight of evidence, or the credit you should give to any witness sworn in this case. These are matters entirely within your province and which you, as jurors, determine for yourselves. In the charge now being given to you the judge of this court in no manner or form intends or desires you to understand that he is expressing any opinion as to the guilt or innocence of any of these defendants, or upon the weight of evidence or as to the truth or falsity of the statement of any witness in this case, or as to any inference you should draw from any of the testimony, or as to whether any fact is or is not proven." Notwithstanding the foregoing statement of the court at the inception of its charge to the jury, it is insisted by counsel for the defendants that the effect thereof was removed by the forms of the verdict which the court submitted to the jury at the close of its instructions, one of which was the following: "We, the jury in the above-entitled cause, find the defendant * * * guilty of felony, to-wit: murder in the first degree as charged in the indictment." The obnoxious phrase which appellants' counsel finds in this form of verdict is "as charged in the indictment"; but we are unable to discover in this phrase the evil effects or consequences which are sought to be assigned to it. It is a phrase which is almost universally in use in the forms of verdicts, and means no more than that the jury, in returning their verdict, are to render the same conformable to the particular offense and to the degree thereof with which the defendant has been charged and put upon his trial. In this, as in other respects, the instructions already given to the jury had fully clarified the duty which was about to be laid upon them in their consideration of both the form and extent of their verdict with rela-

tion to each of the defendants who were upon trial before them.

[8] The remaining objections which we deem of sufficient importance to require particular comment relate to the case of the defendant O'Brien, who, in addition to his plea of "not guilty," was the only one of the defendants who also tendered the plea of "not guilty by reason of insanity." It is urged on behalf of this defendant that he was entitled under his said pleas to offer upon his trial upon the first of said pleas evidence as to his mental condition prior to the commission of the offense charged as bearing upon his intent at the time of his commission of said crime. The record discloses, however, that the evidence which said defendant thus desired to offer upon his plea of "not guilty" did not in any way involve the facts and circumstances immediately attending the commission of his crime, but related wholly to mental states and their causes existing and affecting the defendant during a period long preceding the date of his crime. As to this evidence the record discloses that he was allowed the fullest opportunity to present the same upon his trial upon the plea of "not guilty by reason of insanity," and his case in that respect is thus brought directly within and is fully disposed of under the recent decisions of this court in the cases of *People v. Troche*, 273 P. 767; *People v. Fook*, 273 P. 779; and *People v. Coen*, 271 P. 1074. We therefore find no prejudicial error on the part of the trial court in confining said defendant with relation to such evidence to his proofs under his plea of "not guilty by reason of insanity." Neither do we find that the district attorney was prejudicially guilty of misconduct in the respects alleged upon this appeal during either the trial of the defendants jointly under their plea of "not guilty" or during the trial of the defendant O'Brien individually under his plea of "not guilty by reason of insanity."

[9] The final contention of the appellants is the old and time-worn one that the court had no right under the law to inflict the death penalty upon defendants charged with capital crimes for the reason that the infliction of such penalty constitutes a cruel if not unusual punishment within the meaning of both the state and federal Constitutions. It is not necessary to cite authorities for the purpose of showing that this contention has uniformly been held to be unmeritorious.

We have examined this record most carefully, in view of the elaborate argument of counsel for the defendants presented by both his original and supplementary briefs, and in view also of the enormity of the defendants' alleged offense against the law. As a result of such examination we arrive at the conclusion that no prejudicial error was committed by the trial court in the course of the trial or

by the jury in the form and application of their verdict of guilty without recommendation as to each and all of the defendants.

It follows that the judgment should be, and is hereby, affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

PRESTON, J. (concurring). I concur in this judgment, but I do so solely because the evidence produced on the second hearing failed to show the existence of legal insanity. However, I am unable to come to the conclusion that a defendant may show intoxication for the purpose of reducing the degree of the crime but may not show idiocy or total insanity as a complete defense to it. It seems that on this issue of insanity we are being compelled to assume illogical and incongruous positions.

207 Cal. 465

WALLNER v. BARRY et al. (L. A. 9934.)★

Supreme Court of California. June 28, 1929.

As Modified on Denial of Rehearing July 25, 1929.

1. Waters and water courses ☞171(2)—Storm, not unusual, washing out fill around culvert and releasing waters impounded and flooding property, held not act of God which could not be anticipated.

Contention that storm, causing outflow of waters in stream to such an extent as to result in temporary impounding behind culvert and fill destroying fill and flooding property of lower proprietors, was such an exceptional occurrence as to be deemed an act of God, which could not be anticipated, held without merit, where evidence showed that storm, while torrential, was not unusual, and therefore should have been anticipated and provided against in the capacity of culvert and in permanent resistant properties of fill.

2. Dedication ☞31—Mere offer of dedication does not amount to dedication relieving dedicators from future liability, in absence of very definite acceptance.

Mere offer to dedicate streets, avenues, drives, ways, walks, sewers, or culverts in connection with proposed subdivision does not amount to dedication thereof, so as to relieve would-be dedicators from future liability from proper construction or care thereof, in absence of very definite acceptance of such dedication on part of municipality.

3. Dedication ☞35(1)—City approving map of proposed subdivision did not accept dedication of streets and assume liability for imperfect construction of culvert and fill.

Where property owner built culvert and fill and roadway thereover with approval of city engineer and thereafter made offer to dedicate

same and city accepted map of proposed dedication, city through informal action of officials in approval of map of proposed subdivision did not assume nor relieve would-be dedicators from responsibility for damages from imperfect construction or inadequate maintenance of culvert and fill.

4. Release ⇨29(3)—Lower proprietor releasing city from liability for flood caused by impounding waters behind culvert and fill in process of dedication did not release upper proprietors.

Where property of lower proprietor was injured by flood caused on release of waters impounded by culvert and fill erected by upper proprietors over which street was constructed, lower proprietor, by accepting aid of city officials in restoring house to foundations and signing release to city, did not release upper proprietor from responsibility for effects of flood, since city could not be held joint tort-feasor with upper proprietors because city as matter of law was in no degree liable for injuries to private persons or property of character complained of.

5. Municipal corporations ⇨745—Public corporations are not liable for negligence of officials or agents, in absence of statute or charter imposing liability.

Public corporations are not liable for injuries suffered by individuals through negligence of its officials or agents, in absence of express provision in statute or charter thereof imposing such liability.

6. Release ⇨29(1)—Release of one joint tort-feasor will not discharge other, unless release is accepted in full satisfaction of injury.

Before one joint tort-feasor can be held discharged from liability through release of other, consideration for such release must have been accepted by injured person in full satisfaction of injury.

In Bank.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Anna Wallner against John F. Barry and others. Judgment for plaintiff, and defendants appeal. Affirmed.

James H. Howard, of Pasadena, for appellants.

O. H. Myrick and C. W. Pendleton, both of Los Angeles, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the plaintiff and against the defendants in an action for damages caused by flood water along a stream upon the banks of which the plaintiff was a lower proprietor and the defendants were upper proprietors. The stream in question carries the water from what is known as Eagle Rock Valley in the northwestern part of the city of Los Angeles to a lower outlet. The defendants in the year 1923 were engaged in subdividing a tract of land lying along or

near said stream, but found themselves unable to record their tract map without providing access to Glassell avenue, sometimes called Eagle Rock boulevard, which lies along the northwesterly side of the stream; the tract itself being upon the southeasterly side thereof, and the ordinances of the city of Los Angeles requiring provision for such access to a main avenue. The defendants accordingly acquired a strip of land 50 feet in width which would enable them to extend their most westerly street, Avenue Forty, northerly across the stream, thereby making contact with Glassell avenue. It thus became necessary for them to construct a fill of said width across the ravine of said stream and to provide a culvert therein for the passage of its water, and to construct a roadway along the top of the fill, thus making the required contact with Glassell avenue. The defendants constructed such fill and culvert during the months of May and June of 1923 and thereupon submitted their map to the officials of the city of Los Angeles, together with an offer of dedication to the public use of all of the streets, avenues, drives, ways, and walks of their said tract as shown upon such map. The city, upon the recommendation of the city engineer, at its meeting on October 11, 1923, adopted a resolution approving said map. The property of the plaintiff was located about five blocks below the location of said fill, abutting on the southwesterly side of the stream. On March 4, 1924, a heavy storm occurred in the region of Eagle Rock and along the upper courses of said stream, causing a very considerable flood of water, amounting to a torrential flow, to collect and come down the stream, the extent and menace of which is set forth in a finding of the trial court reading as follows: "That on said 4th day of March, 1924, * * * and during and on account of the showers and fall of rain, aforesaid, a large body of water collected, and was caused and permitted to be impounded by defendants on said day, immediately above and back of said fill and embankment, and against and because of said fill and embankment; and while so collected and impounded in the place and time and manner aforesaid, said impounded water, being of great volume, weight and pressure, destroyed and swept away said fill and embankment, and then and there rushed down and along said storm drain ditch with great force and momentum to and over plaintiff's said premises, and swept plaintiff's house and home, which was then and theretofore occupying her said premises from its foundations and into said ditch and into the current of said flood, whereupon water, thick with mud, silt, rubbish, and filth, flowed into and over said house, and over and upon plaintiff's said household furniture, effects and personal property contain-

ed in said house." On the day following said flood the plaintiff applied for relief from the immediate effects thereof to the city engineer, who with other officials and employees of the city went out and replaced the plaintiff's house upon its foundations and thereupon secured from the plaintiff some sort of release for any liability which might have arisen as against the city on account of said flood. Later on the plaintiff commenced this action against the defendants for the recovery of the damages caused to her aforesaid property by reason of said flood, the items of which, as set forth in her complaint, aggregated the sum of \$2,047.75. The defendants in their answer denied responsibility for the occurrence of the overflow which had invaded the plaintiff's premises and for the damage caused thereby, and denied that the same had been caused by reason of any carelessness, negligence, unskillfulness, or unworkmanlike manner in the construction and maintenance of the fill or of the culvert which penetrated the same and through which the waters of the stream were at all times supposed to flow. They further set forth as a separate defense that their plans for the construction of the fill and culvert across the ravine occupied by the stream had been submitted for approval to the city of Los Angeles and had been, prior to the construction thereof, approved by the officials of the city, and that the culvert and fill and the roadway thereover, after the construction thereof in accordance with said approved plan, had been dedicated to the city of Los Angeles, which had accepted the dedication and had thereby assumed control over and responsibility for the future maintenance thereof, and that the defendants had thus been relieved of all further responsibility therefor, and were therefore, after the dedication, no longer liable for any floods occurring along the course of said stream or form and damage caused thereby or in consequence of any defective construction of the culvert and fill. In an amendment to their answer the defendants also pleaded that the plaintiff, in consideration of the restoration of her house and residence to its former foundations after the flood, had released the city of Los Angeles from liability and had thereby also released the defendants from liability. The cause came on for trial before the court upon the issues thus framed, sitting without a jury. Whereupon a considerable volume of evidence was presented on behalf of both parties to the action respecting the construction of the fill and the size and manner of the construction of the culvert, and also relating to the severity of said storm with its resultant flood and the accumulation of the waters thereof above and about the fill, and the inadequacy of the culvert to carry off said waters and the giving away of the fill with the consequent overflow and destruction or damage caused to the plaintiff's property. Upon the submission of

the cause the court made its findings of fact and conclusions of law, setting forth in the former with considerable detail the facts as above stated, finding that the plaintiff's version thereof as set forth in her complaint and supporting evidence was true, and that the allegations of the defendants' answer were untrue, and also finding that the special defenses urged therein were unsupported by the evidence in the case. As conclusions of law based upon such findings, the court found that the injury caused to the plaintiff by the occurrence of said overflow was the result of the negligence of the defendants in the construction and maintenance of the culvert and fill, and that plaintiff was entitled to judgment in the sum of \$927.75, for which sum judgment was accordingly entered. The defendants have appealed from such judgment, and urge in support of their appeal several contentions which we shall now proceed to consider.

[1] The appellants' first and second contentions are that the finding that the damage occurring to the plaintiff's property was caused by the release of impounded water, and that the fill and culvert were so negligently designed or constructed as to cause the impounding of such water, was unsupported by the evidence in the case. We have examined the record bearing upon this contention and, without attempting to restate the evidence in detail, we are satisfied that the finding of the trial court touching this subject finds full support therein. It is argued by the appellants that the torrential storm which caused the outflow of waters in said stream to such an extent as to result in their temporary impounding behind the culvert and fill was such an exceptional occurrence as to be deemed an act of God, and was of such a character as that which the defendants were not required to anticipate or provide against the construction of their culvert and fill. The evidence in the case does not, however, support this contention, since it shows that the storm, while torrential was not unusual to that region, and hence should have been anticipated and provided against in the capacity of the culvert and in the permanent resistant properties of the fill. There was substantial evidence before the court to the effect that the culvert was so constructed that the bracing timbers thereof were placed inside rather than outside of the culvert, and thus offered an obstruction to the free passage of storm waters through the same, even if it were to be conceded that the culvert were otherwise of such interior proportions as would suffice to carry off such storm waters. There was also substantial evidence to the effect that the position of the culvert was such that instead of being in the direct course of the stream where the waters thereof could easily approach and enter it, the culvert was set over against the

bank of the ravine where the waters would be compelled to turn from their direct channel in order to enter the culvert, and that such deflection of the storm waters upon the occasion in question caused a whirlpool at the point of their attempted entrance into the culvert, which finally resulted in their breaking through the fill, with the consequent downflow of their accumulated flood upon the plaintiff's property.

[2, 3] The appellants' third contention is that when they built the culvert and fill and the roadway thereover with the approval of the city engineer, and thereafter made their offer to dedicate the same in common with the other streets, drives, ways, and walks of their said subdivided tract of land as the same appeared upon the map thereof, the city by its approval of said map had thereby accepted such dedication and by so doing had relieved the defendants from responsibility for any future damages resulting from the construction and maintenance of the culvert and fill. The authorities do not support the appellants' contention that a mere offer to dedicate the streets, avenues, drives, ways, walks, sewers, or culverts in connection with a proposed subdivision amounts to a dedication thereof so as to relieve the would-be dedicators from future liability for the proper construction or care thereof, in the absence of a very definite acceptance of such dedication on the part of the municipality. The mere filing, recording, or even approval of the map of such subdivision will not suffice to establish such accepted dedication as would either impose upon the municipality any of the obligations which the dedicators had theretofore been under to properly construct, or keep in repair such portions of their property as they were proposing to devote to a public use, nor operate to relieve the latter therefrom. The early cases of *Stone v. Brooks*, 35 Cal. 489, and *Archer v. Salinas City*, 93 Cal. 43, 28 P. 839, 16 L. R. A. 145, would seem to have settled this question contrary to the appellants' contention, and it would seem to be clear that in the instant case the city of Los Angeles through the rather informal action of its officials in the mere approval of the map of the defendants' proposed subdivision neither assumed, nor relieved the defendants from, responsibility for any damages arising from the imperfect construction or inadequate maintenance of said culvert and fill.

[4, 5] The fourth and final contention of the appellants is that the plaintiff in applying to the city officials for relief from the immediate consequences of the disaster to her home and property, and in receiving such relief by the return of her house to its foundations and by thereupon signing some sort of release of the city from liability, had thus also released the defendants from their responsibility to her for the effects of the flood.

The argument of the appellants in this behalf is apparently predicated upon their contention that the city was a joint tort-feasor with the defendants, and that being such it was the law that a release by the plaintiff of one of such joint tort-feasors also released the others from their liability for such damages as they had jointly caused. There are several difficulties in the way of an acceptance or approval of this contention, but an all-sufficient one is to be found in the fact that the city of Los Angeles cannot be held to be a joint tort-feasor with these appellants, since, as a matter of law it was in no degree liable for injuries to private persons or their property of the character complained of here. The law is well settled in this state that public corporations are not to be held liable for injuries suffered by individuals through the negligence of its officials or agents in the absence of an express provision in the statutes or in the charter thereof imposing such liability. It is conceded by the appellants that no such liability has been thus imposed upon the city of Los Angeles, and this being so it could not become a joint tort-feasor with the appellants in occasioning the injuries of which the plaintiff complains.

[6] A further equally complete answer to the appellants' contention in the foregoing regard is to be found in the fact that in whatever release from liability the plaintiff signed at the suggestion of the city officials or employees for restoring her house to its foundations, she did not purport to admit or accept the temporary relief from her disaster thus afforded as a recompense for the whole sum of injury which had been caused by the overflow of her home and property as these are enumerated in detail in her complaint herein and are found to be sustained by the findings of the trial court. Even if it were to be conceded that the city of Los Angeles was a joint tort-feasor with these appellants and that the same liability rested upon it as such for her injuries, it is well-settled rule that before one joint tort-feasor can be held to be discharged from liability through the release of another, the consideration for such release must have been accepted by the plaintiff in full satisfaction of the injury. 1 Cyc. 318, and cases cited; *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; *Chamberlin v. Murphy*, 41 Vt. 110; *Smith v. Gayle*, 58 Ala. 600; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Whiting v. Plumas County*, 64 Cal. 65, 28 P. 445.

We therefore arrive at the conclusion that there is no merit in any of the contentions of the appellants upon this appeal.

This being so, the judgment must be, and is hereby, affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

207 Cal. 498

MORRIS v. WARNER. (L. A. 9983.)

Supreme Court of California. July 1, 1929.

1. Landlord and tenant ⇨152(5)—Provision requiring lessor to rebuild did not apply where fire was proximately caused by lessee's negligence.

Lessor under lease requiring lessor to rebuild in case of fire was not under obligation to rebuild, where fire which destroyed building was proximately caused by lessee's negligence, though lease further provided that lessee should keep premises in good repair and condition at his own expense, damage by fire or elements excepted.

2. Landlord and tenant ⇨154(3)—In lessee's action for damages under lease permitting termination if building could not be restored within reasonable diligence within 60 working days, finding that such period was insufficient held justified.

In action by lessee against lessor for damages for lessor's termination of lease and failure to rebuild building damaged by fire, under lease requiring lessor to rebuild, but providing for termination of lease if building could not be restored within reasonable diligence within 60 working days, finding of trial court that building could not with reasonable diligence be rebuilt within that time held sustained by evidence.

3. Set-off and counterclaim ⇨29(1)—Lessor's claim for destruction of building by fire through lessee's negligence held subject of counterclaim as arising out of same transaction, in lessee's action for damages for termination of lease (Code Civ. Proc. §§ 438, 442).

In action by lessee against lessor for damages for termination of lease and lessor's refusal to rebuild after fire, under lease requiring restoration of building but permitting termination if building could not be restored with reasonable diligence within 60 working days, cross-complaint of lessor for damages for value of building, based on claim that building was destroyed through lessee's negligence, held proper subject of counterclaim as arising out of same transaction under Code Civ. Proc. §§ 438, 442; destruction of building by fire being considered as the transaction.

4. Set-off and counterclaim ⇨29(1)—Lessor's claim for lessee's negligent destruction of premises by fire, under lease requiring that lessor be saved harmless from lessee's neglect, held subject of counterclaim in lessee's action for damages for termination of lease (Code Civ. Proc. § 438, subd. 2, § 442).

In action by lessee against lessor for damages for termination of lease after fire and failure to restore premises in accordance with provisions of lease requiring restoration by lessor if premises could be restored within reasonable diligence within 60 working days, claim of lessor for damages for lessee's negligent destruction of premises held proper subject of counterclaim under Code Civ. Proc. § 438, subd. 2, and section 442, as another cause of action arising upon contract, where lessee covenanted to keep premises reasonably safe from destruction and

to hold lessor harmless from any damages resulting from misuse or neglect of premises.

5. Landlord and tenant ⇨154(3)—Finding that burning of leased building was proximate result of lessee's negligence held justified.

In action by lessee against lessor for damages for failure to rebuild after fire, in which lessor asserted counterclaim for lessee's negligent destruction of premises by fire, evidence of lessee's burning debris and inflammable materials from his furniture factory in lot adjoining leased premises, and leaving fire unattended, smoldering, and smoking, held sufficient to sustain finding that fire was direct and proximate result of lessee's negligence.

6. New trial ⇨101—After lessor's recovery for lessee's negligent destruction of building by fire, refusal of new trial for newly asserted claim that lessor had received insurance held not reversible error.

Where lessee learned from deposition of lessor that lessor carried insurance on building, but failed to bring that matter to court's attention during trial involving claim of lessor for damages for lessee's negligent destruction of building by fire, lessee could not predicate reversible error on trial court's refusal to grant new trial by reason of fact that lessor received insurance, though lessee might have compelled joinder of insurance companies at the trial.

7. Pleading ⇨168—Uncontroverted allegation in cross-complaint must be deemed admitted.

Allegation in cross-complaint which is not controverted must be deemed to have been admitted, and court is justified in finding such allegation to be true.

8. Pleading 377—Cross-complainant need not produce evidence in support of admitted allegations of cross-complaint.

Cross-complainant is not required to produce evidence in support of allegations of cross-complaint which are admitted by plaintiff's failure to deny them.

9. Appeal and error ⇨173(2)—Judgment for lessee's negligent destruction of building should not be disturbed on newly asserted claim that lessor held only leasehold.

Judgment for lessor for damages for lessee's negligent destruction of leased building by fire should not be disturbed on claim, asserted for first time on appeal, that lessor was not the fee owner of the property but held premises under lease from another, where allegation of lessor's ownership was not denied and only evidence that lessor was not the fee owner was by reference to prior lease introduced as exhibit, wherein it was recited that lessor held leasehold interest in premises and that lease was subject to terms of original lease.

In Bank.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Edward S. Morris against Phil Warner, in which defendant interposed a counterclaim. Judgment for defendant, and plaintiff appeals. Affirmed.

Murphy & Cohen, of Los Angeles, for appellant.

Fred W. Morrison and W. W. Hindman, both of Los Angeles, for respondent.

SEAWELL, J. Plaintiff, Edward S. Morris, and defendant, Phil Warner, entered into an agreement on July 28, 1922, whereby defendant leased industrial property in the city of Los Angeles to plaintiff for a term of five years, commencing on August 1, 1922, at an average monthly rental of \$300. The premises, upon which was located a large frame building of rough construction, were to be used by the lessee for the purposes of manufacturing, storing, and dealing in furniture. On December 25, 1923, the building was completely destroyed by fire. The lease contained the following provision, the alleged breach of which by the lessor is the basis of the cause of action set forth in plaintiff's complaint:

"If the building hereinbefore referred to is so badly damaged by fire, earthquake or other unusual action of the elements or any contingency beyond the control of the lessor, as to render it wholly unfit for lessee's occupancy, and if it cannot be restored with reasonable diligence within sixty (60) working days after the commencement of actual work, then this lease may be terminated within the period of ten (10) days after such disaster (by either party, upon written notice to the other), whereupon lessee shall surrender the premises and shall not be liable for any further rental, and lessor shall refund any unearned rent paid by lessee, calculated at a daily rate based on the regular monthly rental. *In case of any lesser damage by any of the above causes, the premises shall be restored with all reasonable speed by the lessor at the latter's own expense*, and the lessee shall pay a reasonable rent during the period of such restoration, for such part of the premises as shall be fit for occupancy by the lessee. * * *

(Italics supplied.)

In his complaint plaintiff alleged that the building was damaged by fire to the extent that it was entirely and wholly untenable, but that a reasonable time for the restoration of the building was less than 60 working days, to wit, not in excess of 50 working days; that defendant refused plaintiff's demand that he restore and repair the building, in accordance with the provision contained in the lease, and on December 31, 1923, said defendant served notice in writing on plaintiff that by reason of said fire he considered the lease terminated. Plaintiff claimed that by defendant's refusal to rebuild he was unlawfully evicted from said premises to his damage in the sum of \$17,148.

Defendant, answering, denied that the building could be restored within 60 working days, and alleged that it would require con-

siderably more than 60 working days to rebuild, and that he had notified plaintiff of the termination of the lease, as authorized by said contract of lease. He further denied that plaintiff had suffered damage in any sum whatsoever by reason of the termination of the lease. He also filed a cross-complaint in which he alleged that the fire was caused by the negligence of plaintiff and his violation of covenants in the lease whereby he agreed to keep said premises and all appurtenances thereto in a clean and wholesome condition and to comply faithfully with all ordinances of the city of Los Angeles. The city ordinance claimed to have been violated prescribed requirements designed to reduce the fire hazard to a minimum. The prayer of the cross-complaint was for damages for the value of said building, which was first alleged to be \$18,000, and later by an amendment alleged to be \$25,000.

The trial court, sitting without a jury, denied plaintiff any relief upon his complaint, and entered judgment for defendant and cross-complainant for \$19,500. Plaintiff appeals from said judgment.

[1] Considering first the cause of action set forth in the complaint, by the express terms of the lease defendant was not obligated to reconstruct the building unless it could be rebuilt within sixty working days after the commencement of actual work. Nor was defendant required to rebuild if the fire which destroyed the building was proximately caused by the negligence of the lessee. Neither the rebuilding clause nor the provisions of the lease to the effect that the lessee should keep said premises in good repair and condition at his own expense, *damage by fire or elements excepted*, and at the end of the term quit and surrender said premises to the lessor in good repair, *damage by fire* and ordinary use excepted, can reasonably be construed as relieving the lessee from liability to the lessor for a fire caused by his own negligence or as requiring the lessor to rebuild in the event that the premises should be destroyed by a fire thus caused by the negligence of the lessee.

Defendant, however, does not rely upon negligence on the part of plaintiff as a defense in his answer, but only sets it forth in his cross-complaint as the basis for recovery of the value of the building. Whether such negligence, found by the court to exist, would be available as a defense to the cause of action set forth in the complaint, although not pleaded in the answer, it is not necessary to here decide, for the court's finding that the building could not with reasonable diligence be rebuilt within 60 days, but that a period of 70 working days was a reasonable time for its restoration, is sustained by the evidence.

[2] The building contained more than 24,000 square feet of floor space and was of

frame construction, roughly finished. Portions of it were two stories in height. It was built upon cement piers or blocks so that the floor of the building and the exterior platform on the west side of the building were several feet above the ground in order to facilitate loading merchandise into freight cars on the spur railroad track which adjoined the property on the west. Witnesses testified that approximately 600 cement piers would be required in reconstruction. Two witnesses, Gitelson and Pennell, builders, who testified on behalf of plaintiff, stated that the building could be rebuilt in 40 working days, using reasonable diligence. The witnesses who testified on behalf of defendant gave estimates varying between 73 and 85 days. Said witnesses do not appear to have been lacking in qualifications to express an opinion, nor does their examination, in the course of which they were required to itemize the periods of time they deemed necessary for the accomplishment of the various phases of the reconstruction, contain anything which would require the trial court as a matter of law to reject their testimony and accept that of plaintiff's witnesses, who were not shown to have had any dealings with defendant or to have made any offers to him to rebuild in less than 60 days. No reason appears why the trial court should have accepted the testimony of plaintiff's two witnesses as against the testimony of the witnesses offered by the defendant. There being a flat contradiction as to the issue of fact, we would not be justified in disturbing the court's finding.

[3] We pass now to a consideration of the judgment entered for defendant upon his cross-complaint awarding him damages for the value of the building alleged to have been destroyed by fire caused by the negligence of his lessee, the plaintiff herein. Plaintiff contends that the cause of action set forth in the cross-complaint is not a proper subject of counterclaim or cross-complaint. We cannot agree with this view. Proof of a destruction caused by the negligent acts or omissions of the lessee would, as noted above, be a proper defense to the cause of action set forth in the complaint to recover damages for breach of the covenant to rebuild. It would also afford the lessor a cause of action for damages against the lessee. The question is: May said lessor recover herein upon such cause of action by cross-complaint or counterclaim? We are satisfied that he may. Although plaintiff's action is brought upon the lease contract, it is necessary to the existence of said cause of action that the building should have been destroyed by fire. Therefore, in a proper sense, the destruction of the building by fire is the "happening" or "accident" upon which the action is brought within the meaning of section 442, Code of Civil Procedure. The cause of action set forth in the cross-complaint or counterclaim to recov-

er damages for the destruction of the building relates to and depends upon the same happening or accident. The destruction of the building by fire may also be considered as the "transaction" set forth in the complaint as the foundation of plaintiff's claim within the meaning of the language of section 438, Code of Civil Procedure, as said section read at the time of the filing of the pleadings herein, and defendant's cause of action, alleged in the cross-complaint, certainly arises out of said transaction. The negligent destruction of the building by plaintiff would be a bar to any damage or loss he might attempt to create by his own act of negligence, and plaintiff having brought an action to recover damages which has as a basis the destruction or loss of the building which his own negligence caused, the defendant, who is the legal sufferer, is unquestionably authorized by the provisions of section 442, Code of Civil Procedure, to file a cross-complaint.

[4] Furthermore, the acts of negligence relied upon by cross-complainant were violations of the lessee's covenants in the lease to keep said premises in a clean and wholesome condition and reasonably safe from destruction, and to comply faithfully with all ordinances of the city of Los Angeles. The action may well be considered as based upon the lessee's covenant in the lease "to hold the lessor and said premises harmless from any damages of any kind resulting from the misuse or neglect of said premises." In this view, the matter set forth in the pleading denominated a "cross-complaint" to the plaintiff's cause of action arising upon contract, is another cause of action arising upon contract within the meaning of subdivision 2 of section 438, Code of Civil Procedure, as well as under section 442, Code of Civil Procedure.

Glide v. Kayser, 142 Cal. 419, 76 P. 50, and *Meyer v. Quiggle*, 140 Cal. 495, 74 P. 40, relied upon by plaintiff, in which it was held that claims for monetary damages could not be recovered upon cross-complaint or counterclaim in actions for the recovery of possession of personal property and to quiet title to real property, respectively, for the reason that the relief sought would not affect, modify, or change in any way the decree to which the plaintiff would be entitled, are not controlling here. In those cases two different types of relief were sought. But in the case here before us the prayer of both complaint and cross-complaint is for monetary damages. A money judgment upon a cross-complaint offset against a money judgment necessarily reduces the amount plaintiff may recover by the amount of the judgment upon the cross-complaint.

[5] We do not agree with cross-defendant's contention that the court's finding that the building was totally destroyed by fire as a direct and proximate result of the carelessness and negligence of cross-defendant is unprop-

ported by the evidence. Cross-complainant and witnesses who testified on his behalf, both employees and others, stated that plaintiff was accustomed to burn debris from his furniture factory, consisting of shavings, excelsior, sacks, bags, sawdust, and other highly inflammable materials in the lot adjoining the leased premises on the west, and that said combustible materials were also scattered through the building in a disorderly fashion. The testimony of said witnesses indicates that the fire was left unattended, smoldering, and smoking, through all hours of the day and night on frequent occasions. An ordinance of the city of Los Angeles provided that it should be unlawful to burn rubbish, paper, shavings, boxes, or other combustible materials in any lot in the district where the building was located except between the hours of 6 and 9 a. m. Cross-complainant and his witnesses also testified to having observed fire burning briskly in said rubbish pile on the afternoon of December 24, the day before the fire, and on the 23d. Cross-complainant testified that he remonstrated with plaintiff concerning the maintenance of said fire and directed him to extinguish it before leaving the premises on both December 23 and 24 and on other occasions in 1922 and 1923. The witness Trimble stated that he observed fire in the pile on the morning of December 25. Said testimony, accepted by the court as true, will support a conclusion of negligence, and indicates a sufficient degree of probability that the fire destroying the building originated from the fire so negligently maintained on the vacant lot to support a judgment against cross-defendant. Witnesses for cross-defendant gave evidence that the premises were maintained in a condition that would not favor the spread of fire and that the burning rubbish pile was not so maintained as to constitute a fire menace. The court resolved the conflict in cross-complainant's favor. Nor can we accede to the view that cross-complainant had conferred a license upon his lessee to maintain the fire in the adjoining lot.

[6] Plaintiff contends that the judgment for cross-complainant for the full value of the building is excessive for the reason that said cross-complainant, prior to the trial of the action, had collected \$13,000 in fire insurance. Assuming, but not deciding, the correctness of this proposition of law, the point was raised for the first time upon the motion for a new trial. It appears from an affidavit filed by one of the attorneys for cross-complainant, in opposition to the motion for a new trial, that prior to the trial of the action plaintiff took the deposition of said defendant and cross-complainant, and that therein defendant stated that he carried insurance on the building and that the insurance companies had adjusted the loss for him. Although plaintiff might upon the trial have compelled cross-complainant to join the insurance companies

paying the loss as either cross-complainants or cross-defendants (*Fairbanks v. S. F. & N. P. Ry. Co.*, 115 Cal. 579, 47 P. 450; *Offer v. Superior Court*, 194 Cal. 114, 228 P. 11), or, perhaps, in the absence of such joinder have limited plaintiff's recovery to the value of the building less the insurance, the pleadings and evidence are absolutely silent on the insurance feature. Having knowledge of the insurance and having failed to bring the matter to the court's attention during the trial in any manner whatsoever, plaintiff and cross-defendant cannot now claim that the trial court committed reversible error in refusing to grant a new trial by reason of the payment of said insurance. Aside from the concrete instance of notice that the building was insured, the common business practice of carrying fire insurance on buildings such as the one described in the evidence should have put plaintiff upon his inquiry as to whether insurance was carried on said building.

[7-9] Petitioner also urges for the first time upon this appeal that it was improper to allow the cross-complainant to recover as damages the full value of the building destroyed for the reason that he was not the owner in fee thereof, but himself only a lessee, plaintiff being a sublessee. The cross-complaint contains an allegation that cross-complainant was the owner of the property. This allegation is nowhere controverted, and hence must be deemed to have been admitted. The court found said admitted allegation to be true. No evidence upon the question of ownership was introduced by either party upon the trial. In view of the admission made by the pleadings, the defendant and cross-complainant was not required to produce such evidence. The only indication that cross-complainant was not the owner is a reference in the lease executed prior in time between the parties, which was introduced in evidence as an exhibit, wherein it is recited that the lessor therein is a lessee, and the lease subject to the terms of the original lease. This intimation is entirely too weak to alter the decision in the case. Although cross-complainant may have been a lessee when he executed the lease in favor of cross-defendant in July, 1922, he may subsequently have acquired ownership in fee. There is no evidence contradicting such a contingency. Furthermore, we can readily conceive of situations where a lessor, himself the lessee of another, would be entitled to recover from his lessee the value of a building destroyed, as, for example, where the sublessor had assumed liability to his lessor for the value of said building.

Appellant, on motion for new trial, offered a number of affidavits tending to show that the fire which destroyed the building started from within, rather than from without. We have examined said affidavits and find them, as doubtless did the trial court, lacking in

impressiveness. No abuse of discretion is shown to have existed on the part of the trial court in denying the motion for a new trial.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

207 Cal. 427

CHUN KAM v. MYERS. (Sac. 4312.)★

Supreme Court of California. June 25, 1929.

Rehearing Denied July 25, 1929.

Money received — Action for money had and received lies to recover sums wrongfully retained from proceeds of crops raised by plaintiff under share contract.

Action for money had and received will lie to recover sums wrongfully retained by agent for decedent's estate from proceeds of crops raised by plaintiff under contract entitling him to percentage thereof.

Shenk, J., and Waste, C. J., dissenting.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Chun Kam against L. J. Myers. Judgment for defendant, and plaintiff appeals. Reversed.

Rehearing denied; WASTE, C. J., and SHENK, J., voting for a rehearing.

Superseding opinion of District Court of Appeal in 274 P. 377.

W. H. Hatfield and V. L. Hatfield, both of Sacramento, for appellant.

Gaffney & Zagoren, of Sacramento, for respondent.

PRESTON, J. Action for money had and received. Defendant had judgment. Plaintiff appeals. The question presented is whether this cause of action will lie under the facts shown.

Defendant, L. J. Myers, as agent for the estate of L. W. Myers, deceased, made a cropping contract for the years 1924 and 1925 in behalf of said estate, with plaintiff, a Chinese. The estate was operating its farm property under a special order of court. The finances for and from these operations were carried in a special account in the bank upon which defendant alone had the right to check. Under the cropping contract plaintiff was entitled to a percentage of the fruits and vegetables produced. For each of these years he delivered the whole crop to said estate through defendant as agent. The crops were sold and the proceeds deposited in this special account. Defendant was to disburse to plaintiff the portion thereof due him. It

appears that for the year 1924 he arbitrarily retained from the amount due plaintiff the sum of \$481.90. In the same manner for the year 1925 he retained the sum of \$417.37, the aggregate of these sums constituting the amount sued for here.

The evidence shows no justifiable excuse for the retention of said sums. The sole contention upon this appeal is that a cause of action for money had and received will not lie. No claim is made by defendant that said amounts were not on deposit in the said special account; neither is there any claim by him that his liability should be limited in any way.

There is no merit in the contention that a cause of action for money had and received will not lie. Such claim was answered adversely to defendant in the recent case of *Irvine v. McGregor* (Cal. Sup.) 265 P. 218. Upon authority of that case and the cases upon which it is predicated, the judgment in this cause is reversed.

We concur: CURTIS, J.; RICHARDS, J.; LANGDON, J.; SEAWELL, J.

SHENK, J. I dissent. The action is for money had and received in the usual form. On the facts the action is grounded on the alleged deceit of the defendant in withholding the amount sued for as a portion of the plaintiff's share of the crops of 1924 and 1925, upon the representation that the estate of which the defendant was the agent had expended or incurred said amount as charges properly payable to the California Pear Growers' Association when in truth it is claimed by the plaintiff that the estate was not a member of said association during the years in question. The defendant filed a general demurrer to the complaint and also a special demurrer on the ground of uncertainty, etc., which, after argument thereon, was overruled. The answer was merely a denial of the allegations of the complaint. At the trial the defendant contended first that the wrong form of action had been instituted and, secondly, that, if any one were liable, it was the estate and not the defendant, its known agent. The findings were as brief as the allegations of the complaint and the denials of the answer, merely finding that the allegations of the complaint were not true.

The same contentions made at the trial are now urged on appeal with the further contention on the part of the defendant that on the evidence the findings are supported.

Since the case of *Minor v. Baldridge*, 123 Cal. 187, 55 P. 783, it has been the law of this state that an action grounded in fraud may be stated in the form of the common count and that the pleading is good as against a general demurrer, but is not sufficient as against a special demurrer. Wheth-

er the demurrer in the present case should have been overruled need not be determined. On the trial the plaintiff offered evidence to establish his charge of fraud and deceit. The defendant offered evidence to meet the charge, contending that the amount sued for was represented by legitimate offsets against the plaintiff, including the settlement for a sum in excess of plaintiff's demand of a claim against the estate on the part of the Pear Growers' Association under a contract executed by the decedent with the association whereby the decedent agreed to sell and deliver to the association all Bartlett pears produced or acquired by him during the years 1921 to 1927, inclusive. The findings of the court, necessarily implied, negative the charge of fraud, or deceit on the part of the defendant, and there is evidence to support the express as well as the implied findings.

On the second point, viz., that the suit should have been brought against the estate upon a rejected claim, it appears that the defendant was the agent of the administrator and known by the plaintiff to have been such. It is the general rule that an agent may be liable for his tortious act notwithstanding the principal may also be liable. *Perkins v. Blauth*, 163 Cal. 782, 127 P. 50; 1 Cal. Jur. 817. But since the court found in favor of the defendant on the fraud charge this rule would not be applicable. In any view of the case I am satisfied that the judgment should be affirmed.

I concur: WASTE, C. J.

99 Cal. App. 645

Ex parte LEACH et al. (Cr. 1816.)

District Court of Appeal, Second District,
Division 1, California. June 27,
1929.

1. Infants ☞18—Municipal court of Los Angeles held to have exclusive jurisdiction of misdemeanor of contributing to delinquency of minor committed outside city but within county (Const. art. 6, § 5, as amended [see St. 1927, p. 2390]; Const. art. 6, §§ 11, 13; Municipal Court Act 1925; Pen. Code, § 1462; Juvenile Court Law, § 21).

Under Const. art. 6, § 5, as amended (see St. 1927, p. 2390); Const. art. 6, §§ 11, 13; Municipal Court Act 1925 (St. 1925, p. 648); and Pen. Code, § 1462, creating, regulating, and defining jurisdiction of municipal courts, municipal court of the city of Los Angeles had sole right and exclusive jurisdiction to hear information charging offense under Juvenile Court Law, § 21 (St. 1915, p. 1247), defining offense of contributing to delinquency of minor, a misdemeanor, committed outside city of Los Angeles,

but in county thereof, and superior court had no jurisdiction to try offense.

2. Infants ☞16—Proceedings under Juvenile Court Law, except for offenses by persons other than wards of court, are not of criminal nature (Juvenile Court Law, § 21 (St. 1915, p. 1247)).

Proceedings under Juvenile Court Law, § 21 (St. 1915, p. 1247), are not of a criminal nature, except those for offenses by persons other than wards of court.

Habeas corpus by Henry Leach and another to secure release of petitioners from custody on the ground of lack of jurisdiction. Petitioners discharged.

Arthur B. Rose, John A. Deweese and Josiah Coombs, all of Los Angeles, for petitioners.

Buron Fitts, Dist. Atty., and Florence M. Woodhead, and B. J. Scheinman, Deputy Dist. Atts., all of Los Angeles, for respondents.

YORK, J. This is an application for a writ of habeas corpus on behalf of petitioners Henry Leach and Forrest Huggins, who were charged by information filed by the district attorney, and were convicted thereon in the superior court of the state of California in and for the county of Los Angeles, juvenile department, and sentenced to imprisonment for the offense of contributing to delinquency, a misdemeanor. The charge was of the character defined under the Juvenile Court Law, § 21 (St. 1915, p. 1247).

[1] In this proceeding, apparently both the petitioners and the parties appearing in opposition to the petition desire the court to pass upon the question as to whether or not the constitutional amendment, section 5, article 6 (see St. 1927, p. 2390), and sections 11 and 13 of article 6 of the Constitution, and the Municipal Court Act of 1925 (St. 1925, p. 648), have entirely taken from the jurisdiction of the superior court and placed in the municipal court the sole right and exclusive jurisdiction to hear informations charging offenses under the Juvenile Court Act, and particularly as to the offense of contributing to delinquency, a misdemeanor.

It is stated, however, by the parties appearing as respondents to the writ of habeas corpus, and is not denied by the petitioners, that the offense charged was not committed in the city of Los Angeles, but committed outside the said city, in the county. In fact, the petition does not allege that this act was committed in the city of Los Angeles, or that it was charged that the act was committed within the city of Los Angeles. Therefore the matter will be determined upon the hypothesis that the offense charged in the information was charged as having taking place outside of the city of Los Angeles and in the county of Los Angeles.

The Constitution (article 6, § 11, as amended November 4, 1924, provides that "municipal courts shall have original jurisdiction, except as hereinafter provided, * * * in all criminal cases amounting to misdemeanor punishable by fine and imprisonment in the city or city and county or county jail, or punishable by fine or such imprisonment. * * * The legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof, except in the particulars otherwise specified in this section. * * * " The Constitution further provides (article 6, § 13, as amended in November, 1925): "Notwithstanding any provision contained in this article, the legislature may fix by law the jurisdiction of municipal courts and inferior courts in cities having municipal courts which may be established in pursuance of this article, and may fix by law the powers, duties, qualifications and responsibilities of judges thereof. Any action heretofore taken by the legislature in fixing exclusive jurisdiction of municipal courts in cases at law is hereby ratified and confirmed." See St. 1927, p. 2391.

The Municipal Court Act, § 4, as amended in 1925, provides: "In each city or city and county, in which a municipal court is established as herein provided, there shall be no other court inferior to the superior court unless it be a court having jurisdiction in cases in which the claim or demand is fifty dollars or less. Upon the establishment of a municipal court as herein provided all existing inferior courts, except as above provided, in the city or city and county wherein such municipal court is established and in a township situated wholly within such city or city and county, shall be superseded by the municipal court. * * * " St. 1925, pp. 648, 650.

Section 28 provides: "Each municipal court shall have original jurisdiction in all criminal cases amounting to misdemeanor, punishable by fine or imprisonment in the city or city and county, or county jail, or punishable by fine or such imprisonment where the offense charged was committed within the county in which the municipal court is established." St. 1925, pp. 648, 658.

The new section of the Penal Code, § 1462, adopted in 1925 (St. 1925, p. 948), provides: "*Jurisdiction of Municipal Courts in Misdemeanor Cases.* Whenever a municipal court shall have been established, as provided by law, such court shall have exclusive jurisdiction of all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment, committed in the city, or city and county where such municipal court is held; and of all proceedings for violation of any ordinance of said city, both civil and criminal, and of all actions for the collection of

any license required by any ordinance of said city or city and county. In all cases in which the said municipal court has jurisdiction, it shall have the power to try and determine the same, convict or acquit, pass and enter judgment and carry such judgment into execution, as the case may require, according to law. In each city wherein a municipal court shall have been established, such courts shall also have jurisdiction over any misdemeanor committed in the county in which such city is located."

It will be noted that the last paragraph of this section specifically provides that, in each city where a municipal court shall have been established, such courts shall have jurisdiction over any misdemeanor committed in the county, while in the first part of said section it is provided that, wherever a municipal court is established, as provided by law, such court shall have exclusive jurisdiction of all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment, committed in the city, or in the city and county, where such municipal court is held.

By the use of the term "exclusive" in the first paragraph of this section, and by the use of the words "shall also have jurisdiction over any misdemeanor committed in the county," etc., it is apparent that such section intends to give to the municipal court jurisdiction as to any misdemeanor committed in the county, concurrent with the jurisdiction of justices of the peace, or other inferior courts, when the particular misdemeanor is one within their various jurisdictions; but it does not necessarily follow that a concurrent jurisdiction is retained in the superior court. In *re Luna*, 201 Cal. 405, 257 P. 76, the Supreme Court held, in effect, that the superior court of Los Angeles county, since the creation of the municipal court, had no jurisdiction whatever over any misdemeanor.

[2] We do not share the fears of counsel for respondents that the plan and purpose of the Juvenile Court Law will be frustrated or impeded by an interpretation of the law whereby the municipal court, in any county wherein such court exists, is given exclusive jurisdiction over misdemeanors committed in violation of section 21 of the Juvenile Court Law. Proceedings under that law (except those which constitute offenses by persons other than the wards of the court) are not of a criminal nature. *Matter of Damon Edwards* (Cal. App.) 278 P. 910, and cases there cited. It is our opinion that the jurisdiction and powers of the juvenile court, aside from prosecutions under said section 21, are not involved in this decision.

The petitioners, Leach and Huggins, are discharged from custody.

We concur: CONREY, P. J.; HOUSER, J.

HOUGLAND et al. v. ROTH BLUM PACKING CO. (Civ. 3809.)★

District Court of Appeal, Third District, California. June 26, 1929.

Rehearing Denied July 26, 1929. Hearing Denied by Supreme Court Aug. 22, 1929.

1. Sales ⇨81(2)—Where contract for purchase of sheep was silent regarding time of performance, law writes in reasonable time (Civ. Code, § 1657).

Where contract for purchase of sheep was silent as to time of performance, law writes into contract reasonable time for performance under Civ. Code, § 1657, providing that, if no time is specified for performance of an act required to be performed, a reasonable time is allowed.

2. Sales ⇨81(2)—In determining reasonable time for delivery of wethers sold, court should consider condition at time of contract and time usually required to fatten them and make delivery (Civ. Code, § 1657).

In determining what was reasonable time under Civ. Code, § 1657, for delivery of wethers contracted for, where no time for delivery was specified in purchase contract, court should consider their condition on date of sales contract and time ordinarily and usually required to enable sellers to fatten wethers and make delivery, and also kind of feed and care usually given to sheep in locality where contract was entered into.

3. Sales ⇨81(2) — Where purchase contract was silent regarding sellers' duties, law writes into contract obligation to take customary means to fatten sheep within reasonable time and tender delivery.

Where contract for purchase of sheep was silent as to any duties being imposed on sellers, law writes into contract obligation on part of sellers to take reasonable and customary means and methods to fatten sheep within reasonable time and tender delivery thereof to buyer.

4. Sales ⇨87(3)—Where purchase contract was made February 3, evidence did not show parties contemplated delivery of sheep March 15.

Where contract for purchase of sheep, not specifying time for delivery, was made February 3, 1925, evidence in action for breach of contract did not show that date of March 15, 1925, was contemplated by parties as time when performance should have been completed, and court properly rejected buyer's contention to that effect.

5. Sales ⇨81(2)—Reasonable time for delivery of sheep purchased was reasonable time necessary to fatten sheep and have them ready for market (Civ. Code, § 1657).

Reasonable time under Civ. Code, § 1657, for delivery of sheep under purchase contract not specifying time for performance, was reasonable time necessary to fatten sheep and have them ready for market, irrespective of fact that spring lambs usually came upon market on certain date.

6. Appeal and error ⇨1170(3)—Overruling demurrer to complaint not alleging performance of contract by plaintiff held not prejudicial, where issues were tried out as though allegations were contained in complaint (Const. art. 6, § 4½).

In action for breach of contract to purchase sheep, court's overruling demurrer to complaint not alleging performance on part of plaintiff held not prejudicial error under Const. art. 6, § 4½, where questions at issue were as fully tried out as though complaint had contained such allegations.

7. Sales ⇨384(7)—Where sheep refused by buyer were sold at auction within reasonable time, sellers were entitled to difference between price obtained and contract price (Civ. Code, §§ 3049, 3311, subd. 1).

Under Civ. Code, §§ 3049, 3311, subd. 1, where buyer refused to accept sheep when tendered and sellers resold sheep at auction within reasonable time, sellers were entitled to judgment against buyer equal to difference in price obtained and price contracted to be paid.

8. Sales ⇨383—Evidence did not show seller failed to exercise reasonable diligence in reselling sheep refused by buyer.

In action for breach of contract to purchase sheep, evidence held not to show that seller failed to exercise reasonable diligence to resell sheep so as to require reduction of his damages.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action for damages for breach of a contract to purchase sheep, by G. W. Hougland and another, copartners doing business under the firm name and style of the Valley Sheep Company, against the Roth Blum Packing Company, in which defendant filed a cross-complaint. From a judgment for plaintiffs, defendant appeals. Affirmed.

Leon E. Morris, of San Francisco, Atran & Sheets, of Colusa, and Barnett Sumski, of San Francisco, for appellant.

Alva A. King and Rutledge & Rutledge, all of Colusa, for respondents.

PLUMMER, J. The plaintiffs had judgment in the sum of \$3,531.76 for and on account of the alleged failure of the defendant to fulfill its contract for the purchase of certain sheep.

It appears from the record that on or about the 3d day of February, 1925, the plaintiffs and the defendant entered into a contract for the sale and purchase of sheep, which contract is in the following words and figures: "This is to certify that Valley Sheep Co. of Colusa, have this 3d day of Feb., 1925, bargained and sold to Roth Blum Packing Co. or order, the following described livestock, and do hereby guarantee the title thereto, viz.: 1,550 yearling wethers to receive as they get fat, price per pound 14 cents. Shrink drive of 9 miles. Delivery f. o. b. cars Colusa, take off the deposit of \$1.00 per head as de-

livered. Stock guaranteed to be fat and free from all disease. All cattle and sheep bought subject to Federal or State inspection. Received in part payment for above mentioned stock \$1,500." Said contract was made in duplicate, each party subscribing separate copies.

In pursuance of this contract it appears that on or about February 17, 1925, 126 head of the sheep referred to were delivered by the plaintiff to the defendant, accepted by the defendant, and paid for; that thereafter, and on or about the 18th of March, 1925, an additional delivery was made of said sheep to the number of 168 head; these deliveries were accepted and paid for by the defendant according to the contract price, an allowance being made of the sum of \$300 on account of the \$1,500 deposit made by the defendant to the plaintiff at the time of the entry into the contract, leaving a balance in the hands of the plaintiffs on account of the original deposit in the sum of \$1,200; thereafter, and on April 28, 1925, the plaintiffs notified the defendant that they were ready to deliver approximately 500 head more of said sheep; the defendant rejected the tender of said sheep, refusing to accept or pay therefor; on or about June 1, 1925, the plaintiffs tendered all of the balance of the wethers of said band of sheep; acceptance was refused by the defendant, and thereafter, and on or about the 14th day of July, 1925, the plaintiffs sold said sheep at auction, crediting the defendant with receipts of such sale, and also crediting the defendant with the value of the wool that had been sheared from the said band of sheep. No controversy is made over the value of the wool, the only question being as to whether tender of said sheep was made according to the terms of the contract. At the time of the last tender made by the plaintiffs to the defendant, the defendant, by its attorney, wrote to the plaintiffs as follows: (1) That performance was not made within the time contemplated by the parties or within the usual time for the fattening of sheep in your territory. (2) That the wethers were not fat and in a deliverable condition within the time contemplated by the parties. (3) That the said wethers are not now in a deliverable condition for the following reasons: (a) That the said wethers are not now fat; (b) that the said wethers are now shorn of their wool, which is contrary to the custom in these transactions, also to the understanding of the parties. (4) That by your conduct in shearing said wethers, you have put them in a condition which makes it impossible for you to perform according to the terms of the contract and the understanding of the parties. (5) That the defendant elects to treat your conduct in shearing the wethers as a repudiation of your obligations under the contract. (6) That the sale by you of said wool is taken by the defendant as a repudiation of your obligations under the contract.

(We have not followed the exact wording of these objections but have given their substance.) As stated above, no objection is urged on account of the shearing and sale of the wool, it being practically conceded that it was necessary to shear the sheep and sell the wool, and that the wool was sold for the best market price obtainable.

[1-4] The contract in this case is silent as to time of performance, and under such circumstances section 1657 of the Civil Code is controlling. That section reads, so far as applicable here, as follows: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed." This portion of the section was taken up and considered in 6 Cal. Juris, pp. 346 and 347, and the authorities there cited, showing that under a contract such as the one we are here considering, the law writes into it the idea of a reasonable time for performance. This reasonable time takes into consideration the condition of the objects or merchandise with which the parties are dealing. It also admits the testimony as to what is a reasonable time for deliverance, taking into consideration the subject of the contract and the condition of the merchandise for the sale and delivery of which the contract is made. In other words, this contract being silent as to time of performance, the law writes into it terms which require a reasonable performance, having in view the subject of the contract and the place and condition of the objects concerning which the contract was made. Thus, in determining what was a reasonable time for the delivery of the wethers constituting the subject of the contract between the parties to this action, a court would take into consideration their condition on the 3d day of February, 1925, and the time ordinarily and usually required to enable the plaintiffs to fatten the wethers and make delivery. The court would also take into consideration the kind of feed and care usually given to sheep in the locality where the contract was entered into. While the contract is silent as to any duties being imposed upon the sellers, the law would write into the contract the obligation on the part of the sellers to take the reasonable and customary means and methods to fatten the sheep within a reasonable time, and tender delivery thereof to the defendant. These principles are all supported by the authorities cited in 6 Cal. Juris. et seq., and need not be further stated herein. On the part of the appellant it is insisted that it was the understanding of the parties, at the time of entering into the contract, on February 3, 1925, that the wethers would be ready for delivery by March 15, 1925. This argument is based upon the fact that spring lambs are usually coming upon the market about March 15, or very shortly thereafter, and that when spring lambs come into the market, prices usually decline. This contention, however, is not supported by anything in

the record, other than the fact that we have stated, that when spring lambs are placed upon the market, prices usually decline. There is no testimony in the record upon which any such understanding can reasonably be predicated. The record shows that R. T. Carey, the agent of the defendant, inspected the sheep, the subject of the contract being considered, on or about February 3, 1925, and after inspecting the sheep, wrote out the contract. The testimony of this witness is to the effect that it would require from 60 to 70 days to fatten the sheep after the date of the contract. The record further shows that a second delivery of sheep was made and accepted on March 17, 1925. The testimony of the agent of the defendant being as we have just stated, the trial court, outside of the testimony of other witnesses who testified to the same effect, was justified in rejecting the contention of the appellants that the date of March 15 was contemplated by the parties as the time when performance should have been completed.

[5] The whole question as to what was a reasonable time was for the trial court to determine under the testimony submitted to it to establish what was a reasonable time. So far as the appellants were concerned, they seem to have relied simply upon the testimony as to when spring lambs would come upon the market, and that the reasonable time for the delivery of the sheep contracted for would be before the spring lambs were ready for market. This reasoning, of course, is untenable. The reasonable time, as applied to this contract and as applied to the sheep purchased, would be a reasonable time necessary to fatten the sheep constituting the subject of the contract, and have them ready for market, irrespective of spring lambs. The condition of the sheep purchased was known to the defendant on March 3, 1925. The manner of feeding sheep in that locality appears also to have been known. That the defendant may have desired delivery of the sheep before spring lambs came upon the market is an entirely different question. That subject is not in the contract.

So far as there is any testimony in the record on the subject, it is to the effect that the sheep covered by the contract were well fed and kept upon the best possible feed in the locality where the sheep were accustomed to range. Witnesses who were familiar with the range where the sheep were kept testified that it was a good range; that the feed consisted of burr clover, alfalfa, and other wild grass. The testimony of Mr. McCall, a witness called for the plaintiff, was to the effect that the sheep were at all times kept on good feed; that in the latter part of April, from 80 to 90 per cent. of the sheep were getting marketable, and on June 1, at least 95 per cent. were fit for market. The court in its findings found as follows: That cross-defendants (meaning plaintiffs) did not fail or neglect or refuse to

fatten said wethers or deliver the same to cross-complainant (meaning defendant) as provided in said contract. To explain the terms used in this finding we may here state that the defendant filed a cross-complaint seeking recovery of \$1,200, the balance of the \$1,500 paid to the plaintiffs on the date of the execution of the contract. This cross-complaint specifically set forth that the plaintiffs, being the cross-defendants named in the cross-complaint, had not fattened the sheep according to contract. The appellant introduced the testimony of a few witnesses to the effect that it was their understanding, when wethers were purchased at about the time of the execution of the contract in controversy, they would expect delivery to be made of the sheep prior to the time when spring lambs would come upon the market, but this, however, as we have stated, does not controvert the finding of the trial court that the plaintiff did what was necessary to fatten the sheep within the time specified in the contract, which we have said, necessarily must mean within a reasonable time. We understand that there was some testimony to the effect that a somewhat longer time would be necessary than that stated by the witness Carey, that green feed was necessary to fatten the sheep, and that they would not fatten upon dry feed.

[6] We will now consider the appellant's contention that its demurrer to the plaintiffs' complaint should have been sustained. The complaint, it is true, does not allege that the plaintiffs complied with their terms of the contract, nor does it allege that the plaintiffs tendered delivery within a reasonable time. These are necessary matters to appear in the case, and should be alleged and proved. This failure of the complaint to contain allegations as to performance on the part of the plaintiffs was raised by the defendant's demurrer, and the defendant's demurrer should have been sustained with leave to the plaintiffs to amend. This, however, does not necessitate a reversal of the judgment. The question as to whether the sheep were kept upon proper feed; as to whether the plaintiffs neglected to fatten the sheep, etc., as we have just stated; and what the plaintiffs did with the sheep; and the time when they were fattened and tendered—were issues which were tried out as fully and completely as though the allegations to which we have referred had been contained in the plaintiffs' complaint. Under such circumstances the error of the court in failing to sustain the defendant's demurrer is cured by section 4½ of article 6 of the Constitution, where it is specified that error as to a matter of pleading is not reversible unless it has led to a miscarriage of justice.

As the questions at issue were as fully tried out as though the complaint had contained the allegations mentioned, we do not well perceive how the lack of the allegations in

any manner resulted in prejudice to the defendant. While the trial court does not, in as clear and precise terms as might be desired, find that the plaintiffs complied with their terms of the contract, such fact is included within the language used, because if the plaintiffs did not fail or refuse or neglect to fatten the sheep and to deliver the same as provided in the contract, they necessarily must have fattened and tendered delivery of the sheep according to the terms of the contract, which would mean within a reasonable time after the date of the execution of the contract.

We do not deem it necessary to review the authorities cited by the appellant as to the manner in which a contract, in which time of performance is unmentioned, should be construed; for the reason that we find that all the authorities cited sustain just what we have stated herein, that the law writes into such a contract the requirement of performance within a reasonable time, but that reasonable time is to be determined by the court in view of the condition of the property at the time of entering into the contract and what is necessary to be done to place the article contracted for in condition fit for delivery. There is nothing in the record to show that such reasonable time should be limited to a period preceding the date when spring lambs should come upon the market. If such had been the contemplation of the buyer, the insertion of such a term in the contract would have been a matter of but little effort. It is not there, as we have said, and the court is not limited by such testimony in the determination of what is a reasonable time to comply with the terms of the contract in this case, even though the court should take into consideration all the conditions and customs of the trade. The sheep in this case were inspected by the buyer, and the defendant had knowledge of what would be required to place them in condition for the market.

[7] It is next contended on the part of the appellant that the damages allowed were and are excessive. In this case section 3049 of the Civil Code governs. The property was resold at auction, and if sold within a reasonable time, the plaintiffs were entitled to judgment against the defendant equal to the difference in the price obtained therefor and the price contracted to be paid. Section 3311 of the Civil Code, in subdivision 1 refers to section 3049, and specifies the amount which the seller is entitled to recover, which is as we have stated above.

[8] It is further contended that the plaintiffs failed and neglected to make sale of the sheep within a reasonable time, and in this behalf attention is called to the testimony of the plaintiffs that they made no effort to sell until the property was sold at public auction, and that some little time elapsed in giving notice of the public sale. Whether this

delay did or did not result in prejudice to the appellant does not appear. The testimony set out in appellant's brief in support of this claim is not correctly apprehended, as appears from the following taken from the transcript:

"Q. Do you know, as a matter of fact, what market prices are around July 4th? A. Around 8 cents.

"Q. And these lambs brought around how much in July? A. $7\frac{1}{2}$ cents."

This testimony is relied upon by appellant to support its contention that the price declined from 8 cents to $7\frac{1}{2}$ cents at the particular time when the lambs mentioned in the contract were being disposed of. In making this argument the word "prices" is changed to the word "price," and the word "are" is changed to the word "was." This inadvertent change in the testimony undoubtedly led to the incorrect conclusion advanced by appellant. A reading of the testimony shows that it was a general question and a general inquiry as to the fact that the price of lambs ordinarily declined at that season of the year. This appears from the question and answer preceding what we have stated, to wit:

"Q. Is there anything in the general trend of prices, or can you point to the trend of prices in any year in which the lamb market goes up from June to July? A. I don't know of any particular year but the market seems to be at the bottom a lot of times, a falling market, and it finally comes back a little. After the scare is over people holding that stuff will push it on the market."

The law is well settled that if the seller fails to exercise reasonable diligence, the price he might have obtained may be shown to reduce his damages. 8 Cal. Jur. pp. 786, 787. There is no such showing in this case, and therefore the matters advanced by appellant are purely matters of speculation. It is likewise argued by appellant that, during the time taken by the plaintiff to make resale of the lambs, they increased in weight. Whether this is true or not true does not appear from the testimony. There is some testimony to the effect that between the date of sale and the date when the lambs were weighed there was practically no increase in weight. By reason of the fact that the defendant failed to accept delivery of the lambs at the time when they were ready for delivery, and as found by the trial court, any slight changes in the weight of the sheep would be due to the failure and refusal of the defendant to fulfill its contract, and unless such change was shown to be due to the neglect and failure of the sellers, so as to materially affect the rights of the defaulting buyer, we do not think that the conclusion of the trial court should be reversed.

In addition to the finding of the trial court which we have particularly pointed out, the court also found that all the allegations of the plaintiffs' complaint are true and correct.

While this form of making findings has been upheld, it cannot be approved as the best method of aiding an appellate court when called upon to review questions decided in the court below.

It follows from what we have said that the trial court was correct in denying the defendant any relief by reason of its cross-complaint.

The judgment is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

99 Cal. App. 686

WM. J. BETTINGEN LUMBER CO. v. KERRIN et al. (Civ. 6722.)

District Court of Appeal, First District, Division 1, California. July 2, 1929.

1. Mechanics' liens $\Rightarrow$ 246, 304(1)—Lien proceeding is not exclusive, and materialman may bring personal action, or in lien proceeding recover personal judgment and maintain attachment against purchaser (Code Civ. Proc. § 1197).

Under Code Civ. Proc. § 1197, right to mechanic's lien is not exclusive remedy, but personal action against one purchasing materials for erection of a building may be maintained without reference to such right, or, in action to foreclose the lien, purchaser may be joined as a defendant and a personal judgment recovered against him, and trial court erred in dissolving attachment in action to foreclose mechanic's lien on ground that remedy by attachment was not available therein.

2. Mechanics' liens $\Rightarrow$ 304(1)—Complaint, alleging defendant purchased material and agreed to pay its reasonable value stated, held sufficient to authorize personal judgment.

In materialman's action to foreclose mechanic's lien, complaint alleging that material was purchased by defendant who agreed to pay its reasonable value, which was alleged, and praying judgment against defendant for that sum, held sufficient statement of facts to warrant personal judgment against defendant.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Wm. J. Bettingen Lumber Company against Gerald E. Kerrin and others to foreclose a mechanic's lien. From an order dissolving an attachment, plaintiff appeals. Reversed.

Carter & Webster, of Pasadena, for appellant.

Harry M. Ticknor and Roland Maxwell, both of Pasadena, Robt. J. Gardner, of Los Angeles, and Hahn & Hahn, of Pasadena, for respondents.

PER CURIAM. The above action was brought by plaintiff corporation to foreclose a

mechanic's lien upon certain real property of which Gerald E. and Ethel V. Kerrin are the alleged owners, and to recover a personal judgment against Gerald E. Kerrin, who will be hereinafter referred to as the defendant.

The complaint alleged that the defendant, prior to April 15, 1926, began the erection of a dwelling house and garage upon the property, and that between June 29, 1926, and December 14, 1926, the plaintiff sold to him certain building material to be used and which was used in the construction of the buildings mentioned; that the defendant promised to pay the reasonable value thereof, which was \$1,637.56; and that of this amount \$729.87, and no more, had been paid. The complaint contained further allegations to the effect that a claim of lien for the amount unpaid was filed in accordance with the statute, and that the property was necessary for the convenient use and occupation of the buildings for the erection of which the materials were furnished. Other defendants, who were alleged to have or claim an interest in the property, were joined, and the complaint concluded with the following prayer:

"Wherefore, plaintiff prays judgment against the defendant Gerald E. Kerrin for the sum of nine hundred seven and 69/100 dollars, and the cost of recording and verifying said claim of lien, to-wit: the sum of \$1.40, together with interest on said sums at the rate of seven per cent per annum from November 22nd, 1926, the date of recordation of said claim of lien, and for costs of this action; and that said sums be adjudged a lien upon the real property and said buildings thereon hereinbefore described, and upon the interest or interests of defendants and each and all of them therein.

"That the said lands and premises and appurtenances thereunto belonging be adjudged and decreed to be sold by the sheriff of Los Angeles county according to law and the practice of this court, and that the proceeds of said sale be applied as follows: To the payment of costs of sale and any judgment that may be recovered by plaintiff herein, including the cost of verifying and recording said claim of lien as aforesaid; and that it may have execution against said defendant Gerald E. Kerrin for any and all deficiency which may remain after applying all the proceeds of said sale properly applicable to the satisfaction of said judgment.

"That plaintiff may be a purchaser at such sale, and that the sheriff execute a deed to the purchaser, and said purchaser be let into possession of said premises on production of the sheriff's deed therefor; and for such other and further relief as to this court may seem meet and proper."

The plaintiff, following the filing of its complaint, filed an undertaking on attachment, with an affidavit in the usual form, al-

leging the defendant to be indebted upon the contract as stated in the complaint, and on February 17, 1927, the clerk of the court caused to be issued a writ of attachment directed to the sheriff of Los Angeles county. Pursuant thereto and according to instructions, this officer levied upon the right, title, and interest of said defendant in several parcels of real property situated in that county other than that upon which the mechanic's lien was filed. Subsequently the defendant and Ethel V. Kerrin, upon notice to the plaintiff, moved to dissolve the attachment upon the ground stated in the notice, namely, "that said motion will be made upon the ground that said action is an action solely for the foreclosure of a mechanic's lien and the relief incidental thereto, and constitutes an election to pursue the remedies incidental thereto, to the exclusion of those which might be available in a personal action, and by reason of the said facts the remedy of attachment is not available therein." After a hearing the motion was granted, and from the order the plaintiff appealed, claiming that the attachment was properly issued and its dissolution erroneous.

[1] Section 1197 of the Code of Civil Procedure provides as follows: "Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover said debt against the person liable therefor; and the person bringing such personal action may take out an attachment therefor, notwithstanding his lien, and in his affidavit to procure an attachment need not state that his demand is not secured by a lien; but the judgment, if any, obtained by the plaintiff in such personal action shall not be construed to impair or merge any lien held by said plaintiff under this chapter; provided, only, that any money collected on said judgment shall be credited on the amount of such lien in any action brought to enforce the same, in accordance with the provisions of this chapter."

Under this section the right to a lien is not the exclusive remedy. A personal action against the person who purchased materials furnished for the erection of a building may be maintained without reference to such right, or, in an action to foreclose the lien the purchaser may be joined as a defendant and a personal judgment recovered against him (*Fresno Planing Mill Co. v. Manning*, 20 Cal. App. 766, 130 P. 196), whether he be the contractor (*Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 P. 419) or the owner (*Faucett v. Riveroll* [Cal. Sup.] 264 P. 1098). Prior to the adoption of the section it was the rule, as held in *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507, that one having secured a mechanic's lien under the statute did not forfeit or waive it by causing an attachment

to be issued and levied upon the property belonging to the debtor to secure the same demand. The court in that case also declared that the two remedies were cumulative and might be pursued at the same time.

Reference was made to the above case in *Martin v. Becker*, 169 Cal. 301, 146 P. 665, Ann. Cas. 1916D, 171, wherein the court said: "* * * It has been held that the right to enforce a mechanic's lien was not lost by reason of the fact that the plaintiff, by levying an attachment upon other property, thereby obtained additional security." Moreover, in *Brennan v. Swasey*, supra, it was intimated that in case of an attempt to pursue the two remedies by separate actions the party might be put to an election; and it was with reference to expressions in that opinion that the court in *Hickman v. Freiermuth*, 21 Cal. App. 629, 635, 132 P. 772, 775, said: "It was probably in view of this tentative suggestion that said section 1197 was afterward enacted." We think, as was suggested in the case last cited, that it was the purpose of the enactment to remove any doubt which the opinion in *Brennan v. Swasey* might have created respecting the right to pursue the above remedies in separate actions without being put to an election, and not to compel that course to be followed by abrogating a rule previously recognized by law. This rule has been followed in other jurisdictions where, as in California (1 Cal. Jur., Actions, § 39, p. 358), both legal and equitable relief may be granted in the same action. The case of *Hatcher v. Hendrie, etc., Co. (C. C. A.)* 133 F. 267, 271, was commenced in the courts of Colorado and subsequently removed to the federal court. The original action was one to enforce a mechanic's lien and also to recover the contractual debt which it secured. The laws of Colorado expressly authorized attachments in actions on contract, and the statute providing for the enforcement of mechanics' liens declared that "No remedy given in this act shall be construed as preventing any person from enforcing any other remedy which he otherwise would have had, except as otherwise herein provided." *Mills' Ann. St. Colo.* 1891, § 2897. In sustaining the right to pursue both remedies in the same action, the court said: "The rule is general, in the absence of some provision to the contrary, that the remedy upon a mechanic's lien and the remedy upon the debt are distinct and concurrent, and may be pursued at the same time or in succession. [*West v. Flemming*, 18 Ill. 248, 66 Am. Dec. 539; *Marean v. Stanley*, 5 Colo. App. 335, 38 P. 395; *Phillips, Mechanics' Liens* (3d Ed.) § 311.] * * * In the courts of those states where the prescribed procedure, like that in Colorado (*Mills' Annotated Code*, §§ 1, 70), permits a blending together of proceedings at law and in equity, both remedies * * * may be pursued in the same action."

It frequently happens that the property subject to liens proves to be insufficient to satisfy the claims filed, and the remedy by foreclosure being only ancillary to the main cause of action, which is the debt itself, no reason appears why, as against an owner personally liable, a claimant in an action to foreclose his lien should not be permitted to obtain by attachment additional security for the payment of a possible deficiency.

[2] It is claimed by the defendant that while the complaint states a cause of action for the foreclosure of a mechanic's lien, the allegations are insufficient to constitute a cause of action upon a personal obligation to pay the value of the materials, and that the remedy by attachment was, consequently, not available in this instance. There is no merit in this contention, as the complaint alleges that the material used and to be used was purchased by the defendant, who agreed to pay its reasonable value, which is alleged, and the complaint prays judgment against the defendant for that sum. This was a sufficient statement of facts to warrant the entry of a personal judgment against the defendant *Faucett v. Riveroll*, supra.

The record discloses nothing which, in our opinion, justified a dissolution of the attachment, and the order appealed from is accordingly reversed.

YAKOBIAN v. JOHNSON et al.*
(Civ. 6759.)

District Court of Appeal, First District, Division 1, California. June 22, 1929.

Rehearing Granted July 19, 1929.

1. Vendor and purchaser ⇨194—Grape crop grown by vendee held "fructus industriales," and vendor's interest therein after declaring forfeiture depended on land contract provisions.

Crop of grapes grown by vendee of land held "fructus industriales," and vendor's interest therein on his election to terminate and forfeit vendee's rights under land contract, and who was not in possession until after crops were marketed, depended on provisions of land contract.

2. Vendor and purchaser ⇨194—As respects crops, vendee in default continuing in possession after vendor declared forfeiture was "adverse claimant."

As respects crops, purchaser in default under executory contract for purchase of realty, who continued in possession after vendor elected to terminate contract and declared forfeiture of vendee's rights thereunder, became "adverse claimant," and all privity between him and vendor ceased.

3. Receivers ⇨21—Vendor and purchaser ⇨194—Vendor declaring forfeiture and suing to foreclose vendee's rights held not entitled to crop nor to receiver.

Vendor of land, who after purchaser's default elected to declare forfeiture of purchaser's rights under contract, notwithstanding which purchaser remained in possession, could not thereafter assert any right to crop which rested on provisions of the contract, and in his action to foreclose vendee's rights no receiver could be appointed; vendor's remedy consisting in recovery of mesne profits.

4. Chattel mortgages ⇨227—Vendor receiving proceeds from sale of crops by receiver held required to account to crop mortgagee for latter's share.

Where vendor elected to declare forfeiture for vendee's default and sued to foreclose vendee's rights under land contract and for possession of land, he received proceeds from receiver's sale of crops subject to lien of crop mortgage on vendee's half interest in crops to which crop mortgagee was in equity and good conscience entitled, and which mortgagee could therefore recover.

5. Chattel mortgages ⇨227—As respects right to proceeds lien of crop mortgage was not extinguished by removal of crop and sale thereof by receiver.

As respects right to proceeds of crops, where receiver appointed in vendor's action to foreclose vendee's rights under land contract sold crops and paid net proceeds to vendor, held, that no reasonable ground could exist for claim that vendee's crop mortgagee consented to receiver's acts, and vendor's contention that crop mortgage lien was prima facie extinguished by removal of crop could not therefore be sustained.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Serop Yakobian against H. G. Johnson and others. From the judgment, named defendant appeals. Affirmed.

Sherwood Green, of Berkeley, and W. E. Simpson, of Fresno, for appellant.

Gallaher & Jertberg and K. Kuyumjian, all of Fresno, for respondent.

PER CURIAM. An appeal by defendant H. G. Johnson from a judgment in the sum of \$2,616.16 recovered against him by plaintiff, Serop Yakobian.

Plaintiff's complaint stated two causes of action. In the first count it was alleged that the defendant converted to his own use certain crops of grapes on which the plaintiff held a crop mortgage securing the payment of a note in the sum of \$2,500. The second count was for money had and received for the use and benefit of the plaintiff.

The facts were as follows: Some time previous to the year 1924, defendant agreed in writing to sell the land on which the crops

were grown to one Papazian, reserving one-half of the crops to be produced thereon as security for the payment of installments of the balance of the purchase price. Subsequently, on January 4, 1924, Papazian mortgaged to the plaintiff one-half of the crops to be produced during the years 1924 and 1925 to secure payment of the note mentioned which by its terms was payable with interest on or before October 1, 1924. During the crop season of 1924 Papazian sold a portion of the crops and received therefor amounts aggregating the sum of \$1,713.67. Thereafter he defaulted in the performance of his contract with the defendant. On September 4, 1924, the latter instituted an action to terminate the vendee's rights thereunder and for the possession of the land. Judgment in the action was entered on March 7, 1925, following which defendant went into possession. Upon the filing of that action the court on the application of defendant Johnson appointed a receiver, who took possession of the crops growing on the property. He proceeded to market the same, and received therefor a total of \$4,411.64. After deducting the expenses incurred in marketing the crops and his own fees, he paid the sum of \$600.85 to defendant Johnson, and expended for the latter's benefit the following: \$81.65 for insurance on the buildings on the property; \$368.21 for taxes; and \$2,280 in payment of the principal and interest of a mortgage executed upon the land by the defendant—the total amount received by the latter directly or indirectly being \$3,330.71.

The court entered judgment in favor of the plaintiff for \$2,616.66, the amount of the chattel mortgage and accrued interest, from which the appeal was taken.

[1-3] Following the execution of his contract with the defendant, the vendee went into possession and, so far as appears from the record, so remained until the entry in 1925 of the judgment terminating his rights. The crops in controversy, which were fructus industriales (*Vulicevich v. Skinner*, 77 Cal. 239, 19 P. 424; *Hovsepan v. Eskender*, 69 Cal. App. 379, 231 P. 364), were not in existence when the contract was executed, and the interest of the vendor therein, who was not in possession until after the same were marketed, arose from and depended upon the provisions of the contract. Upon his election to terminate and declare forfeited the rights of the vendee thereunder the latter, notwithstanding, remained in possession, and thereupon became an adverse claimant, and all privity between him and the vendor ceased. *Cal. Delta Farms, Inc., v. Chinese, etc., Farms, Inc.* (Cal. Sup.) 269 P. 443; *Hovsepan v. Eskender*, supra. Thereafter the

vendor could assert no right to the crop, which rested upon the provisions of the contract (*Glassell v. Coleman*, 94 Cal. 260, 29 P. 508; *Dishian v. Kishishian*, 64 Cal. App. 440, 221 P. 669; *Hovsepan v. Eskender*, supra); and in his action to foreclose the vendee's rights no receiver could legally be appointed (*Cal. Delta Farms, Inc., v. Chinese, etc., Farms, Inc.*, supra), his remedy consisting in the recovery of the mesne profits (*Johnston v. Fish*, 105 Cal. 420, 38 P. 979, 45 Am. St. Rep. 53; *Rector v. Lewis*, 46 Cal. App. 168, 188 P. 1018; note 39, A. L. R. 971).

[4] Appellant contends that the receiver was not his agent, but an officer of the court for whose acts he was not responsible. However this may be, appellant received the proceeds from crops subject to the lien of plaintiff's mortgage, to which the latter in equity and good conscience was entitled. Under such circumstances the money may be recovered. *Gray v. Huffaker*, 176 Cal. 516, 169 P. 1038; *Fontaine v. Lacassie*, 36 Cal. App. 175, 171 P. 812. Moreover, the receiver held the property subject to the lien of the mortgage (*Von Roun v. Superior Court of San Francisco*, 58 Cal. 358; *Bories v. Union Building & Loan Assn.*, 141 Cal. 74, 74 P. 552), and the proceeds having been applied to the benefit of the defendant he was to the amount of the mortgage obligated to repay the same to the plaintiff (*Crosby v. Fresno Fruit Growers' Co.*, 30 Cal. App. 308, 158 P. 1070).

[5] Appellant further contends that the lien of the mortgage was prima facie extinguished by the removal of the crop, and that in order to recover it was incumbent upon the plaintiff to show that the removal was tortious, citing *Ramsey v. Cal. Packing Corporation*, 51 Cal. App. 517, 201 P. 481, and *Valley Bank v. Hillside Packing Co.* (Cal. App.) 267 P. 746. In each of the cases cited a mortgaged crop was purchased by the defendant after the lien of the mortgage had prima facie been extinguished by the removal of the crop from the land by the mortgagor. It was held to be incumbent upon the mortgagee, if he would still enjoy the benefit of his mortgage security, to meet such prima facie case by showing that the removal was without his consent. In view of the facts shown in the present case, no reasonable ground could exist for a claim that the plaintiff consented to the acts of the receiver, and that portion of the crop removed by the vendee is not involved in the action. Moreover, unlike the facts in the above cases, the defendant was not a purchaser for value or otherwise, and stood in no better position than the receiver.

We find no merit in the appeal, and the judgment is accordingly affirmed.

99 Cal. App. 663

SHERWOOD v. GREATER BERKELEY LAND CO. (Civ. 6821.)

District Court of Appeal, First District, Division 2, California. June 29, 1929.

1. Appeal and error ☞1040(10)—Overruling demurrer to complaint is not considered prejudicial error, unless demurring party was misled and cause was not fairly tried on merits.

Where demurrer to complaint on ground of insufficiency of facts was overruled, ruling will not be held prejudicial error, unless appellate court is satisfied that demurring party was misled by alleged defects in pleading and cause was not fairly tried upon merits.

2. Specific performance ☞101—Purchaser tendering balance due after vendor had, accepted monthly installments at irregular intervals without protest, was entitled to specific performance.

Where purchaser paid monthly installments at irregular intervals and installments were accepted by vendor without protest and subsequently a sufficient tender of amount due under contract was made and conveyance demanded and refused, purchaser was entitled to specific performance, since, where vendor has waived right to claim forfeiture because of default in time of payment until after all installments are due, condition cannot be revived except by reasonable notice.

3. Evidence ☞441(8)—Conversation between purchaser and vendor's agent, regarding agreement that purchaser's interest should be security for another contract, held incompetent in action for specific performance (Code Civ. Proc. § 1856).

In action for specific performance, where no question of fraud, ambiguity, or mistake was involved, conversation between purchaser and vendor's agent prior to execution of second contract, wherein agent claimed purchaser agreed that her interest under first contract should be security for second contract, was incompetent under Code Civ. Proc. § 1856, providing that when terms of agreement have been reduced to writing by parties it is to be considered as containing all those terms.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by S. Caroline Sherwood against the Greater Berkeley Land Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. D. Manning, of Oakland, for appellant.
Will S. Robenson, of Richmond, and Cyrus B. King, for respondent.

NOURSE, J. Plaintiff sued for the specific performance of a written contract for the sale of real property. The cause was tried before the court, sitting without a jury, and resulted in a judgment for plaintiff, from which the defendant has appealed upon a bill of exceptions.

The complaint alleged the execution of the contract wherein the defendant agreed to sell certain lots of land to the plaintiff for the sum of \$2,200. The contract was set out in *hæc verba* as an exhibit to the complaint. It was further pleaded that the purchase price named was fair and adequate, and that, on July 30, 1927, the plaintiff tendered to the defendant the sum of \$356.89, which was the full amount due on account of the purchase price, interest, and other charges. At the same time demand for a conveyance was made upon the defendant and refused.

The defendant demurred to the complaint both generally and specially on the ground that it did not appear that plaintiff had performed the contract according to its terms or that the contract had matured on July 30, 1927, or at the commencement of the action. The demurrer was overruled, and the defendant answered setting up the issue that plaintiff failed to perform in making the payments at the times specified and was in default at the time of the tender.

[1] It is now argued that the trial court erred in overruling the demurrer and in overruling defendant's objection to the reception of testimony on the ground that the complaint did not state sufficient facts. The objection to the complaint is that it failed to allege the very facts pleaded in defendant's answer—the issue upon which was fully and fairly tried. Whatever may be our view upon the pleadings, we would not hold the ruling of the trial court prejudicial error unless we were satisfied that the demurring party was misled by the alleged defects in the pleading and the cause was not fairly tried on the merits. *Stein v. United Railroads*, 159 Cal. 368, 370, 113 P. 663; *Tietke v. Forrest*, 64 Cal. App. 364, 367, 221 P. 681.

[2] The undisputed evidence is that plaintiff paid her monthly installments at irregular intervals, and that these were accepted by defendant without protest; that a sufficient tender of the balance due under the contract was made on July 30, 1927, and refused by the defendant. Having found these facts true, the trial court directed a conveyance to the plaintiff as prayed. On this issue the defendant offered no testimony other than to show that plaintiff paid no installments under her contract between December, 1926, and the date of the tender. On the merits of the case plaintiff was entitled to judgment under the well-settled rule of *Boone v. Templeman*, 158 Cal. 290, 297, 110 P. 947, 139 Am. St. Rep. 126; *Stevinson v. Joy*, 164 Cal. 279, 285, 128 P. 751; *Hoppin v. Munsey*, 185 Cal. 678, 688, 198 P. 398; and other cases holding that, where the vendor has waived the right to claim a forfeiture because of default in time of payment until after all installments are due, the condition cannot be revived except by reasonable notice to the vendee.

[3] As a special defense the appellant pleaded a second contract executed on February 7, 1925, between appellant and respondent and respondent's son for the purchase of another tract of land. It was claimed that, prior to the execution of this second contract, respondent orally agreed with appellant that her interest in the land in suit should stand as security for the performance of the second contract until specified payments had been made under the latter. Evidence was received to prove a conversation between respondent and appellant's agent held prior to the execution of the second contract wherein the agent claimed that respondent agreed to his suggestion that her interest in the land in suit should be security for this purpose. The second contract was then received in evidence, and from this it appeared that no mention was made of this plan of security. Respondent then moved to strike the evidence on the ground that it was incompetent and the motion was granted.

The incompetency of this evidence is manifest under the statutory rule approved by all the decisions and found in section 1856 of the Code of Civil Procedure that "when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms." Here the written contract was prepared by the appellant and signed by the appellant before it was signed by respondent. There is no question of mistake, ambiguity, or fraud involved, and none of the exceptions to the parol evidence rule is in any wise applicable.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

99 Cal. App. 671

LAURITSEN v. GOLDSMITH et al.★
(Civ. 6816.)

District Court of Appeal, First District, Division 2, California. June 29, 1929.

Rehearing Denied July 27, 1929. Hearing Denied by Supreme Court Aug. 26, 1929.

1. Executors and administrators §210—Claim based primarily on broken promise to compensate by will may also be sufficient to support cause of action on quantum meruit.

Claim based primarily on broken promise to compensate by will for services rendered may also be sufficient to support cause of action on quantum meruit, where facts set forth are such that law will imply from them promise to compensate at termination of services.

2. Executors and administrators §210—Law implies promise to compensate for services at termination thereof, where promise to compensate by will has not been fulfilled.

The law will imply contract to compensate for services at termination thereof where ex-

press promise to compensate by will has failed of fulfillment.

3. Limitation of actions §49(2)—Where law implies promise to pay at termination of services rendered deceased, limitations does not run as to any part of period of continued services until decedent's death.

Where law implies promise to pay for services rendered deceased at termination of services, cause of action for such services does not arise until day of decedent's death, and statute of limitations does not bar any part of period of continued services.

4. Appeal and error §878(3)—Executors in action on rejected claim could not question evidence rulings until after adverse judgment.

In action on rejected claim against estate of decedent, executors cannot, until judgment is rendered against them, raise questions of admissibility of testimony of plaintiff's wife and rejection of testimony to show services were gratuitous.

5. New trial §168—In action on rejected claim against estate, defendants held not entitled to new trial after reversal of judgment for them notwithstanding verdict for plaintiff (Code Civ. Proc. § 629).

Upon reversal of judgment for defendants in action on rejected claim against estate of decedent notwithstanding verdict for plaintiff, on motion made in alternative under Code Civ. Proc. § 629, defendants held not entitled to new trial, since statute does not give appellate court power, which trial court had, to pass on reserved motion for new trial, and no reason appeared why appellate court should exercise its power as such to grant new trial.

Appeal from Superior Court, Marin County; H. D. Burroughs, Judge.

Action on a rejected claim against an estate, brought by Albert C. Lauritsen against John N. Goldsmith and another, as executors of the last will and testament of Laura Goldsmith Patterson, deceased. Judgment for defendants notwithstanding verdict for plaintiff, and plaintiff appeals. Reversed, with directions.

Hearing denied by Supreme Court; RICHARDS, J., voting for a hearing.

Clarence N. Riggins, of Napa, for appellant. Pillsbury, Madison & Suto, of San Francisco (Alfred Suto and Eugene M. Prince, both of San Francisco, of counsel), for respondents.

KOFORD, P. J. Plaintiff sued upon a rejected claim presented against the estate of the above-named decedent as follows: "To services rendered Laura Goldsmith Patterson and room, board and care furnished and supplied her at claimant's home in Napa County, at frequent intervals and whenever desired by Laura Goldsmith Patterson from 1919 to the time of said Laura Goldsmith Patterson's death, and eggs and poultry furnished and supplied to her constantly by the claimant during said period, with the understanding

and agreement between Laura Goldsmith Patterson and claimant that she would compensate him for said services and things so furnished and supplied to the amount of the reasonable value thereof upon the termination of said services and the furnishing and supplying of said things at or before her death, \$4,000.00."

The allegations of plaintiff's complaint followed closely the wording of the claim. Trial was by jury resulting in a verdict for plaintiff. Defendants' motion for a directed verdict having been denied, after the verdict was rendered, defendants moved for judgment notwithstanding the verdict under Code of Civil Procedure, § 629. This motion was granted upon the ground of variance between the claim and the proof, and judgment was entered for defendants. The trial court held that inasmuch as the claim was for reasonable value of services and supplies rendered the deceased and the proof was that the services were performed in expectation of and in return for the promise of a legacy, this constituted a fatal variance between claim and proof under the authority of *Etchas v. Orena*, 127 Cal. 588, 60 P. 45.

Plaintiff appeals from the judgment so entered. He distinguishes the instant case from *Etchas v. Orena*, supra, upon the ground that here the claim alleged a continuing promise to compensate at death; that such continuing promise served mainly to avoid the statute of limitations; that he is not suing for the reasonable value of the services as the measure of damage for the breach of an oral contract to make a bequest, but because the law implies an agreement to pay for such services under the facts set out in the claim; and that the evidence of the decedent's promise to make a bequest was only offered to show an agreement to compensate on the termination of the services at or before death or to negative the possible inference that such services were rendered gratuitously.

In *Etchas v. Orena*, supra, the claim presented against the estate was an itemized statement of month by month services rendered deceased at her request. The complaint was in the greater part based upon quantum meruit, but it also alleged that the deceased promised to pay plaintiff the reasonable value of services by making provision in her will in a sum equal to the value of the services. The defense was the statute of limitations. Judgment was for plaintiff notwithstanding the defense of the statute of limitations. This was apparently upon the theory that the decedent promised to pay for the services at the termination thereof, to wit, upon her death. Upon appeal it was held that, inasmuch as the claim filed against the estate made no reference to the decedent's promise to make payment for the services in her will, plaintiff could not rely upon such promise, and therefore the plaintiff's claim

was barred and the judgment was reversed. It is said in the decision that, if plaintiff could maintain an action for breach of contract to pay for services continuing for a period of over ten years, it would be necessary to first present a claim against the estate based upon breach of such contract; that inasmuch as the claim presented was for services by the month and no contract was set forth in the claim as to when the wages were to be paid, the presumption was that the hiring was from month to month. It is also pointed out that the executor could not allow the claim as presented, since the greater part of it appears on its face to be barred by the statute of limitations. We understand the doctrine of this case, so far as applicable to the present appeal, is that in order to escape the bar of the statute of limitations by relying upon an express promise to compensate the claimant at the termination of the services, it is necessary that the claim filed against the decedent's estate set out such promise in order that the executor or administrator of the decedent's estate may intelligently approve or reject such claim.

In *Giles v. Reed*, 44 Cal. App. 367, 186 P. 614, the claim was for services rendered decedent under a contract by which decedent agreed in consideration of the services to be rendered to make a will devising claimant certain property. The complaint follows the claim, alleges the rendition of the services, and the failure of the decedent to make the will as agreed, and also, departing from the claim which was strictly confined to damages for breach of said express contract, the complaint alleged the sum claimed was likewise the reasonable value of the services rendered. The trial court sustained objections to testimony offered showing oral promises of the decedent to make such a bequest because such contract was invalid under the statute of frauds. The decision also holds that the trial court did not err in sustaining objections to testimony tending to prove the reasonable value of the services rendered because such a cause of action was not embraced within the claim filed against the estate. This case is but the converse of *Etchas v. Orena*, supra. The former holds that a cause of action for damages for breach of express contract cannot be based upon a claim for the reasonable value of services. The latter holds that a cause of action for the reasonable value of services cannot be based upon a claim which declares for damages for breach of express contract.

[1] Apparently the claim filed in the instant case avoided the consequences of relying on the ordinary contract implied by law, as was done in the *Etchas v. Orena* Case, and at the same time avoided relying entirely upon the express promise to compensate by will, as did the claim in *Giles v. Reed*. The claim here is evidently framed to steer a

middle course between these two cases and follows closely the language of the findings of *Mayborne v. Citizens' T. & S. Bank*, 46 Cal. App. 178, at page 181, 188 P. 1034. Those findings were held to support a judgment upon a quantum meruit, and it should follow that a claim setting out substantially similar facts should be a sufficient claim upon quantum meruit. The transcript also shows the claim in that case to have been quite similar to that filed in the instant case.

Several decisions hold that a claim based primarily upon a broken promise to compensate by will for services rendered is also sufficient to support a cause of action upon quantum meruit where the facts set forth are such that the law will imply from them a promise to compensate at the termination of the services. *Zellner v. Wassman*, 184 Cal. 80, at page 88, 193 P. 84; *Ruble v. Richardson*, 188 Cal. 150, at page 155, 204 P. 572; *Warder v. Hutchison*, 69 Cal. App. 291, at page 296, 231 P. 563.

[2] In this case respondents claim that the record of testimony does not show any express contract to compensate for the services at the termination thereof, but only an express contract to compensate by will. It is true that the testimony does not show any direct promise to pay in any other way than by will. But it has been frequently held that the law will imply such a promise where the express promise to compensate by will has failed of fulfillment. *Estate of Rohrer*, 160 Cal. 574, at page 576, 117 P. 672, Ann. Cas. 1913A, 479; *Zellner v. Wassman*, 184 Cal. 80, at page 88, 193 P. 84; *Warder v. Hutchison*, 69 Cal. App. 291, at page 296, 231 P. 563; *Mayborne v. Citizens' T. & S. Bank*, 46 Cal. App. 178, 188 P. 1034.

[3] It is also contended by respondents that a cause of action upon quantum meruit would be barred by the statute of limitations with the exception of that part of the claim which arose during the last two years preceding the death of decedent. It has been held, however, under facts similar to those in this case, that the law not only implies a promise to pay, but implies the promise to pay at the termination of the services, so that the cause of action does not arise until the day of the death of decedent and the statute of limitations does not bar any part of the period of continuous services. *Hagan v. McNary*, 170 Cal. 141, 148 P. 937, L. R. A. 1915E, 562; *Mayborne v. Citizens' T. & S. Bank*, 46 Cal. App. 178, at page 189, 188 P. 1034; *Warder v. Hutchison*, 69 Cal. App. 291, at page 296, 231 P. 563.

[4] Respondents ask us to rule that the testimony of the wife of appellant should be totally disregarded because she has a community property interest in the chose of action. They also ask us to rule that the court erred as against respondents in rejecting

certain offered testimony which they claim would have tended to show the services and provisions to have been supplied gratuitously and as an act of friendship only, giving rise to no implied contract to compensate. Respondents cannot raise these points until judgment is rendered against them.

[5] Respondents' motion for judgment notwithstanding the verdict was made in the alternative form under Code of Civil Procedure, § 629, reserving the right to apply for a new trial if their motion for judgment be denied, but the motion was granted. That section does not give to the appellate court the trial court's power to pass upon respondents' reserved motion for a new trial. No good reason appears why this court should exercise its power as an appellate court to grant a new trial. Following the precedent of *Eades v. Trowbridge*, 143 Cal. 25, 76 P. 714, we should order judgment entered by the trial court upon the verdict permitting, of course, such further proceedings, as are permitted by law.

The judgment is therefore reversed, and the court directed to enter judgment upon the verdict.

We concur: NOURSE, J.; STURTEVANT, J.

99 Cal. App. 692

PACIFIC FRUIT EXCHANGE v. SCHROPFER. (Civ. 6755.)

District Court of Appeal, First District, Division 1, California. July 2, 1929.

1. Execution ⇨273—Judgment creditor purchasing at execution sale is protected against unknown latent equities.

Judgment creditor purchasing at his own execution sale is protected against latent equities of which he has no notice at the time of the sale.

2. Mortgages ⇨199(2) — Where mortgage, though in terms including rents, gives no right of possession, mortgagee has no right to rent.

Mortgagee has no right to rent, where no right to possession is given by mortgage, though mortgage in terms includes rents.

3. Execution ⇨274—In suit for rent by judgment creditor purchasing at execution sale, tenant had burden to prove plaintiff's actual notice of claim of mortgagee under owner's assignment of rents.

Tenant in possession of land sold under execution had burden to prove that judgment creditor purchasing at sale had actual notice or knowledge of claim of mortgagee under assignment of lease and rents from record owner, in order to avoid judgment creditor's recovery of rent.

4. Execution $\Rightarrow$ 273—Judgment creditor purchasing at execution sale could recover rents from tenant, notwithstanding landlord's oral assignment of rents to mortgagee prior to judgment.

Judgment creditor purchasing at his own execution sale held entitled to recover rent from tenant under lease from record owner, notwithstanding tenant's defense that lease had been orally assigned by lessor to mortgagee before entry of judgment with authority in mortgagee to collect rents and apply them to indebtedness secured by the mortgage, where no instrument showing mortgagee's claim to rents was recorded and judgment creditor had no actual notice or knowledge of such claim.

5. Execution $\Rightarrow$ 273—Purchaser at execution sale claiming rents from tenant held not chargeable with constructive notice of mortgagee's unrecorded claim under oral assignment of rents and subsequent collection thereof by mortgagee.

Judgment creditor purchasing at execution sale was not chargeable with constructive notice of claim of mortgagee to rents, as against tenant in possession, by virtue of landlord's assignment of lease and rentals to mortgagee to be applied on mortgage indebtedness and mortgagee's subsequent collection of rent, where there was no record of mortgagee's claim and possession of mortgagee was inconsistent with record title and terms of lease.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by the Pacific Fruit Exchange against Joseph G. Schropfer. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. E. Babbitt, of Los Angeles, for appellant.

G. Levin Aynsworth, of Fresno, for respondent.

PER CURIAM. The defendant, who was a tenant in possession of certain real property, appeals from a judgment entered against him for the rent which accrued subsequent to the sale of the property under an execution.

The judgment upon which the execution issued was recovered by the plaintiff against F. F. Stober and Anna D. Stober on July 23, 1926, and their interest in the property was purchased by the plaintiff at an execution sale on January 17, 1927, following which a sheriff's certificate of sale was duly issued and recorded. The record title to the property stood in the name of Anna D. Stober, and previous to the entry of the judgment last mentioned she, with F. F. Stober, her husband, executed a mortgage thereon to the Southwest Cattle Loan Company, a corporation, to secure the payment of a debt to the mortgagee. The mortgage in terms included the rents, issues, and profits from the property, but was not verified so as to permit its

recording as a chattel mortgage. They also executed a deed of trust thereon to secure a sum payable to another corporation; the above instruments being dated October 30, 1924, and June 26, 1922, respectively. On February 27, 1925, Anna D. Stober leased the premises to F. F. Stober, her husband, for a term ending March 1, 1928. Previous to the execution of this lease her husband had executed to the defendant a lease of the same property for a term ending March 1, 1926, with the privilege of renewing the same for a further term of five years. Before the entry of the judgment against the lessors, the renewal was duly executed and the leases were orally assigned by Anna D. Stober to the mortgagee above named, with authority to collect the rent thereunder and apply the same to the indebtedness secured by the mortgage and deed of trust. No instrument showing its right to collect the rentals was placed of record, but the mortgagee, pursuant to the assignment and authority granted, collected the rents from the defendant until the 1st day of January, 1927.

[1, 2] It is the rule in California that a judgment creditor purchasing at his own sale is protected against latent equities of which he has no notice at the time of the sale (11 Cal. Jur. Executions, § 70, p. 130), and that a mortgagee has no right to the rent where no right to possession is given although the mortgage in terms, as was the case here, includes the rents (Freeman v. Campbell, 109 Cal. 360, 42 P. 35, Cowdery v. London, etc., Bank, 139 Cal. 298, 73 P. 196, 96 Am. St. Rep. 115).

[3-5] In the present case it is not contended that the plaintiff had actual notice or knowledge of the claim of the mortgagee, and the burden of proof in this respect rested upon appellant (Garber v. Gianella, 98 Cal. 527, 33 P. 458; Hawke v. Cal. Realty & Con. Co., 28 Cal. App. 377, 152 P. 959), but that, due to the assignments and the subsequent collection of the rent, it became a mortgagee in possession, of whose rights appellant's possession of the property gave constructive notice. Whether an assignment by the owner of the reversion of rent to become due under a lease for a term exceeding one year is within the statute of frauds, or a conveyance as the term is used in the recording acts are matters upon which the authorities are conflicting. These questions, however, need not be determined here, for, as stated, no record of the mortgagee's claim appeared; and while it is contended that appellant's possession was that of the mortgagee, such possession was entirely consistent with the title to the reversion, to which the rent was an incident (Winnisimmet Trust, Inc., v. Libby, 232 Mass. 491, 122 N. E. 575), and the terms of the lease as the same appeared of record. Under such circumstances, appellant's pos-

session was not constructive notice of the claim of the mortgagee, and no duty rested upon the purchaser to make further inquiry. *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Garber v. Gianella*, supra; *Schumacher v. Truman*, 134 Cal. 430, 66 P. 591; *Randall v. Allen*, 180 Cal. 298, 180 P. 941.

We find no merit in the appeal.

The judgment is accordingly affirmed.

FAHRENBRAKER v. E. CLEMENS HORST CO. et al. (Civ. 3820.) ★

District Court of Appeal, Third District, California. July 2, 1929.

Rehearing Denied Aug. 1, 1929. Hearing Granted by Supreme Court Aug. 29, 1929.

1. Mortgages §372(4)—Assignee under unrecorded assignment of rents takes only lessor's rights.

Rights of assignee under unrecorded assignment of rents as against subsequent purchaser of leased premises at sale under trust deed are no greater than, but the same as, lessor's would have been had no assignment been made.

2. Landlord and tenant §53(2)—Rent accrues only on due date, and person then owning reversion is entitled to entire installment.

At common law, rent does not accrue from day to day, but only on day fixed for payment, so that person who owns reversion on that day is ordinarily entitled to entire installment due, though he owned reversion or rent only part of time elapsing since last rent day.

3. Landlord and tenant §53(2)—Grantee of reversion is entitled to all rent due at next rent day, in absence of contrary stipulation.

When the landlord conveys the reversion, grantee is entitled to all the rent which falls due at the next rent day, in the absence of a contrary stipulation.

4. Mortgages §372(4), 548—Conveyance by operation of law, under trust deed or power of sale in mortgage, or under decree or execution valid against lessor, passes reversion and rent thereafter accruing.

A conveyance by operation of law, under a trust deed or power of sale in a mortgage, or by a master or sheriff under decree or execution valid against lessor, passes his reversion and rent thereafter accruing as effectively as a deed from him directly.

5. Mortgages §372(4)—Statute providing for apportionment of rent during redemption period does not apply to sales under trust deeds (Code Civ. Proc. § 707).

Code Civ. Proc. § 707, providing for apportionment of rent during period allowed for redemption of property sold under execution or foreclosure of mortgage, does not apply to sales under trust deeds.

6. Appeal and error §909(5)—Where record on appeal from judgment apportioning rent between assignee and purchaser of premises contains no copy of lease or other evidence of its terms, it must be presumed that lease contained provision therefor.

Where record on appeal by purchaser of leased premises at sale under trust deed from judgment apportioning rent between her and holder of prior unrecorded assignment of rents contained no copy of lease nor other evidence of its terms, it must be presumed, in support of findings, on which judgment was based, that lease contained a special provision for apportionment of rent, if land were transferred.

7. Appeal and error §880(3)—Appellant given judgment for all that was due her cannot complain of excessive judgment for respondent.

Where judgment apportioning rent between assignee thereof and subsequent purchaser of leased premises gave latter all that was due her, she was in no position to complain on appeal that assignee was given judgment for more than was due him from lessor; any excess awarded him belonging to lessor.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Frank C. Fahrenbraker against the E. Clemens Horst Company, Josephine A. Hunt, and others. From a judgment for plaintiff, defendant Hunt appeals. Affirmed.

Brobeck, Phleger & Harrison, of San Francisco, and John R. Connelly, of Sacramento, for appellant.

Busick & Leeper, of Sacramento, for respondent.

FINCH, P. J. This is an appeal by the defendant Josephine A. Hunt from the judgment herein apportioning the rent of the lands described in the complaint for the year ending November 1, 1926.

[1] The defendant E. Clemens Horst Company holds the land under a lease from A. D. Murphy for a term of ten years, commencing November 1, 1919, at the annual rental of \$1,500, payable annually at the end of each year of the term. The lease was duly recorded. During the term of the lease, Murphy executed a trust deed to secure payment of his promissory note to the appellant and on September 4, 1926, the land was sold by the trustee to satisfy the indebtedness; the appellant becoming the purchaser for the amount of the debt and the expenses of sale. On September 17, 1926, the trustee conveyed the land to appellant. At the time of the sale, the plaintiff held an unrecorded assignment of all rents to become due under the lease as security for an amount due him from Murphy. The assignment was made prior to the execution of the trust deed, but the appellant had no knowledge thereof until after she had purchased and paid for the

property and had received the trustee's deed therefor. The court apportioned the rent for the year ending November 1, 1926, awarding the plaintiff \$1,316.10 thereof and the appellant \$183.90. Appellant contends that she is entitled to all of the rent for the year. The plaintiff's rights under the unrecorded assignment are not greater than, but the same as, Murphy's would have been, if no assignment had been made.

[2, 3] "Rent is not, at common law regarded as accruing from day to day, as interest does, but it is only upon the day fixed for payment that any part of it becomes due. The result of this principle is that, ordinarily, the person who is on that day the owner of the reversion is entitled to the entire instalment of rent due on that day, though he may have been the owner of the reversion or rent but a part of the time which has elapsed since the last rent day. * * * When the landlord makes a conveyance of the reversion, the grantee is entitled, in the absence of a contrary stipulation, to all the rent which falls due at the next rent day." *Tiffany on Landlord and Tenant*, § 176. In *Diepenbrock v. Luiz*, 159 Cal. 716, 115 P. 743, L. R. A. 1915C, 234, Ann. Cas. 1912C, 1084, the following language in section 389 of *Taylor's Landlord and Tenant* (9th Ed.) is quoted with approval:

"It is well settled that in all cases of periodical payments, accruing at intervals, and not *de die in diem*, there can be no apportionment, for rent will not be apportioned in respect of time, unless by force of a statute or of some special provision of the lease."

[4] "A conveyance by operation of law or under a trust deed or power of sale in a mortgage or by a master or sheriff under a decree or execution that is valid against the lessor, will be as efficacious as a deed from him directly. Whatever unqualifiedly passes his reversion will pass rent thereafter accruing." *Underhill on Landlord and Tenant*, § 318; *Tiffany on Landlord and Tenant*, § 180; 36 C. J. 366.

[5] In this state rent is apportioned during the period allowed for redemption of property sold under execution or in the foreclosure of a mortgage. *Clarke and Cain v. Cobb*, 121 Cal. 595, 54 P. 74. The decision last cited, however, is based on the special provisions of section 707 of the Code of Civil Pro-

cedure, relating to the redemption of property from sales on execution and foreclosure, which section has no application to sales under trust deeds.

[6] In this case, the record on appeal consists of the judgment roll, and, in addition, copies of the trust deed and the trustee's deed to the appellant, both certified by the trial judge as having been introduced in evidence. It need not be determined whether these instruments are so authenticated as to entitle them to be considered on appeal, because neither of them throw any light on the issues to be determined. No copy of the lease appears in the record, and its terms are not disclosed further than as stated. The complaint alleges that the appellant "has no right, title nor interest in or to said rents * * * earned prior to the 17th day of September, 1926," on which date she became the owner of the land through the trustee's deed. Appellant's answer denies this allegation, and alleges that she "is the owner of and entitled to all rent due under the aforementioned lease * * * and the plaintiff has no right, title or interest in or to any of said rent or any part thereof." The court found that "all the allegations of plaintiff's complaint are true," and that the foregoing denials and allegations of the appellant's answer are untrue. In the absence of evidence showing the terms of the lease, it must be presumed in support of the findings that the lease contained a special provision for the apportionment of the rent in the event of a transfer of the land. 2 Cal. Jur. 877.

[7] Appellant contends that the judgment in favor of the plaintiff is for more than was due him from Murphy. Since the appellant was given judgment for all that was due her, she is not in a position to complain that the plaintiff was given judgment for too much. That is a question in which only the plaintiff and Murphy are concerned. If there is any excess in the award to plaintiff over the amount due him, such excess belongs to Murphy.

The other questions argued by appellant are disposed of by what has already been said.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

PATENTS PROCESS, Inc., v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6675.) ★

District Court of Appeal, Second District, Division 1, California. June 20, 1929.

Divorce 6267—Court, on wife's petition, could appoint receiver for corporation to which husband had conveyed property in which wife had community interest (Civ. Code, § 140; Code Civ. Proc. § 564).

Under Civ. Code, § 140, authorizing appointment of receiver to enforce requirement that wife or husband, as the case may be, provide maintenance or make specified payments, court had authority, on petition of wife, to appoint receiver for corporation to which husband had conveyed property in which wife had community interest, particularly by virtue of the terms of interlocutory decree of divorce, regardless of the provisions of Code Civ. Proc. § 564, relative to right of court of equity to appoint receiver for property of corporation.

Original application for writ of prohibition by the Patents Process, Inc., prayed to be directed to the Superior Court of the state of California in and for the County of Los Angeles and others. Application denied.

Milton M. Cohen and R. D. Knickerbocker, both of Los Angeles, for petitioner.

William R. Millar, of Los Angeles, for respondents.

CONREY, P. J. There is pending in the superior court an action, No. 273—391, of *Mildred Williams, Plaintiff, v. Frank D. Williams, Patents Process, Inc., a Corporation, and Others, Defendants*. In that action the plaintiff sets forth facts showing her right to an interest in described property owned by the plaintiff and by the defendant Williams, as community property, particularly as shown by the terms of an interlocutory decree of divorce granted to Mrs. Williams against her said husband. The complaint in action 273—391, after a statement of facts concerning said interlocutory decree of divorce, proceeds to state another series of facts which tend to show that defendant Frank D. Williams has been and is endeavoring to prevent the plaintiff from receiving her share of the community property awarded to her in the divorce action; that sundry other persons have been induced to confederate and conspire with Williams to accomplish his stated purpose; that, in order to more effectually carry out said plan and purpose, the defendant Patents Process, Inc., was created and organized; that sundry properties held by defendant Williams, and belonging wholly or in part to the plaintiff, were by said Williams caused to be transferred and placed in the name of said corporation; that practically all of the shares of capital stock of

said corporation belong to defendant Williams, and those shares which have been issued to names of other persons, are in reality his property; that defendant Williams is general manager, and is in actual control of said corporation and of said properties conveyed by him pursuant to said alleged purpose, plan, and conspiracy. The foregoing indicates the foundation and the nature of the action, but we do not attempt to make a complete statement of the complaint, or of the proceedings therein. Upon the filing of said complaint and, upon application made to a judge of respondent court, an order was made whereby a receiver was appointed of the property of the defendant corporation, Patents Process, Inc. The defendant duly presented a motion to vacate the order appointing the receiver, which motion was denied by an order of May 13, 1929. On the same day the court ordered that defendant Williams deliver to the receiver said described property of Patents Process, Inc., together with all other property of said corporation. The notice of motion to vacate did not state the grounds on which the motion would be made, but the affidavits filed therewith indicate a complaint against the qualifications of the appointee, rather than any challenge of the power of the court to appoint a receiver. In this present proceeding, application is made for a writ of prohibition to restrain the respondent court and the judges thereof from taking further proceedings in connection with the appointment or continuance in office of a receiver for the business of petitioner, and that the appointed receiver be restrained from acting as such receiver, notwithstanding said order of appointment.

In applying for the writ, petitioner relies upon a series of decisions which deny that there is any jurisdiction vested in a court of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private party, or in any case not directly authorized by the provisions of section 564 of the Code of Civil Procedure. Among these decisions are the *French Bank Case*, 53 Cal. 495, 550; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *A. G. Col. Co. v. Superior Court*, 196 Cal. 604, 614, 238 P. 926; *Dabney Oil Co. v. Providence Oil Co.*, 22 Cal. App. 233, 237, 133 P. 1155.

We are satisfied that the case stated in the complaint in the action in respondent court brings that action within a well-recognized exception to the general rule referred to in the preceding paragraph, and that respondent court had jurisdiction to appoint the receiver. Section 140 of the Civil Code (in the chapter relating to actions of divorce) reads as follows: "The court may require the husband [or wife, as the case may be,] to give reasonable security for providing maintenance or making any payments required under the pro-

visions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." The allegations of the complaint, duly verified, are sufficient to show that the corporation Patents Process, Inc., is but the alter ego of defendant Frank D. Williams, and that the plaintiff, Mrs. Williams, although not a stockholder of the corporation, is an owner of at least a half interest in the property held by said corporation. It follows that the directors of the corporation owe to her, as such owner, a duty similar to that which is owed to the stockholders. Upon those alleged facts the directors are charged with the duty of administering a trust in which, so far as plaintiff's interest in the property is concerned, she is the primary beneficiary. That this trust is involuntary and unacknowledged only adds to the seriousness of the situation. Upon facts which as to the principles involved are the same, it was held that, where such a trust existed, and was being violated, the court had authority to appoint a receiver. As the court there said: "We cannot conceive a state of the law, under the enlightened principles which govern the exercise of the jurisdiction of courts of equity, which would deny the appointment of a receiver, under the allegations of the Charle complaint, merely, upon the ground that the plaintiffs were not stockholders of the corporation." *Lieberman v. Superior Court*, 72 Cal. App. 18, at page 37, 236 P. 570, 577.

The demurrer to the petition is sustained, and the application for writ of prohibition is denied.

We concur: HOUSER, J.; YORK, J.

PEOPLE v. BRUNO. (Cr. 1792.)★

District Court of Appeal, Second District, Division 2, California. June 21, 1929.

Hearing Granted by Supreme Court July 18, 1929.

1. Indictment and Information ⇨166—Negative allegations regarding matters peculiarly within knowledge of defendant accused of crime need not be proved.

Under rule of *ab inconvenienti*, negative allegations regarding matters peculiarly within knowledge of defendant accused of crime need not be proved.

2. Criminal law ⇨327—Legislature cannot by mere fiat bring issue within matters which defendant must prove as within his particular knowledge.

Legislature cannot by mere fiat change inherent nature of issue in criminal case and provide that proof thereof shall be within class of

matters which defendant must prove as being within his particular knowledge.

3. Aliens ⇨17—Statute placing burden on defendant to prove citizenship held ineffectual to establish presumption of foreign nativity, in prosecution for possessing firearm of prohibited length as alien, because requiring self-incrimination (Code Civ. Proc. § 1983, as added by St. 1927, p. 434; St. 1923, p. 696, § 2; Const. art. 1, § 13).

Code Civ. Proc. § 1983, as added by St. 1927, p. 434, providing that in any action or proceeding by the state to enforce laws denying certain privileges or licenses to aliens alleged alien shall have burden to establish fact that he was at the time of exercising right or privilege a citizen or eligible to become such, provided state has proved that he actually exercised right or privilege, held ineffectual to establish presumption of foreign nativity in prosecution for possessing firearm of prohibited length as alien, under St. 1923, p. 696, § 2, since issue was not within rule *ab inconvenienti* as within peculiar knowledge of defendant, and would require self-incrimination contrary to Const. art. 1, § 13.

4. Criminal law ⇨306—Reasonable connection must exist between fact and presumption to be drawn therefrom.

There must be reasonable connection between fact and presumption which law directs to be drawn therefrom.

5. Criminal law ⇨409—In prosecution for possessing firearm of prohibited length as alien, admission in evidence of defendant's admissions as to his place of birth held error, where corpus delicti was not proved (St. 1923, p. 696, § 2; Code Civ. Proc. § 1983, as added by St. 1927, p. 434).

In prosecution for having in possession firearm of prohibited length under St. 1923, p. 696, § 2, admission in evidence of statements of defendant to officer concerning his place of birth abroad and his nonnaturalization was error, where there was no *prima facie* proof of corpus delicti, since Code Civ. Proc. § 1983, as added by St. 1927, p. 434, in so far as attempting to create presumption of foreign birth from proof of possession of firearm, was ineffectual.

Appeal from Superior Court, Los Angeles County; Charles S. Fricke, Judge.

Joe Bruno was convicted of possessing a firearm of forbidden length, being at the time an unnaturalized foreign-born person, and he appeals. Reversed.

S. S. Hahn and Dan J. Heyfron, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

CRAIG, J. The defendant was charged with the violation of section 2, Statutes of 1923 (St. 1923, p. 696), in having in his possession and under his control a firearm having a barrel less than 12 inches in length, and

in being at the time an unnaturalized foreign-born person. He was convicted, and appeals from an order denying his motion for new trial, and from the judgment.

The principal ground of appeal is an asserted insufficiency of the evidence to establish the corpus delicti and to sustain the verdict. However, in this connection certain constitutional questions are raised.

In *People v. Quarez*, 196 Cal. 404, 238 P. 363, the Supreme Court of this state held that in the offense here charged the corpus delicti consists of two distinct elements, to wit, first, the possession of a certain type of weapon, and, second, the foreign nativity and nonnaturalization of the accused. Section 1983 of the Code of Civil Procedure, as added by St. 1927, p. 434, does not alter the law in this regard. It was also logically further held in the case above mentioned that extrajudicial statements of a defendant are not sufficient in themselves to establish the second element of the corpus delicti, but that other and independent evidence is necessary for that purpose.

The people argue that by the provisions of section 1983 of the Code of Civil Procedure, enacted since the decision in the *Quarez* Case, a presumption has been created which may be employed to supply the independent evidence required, and that in this case it was so supplied, and that this presumption is sufficient. Appellant insists in this behalf that section 1983 is unconstitutional, as in conflict with several constitutional provisions. The section itself reads, in part, as follows: "Whenever in any action or proceeding, civil or criminal, brought by, or in the name of, the State or the people thereof, * * * to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, * * * and whenever in any action or proceeding in which the State * * * is or becomes a party, it is alleged in the pleading therein filed on behalf of the State, * * * that such right, privilege or license has been exercised by a person not a citizen of the United States, or not eligible to become such citizen, * * * the burden shall be upon the party for or on whose behalf such pleading was filed to establish the fact that such right, privilege or license was exercised by the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such persons, or upon any person, firm or corporation claiming under or through the exercise of such right, privilege or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, * * * and was at said time legally entitled to exercise such right, privilege or license."

The only constitutional provision relied upon by appellant which appears to warrant attention is section 13 of article 1 of the Constitution of California, in which it is guaranteed that the defendant cannot be compelled in any criminal case to be a witness against himself. Undoubtedly any law which would have the effect of forcing a defendant to produce evidence against himself would be unconstitutional.

[1, 2] Under the rule, *ab inconvenienti*, it has been held that negative allegations regarding matters peculiarly within the knowledge of the defendant need not be proved; but this exception to the general rule has been limited in this state to that particular class of cases where the prosecution is required to prove the nonexistence of a license. *People v. Quarez*, supra; *People v. Frey*, 165 Cal. 140, 131 P. 127. In these cases it was held that the precise element involved in the charge against the appellant here, the nativity of the defendant, was not of such a nature as to come within the rule *ab inconvenienti*. The Legislature cannot, by merely declaring it to be so, change the inherent nature of the issue and thus bring proof of the nativity within the class of matters excepted from the general rule as being within the particular knowledge of the defendant, if in fact it is not of that character. Otherwise, it would be competent for the Legislature to pass a law providing that in a prosecution for murder, upon proof of the death of the person alleged to have been murdered, the defendant must show that such death did not come about through unlawful means, and that in the absence of such proof this element of the corpus delicti should be deemed confessed, the act declaring this provision to be within the exceptional rule *ab inconvenienti*. Obviously the mere fiat of the Legislature could not thus metamorphose the issue as to the nature of the agency that produced death.

[3, 4] Accepting then, the decision of our Supreme Court, as announced in the *Quarez* Case, that this issue of nativity is not one whose proof is especially within the knowledge of the defendant, we must conclude that it remains not within the exception *ab inconvenienti*.

It is argued that the only result of the provision is to create a presumption of the foreign nativity of the defendant from proof that he had a firearm of the forbidden length in his possession. But it is clear that in this case far greater and more serious consequences than this would result. The presumption would be but an entering wedge, opening the door to damaging admissions otherwise barred, and which, coupled with the presumption attempted to be created by the statute, might be sufficient to establish the element of nonnativity and thus complete the case against the defendant. We have here an effort to accomplish indirectly that which

undoubtedly could not be done directly, to conjure up through a process of legislative necromancy a semblance of evidence, and to require the courts to treat this counterfeit as real evidence. There is no rational connection between the fact that a person has in his possession a firearm of a certain type or size and that individual's place of birth. If evidence of crime may be thus fabricated in the form of a presumption without any foundation in fact, the most serious felony might be presumed from entirely innocent acts and circumstances. There must be a reasonable connection between the fact and the presumption which the law directs to be drawn therefrom. *People v. Osaki et al.* (Cal. App.) 278 P. 252.

[5] Holding, as we do, that the provision attempting to create a presumption of foreign birth from proof of possession of a firearm of less barrel length than 12 inches is ineffective, it follows that the admission in evidence of the statements of the defendant to the officer concerning his place of birth and nonnaturalization was error, since such admissions cannot be received without at least prima facie proof of the corpus delicti. This leaves the people's case entirely unsupported by evidence.

We find no other point which warrants consideration.

The judgment is reversed.

I concur: IRA F. THOMPSON, J.

Owing to the illness of WORKS, P. J., he does not participate in this opinion.

99 Cal. App. 524

FORGAY et al. v. PLUM et al. (Civ. 3816.)

District Court of Appeal, Third District, California. June 19, 1929.

1. Logs and logging $\S$ 3(13)—Vendor under contract for sale of standing timber held not entitled to forfeiture on purchaser's failure to make payments when due, where time was not made of essence.

Vendor of standing timber, under agreement of purchaser to pay \$4 per thousand feet on delivery thereof, making semiannual monthly payments, together with payments at rate of \$1 per thousand feet of lumber sawed for use of mill, held not entitled to forfeiture of contract and injunction to prevent purchaser's logging operations, on account of purchaser's failure to make payments when due and failure to operate sawmill to full capacity, where time was not made of essence of contract.

2. Contracts $\S$ 318—Failure to perform contract within time stipulated does not permit forfeiture, unless time is made of essence.

Mere failure to pay or otherwise perform contract within time stipulated is not ground for

forfeiture, unless time is made of the essence of the contract.

3. Logs and logging $\S$ 3(15)—Action by vendor of standing timber for recovery under logging contract and forfeiture of purchaser's interest could not be treated as suit for rescission.

Action by vendors of standing timber to recover amount due from purchaser under logging contract, and for forfeiture of contract for purchaser's nonperformance, and for permanent injunction against purchaser's logging operations, could not be treated as suit for rescission, where no notice of rescission was given, and purchaser, prior to trial, deposited amount due in proportion to amount of manufactured lumber sold.

4. Logs and logging $\S$ 3(15)—Judgment awarding vendor entire amount due under timber contract, without allowance for purchaser's deposits, was erroneous.

Where finding showed that purchaser of timber under logging contract had deposited amount of certain payments for vendor, judgment awarding vendor entire amount due, without credit for money so deposited, was erroneous.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Suit by J. A. Forgay and others, doing business under the firm name and style of the Forgay Lumber Company, against C. D. Plum, individually and doing business as the Round Valley Lumber Company. Judgment for plaintiffs, and defendants appeal. Reversed.

H. B. Wolfe, of Quincy, Lawrence W. Skirving, of Sacramento, C. D. Plum and John V. Filippini, both of San Francisco, for appellants.

M. C. Kerr, of Quincy, for respondents.

FINCH, C. J. This is an appeal by the defendant Plum, on the judgment roll alone, from a judgment in favor of the plaintiffs.

It appears from the complaint that in May, 1926, the plaintiffs entered into a contract with A. P. Newhart, by the terms of which they agreed to sell him all the merchantable timber on the Forgay ranch, and also their sawmill and equipment, for which timber he agreed to pay "\$4 per thousand feet, board measure, scaled * * * upon delivery at pond"; payments to be made semiannually. The purchaser also agreed to pay at the rate of \$1 per thousand feet of lumber sawed for the use of the mill until such payments amounted to \$7,500, when he was to be given a bill of sale for the mill. The title to the lumber was to remain in the sellers until paid for. Payments were to be made "to the credit of the party of the first part at the Indian Valley Bank." The buyer was to commence the operation of the mill "on or before the 15th day of June, 1926, and to diligently continue the operation thereof * * * to full capacity." The buyer agreed to keep insured "all lumber piled or stored in an amount

equal to that due" the sellers, the insurance policies to be payable to them to the extent of their interest.

A supplementary agreement was subsequently executed, but its terms are not material here. Time was not made of the essence of the contract, nor was there any provision for a forfeiture contained therein. Newhart assigned to F. C. Wolpert, and he to the defendant; the assignment to the defendant being made prior to May 6, 1927. The breaches of the contract alleged in the complaint are as follows:

The defendant "did log, cut and manufacture into lumber about 170,000 feet * * * of lumber," by reason whereof there became due to the plaintiffs the sum of \$850 on the 5th day of July, 1927. On their demand for payment of that sum the defendant "informed said plaintiffs that he did not intend to pay said sum until said lumber was sold and shipped, and * * * that it was his intention to continue to fall and manufacture timber from said premises, but that none of the same would be paid for until sold and shipped." The defendant failed to insure the lumber "piled or stored." He "has failed to operate said sawmill diligently * * * to full capacity thereof, and that since the 1st day of July little, if any, timber has been sawed at said sawmill, and that said mill is now closed down and not being operated to the full capacity, or at all."

The prayer is for judgment in the sum of \$850, for an injunction restraining the defendant "from further logging and cutting of timber from said premises," for a forfeiture of "said contract," and for damages.

The complaint was filed July 14, 1927. The findings follow the allegations of the complaint, except as to the mill being "closed down," and additional facts are found as follows:

After the complaint was filed and prior to the trial the defendant "deposited with the Indian Valley Bank cash and bills of lading sufficient to cover said amount" of \$850. The defendant "did continue to fall and manufacture timber from said premises into lumber until prevented from so doing by a temporary injunction, and did refuse to pay for the same in accordance with the terms of said agreement and supplement thereto, but continued to have deposited to the credit of plaintiffs the amount of such rental and stumpage as provided in said agreement out of the proceeds of the sale of lumber manufactured from said premises in proportion to the amount of lumber sold." The defendant does "not intend to comply with the terms of the agreement, * * * and that the same will result in a multiplicity of actions."

Judgment was entered in favor of the plaintiffs for the sum of \$850, and it was further adjudged that the agreement "be

and the same is hereby declared forfeited and void for failure to comply with the terms thereof"; that the defendant be "permanently enjoined from logging, cutting, sawing, or in any way interfering with the timber on said premises mentioned in said agreement, or with the sawmill on said premises; and that plaintiffs have a lien on all lumber manufactured on said premises for the amount due plaintiffs under said agreement."

[1-3] Neither the facts alleged in the complaint nor those found by the court constitute grounds for forfeiture, time not being of the essence of the contract. "Mere failure to pay or otherwise perform within the time stipulated is not ground for forfeiture unless time is of the essence of the contract." 25 Cal. Jur. 608. Such facts may be sufficient to warrant a rescission of the contract by the plaintiffs, but there is neither allegation nor finding that they made any effort to rescind. The action cannot be treated as one for rescission, even if the allegations of the complaint were sufficient to show that the plaintiffs are entitled to rescind. They gave no notice of rescission and the findings show that the defendant has rights to be adjusted if the contract is to be canceled. 4 Cal. Jur. 799.

[4] It appears from the findings that the defendant has deposited in the Indian Valley Bank, as required by the terms of the contract, the amount of certain payments which became due to the plaintiffs. The judgment seems to award the plaintiffs the whole amount which became due to them without any credit for the moneys so deposited.

The judgment is reversed.

We concur: THOMPSON, J.; PLUMMER, J.

99 Cal. App. 240

EAST BAY MUNICIPAL UTILITY DIST. v. KIEFFER et al. (two cases). ★

SAME v. PACIFIC GAS & ELECTRIC CO. et al.

(Civ. 3480-3482.)

District Court of Appeal, Third District, California. June 26, 1929.

Hearing Denied by Supreme Court July 25, 1929.

1. Eminent domain ⇨138—Damages by reason of severance of land condemned is limited to land contiguous to that taken (Code Civ. Proc. § 1248).

Damages by reason of severance of land taken by power of eminent domain is limited, under Code Civ. Proc. § 1248, to land which is contiguous to that taken.

2. Courts ⇨92—Ruling on both grounds upon which judgment of trial court can be rested is judgment of court, and neither is obiter.

Where there are two grounds upon either of which judgment of trial court can be rested, and appellate court sustains both, ruling on nei-

ther is obiter, but each is a judgment of court and of equal validity with other.

3. Appeal and error ⇨971(3)—Discretionary power of trial court over cross-examination of witnesses will not be disturbed on appeal, except in case of abuse.

Though wide latitude should be allowed in cross-examination of witnesses, trial court has discretionary power over cross-examination which will be disturbed on appeal only in case of an abuse thereof.

4. Appeal and error ⇨971(3)—Inquiry in determining whether trial court abused discretion over cross-examination is whether sufficiently wide range has been allowed to test credibility and weight.

Where appellate court is called upon to decide whether discretionary power of trial court over cross-examination of witnesses has been abused, inquiry is whether a sufficiently wide range has been allowed to test credibility of witnesses and weight of evidence rather than whether some particular question should have been allowed.

5. Witnesses ⇨267, 330(1)—Trial court has reasonable discretion to determine whether ostensible purpose of cross-examination is to test witness' credibility or weight of testimony.

When question on cross-examination is asked for ostensible purpose of testing credibility of witness or weight of his testimony, trial court has reasonable discretion to determine whether that is in fact purpose of question or whether real purpose is to get substance of inquiry before jury as evidentiary fact.

6. Eminent domain ⇨246(2)—Plaintiff condemning property cannot in effect grant himself new trial by abandoning proceeding after final judgment and then proceed to condemn same property.

Plaintiff in condemnation suit cannot in effect grant himself new trial by simple expedient of abandoning proceeding after final judgment, and then commencing another proceeding to condemn same property.

7. Action ⇨59—Three verdicts, findings, and judgments rendered in three consolidated condemnation proceedings will be treated as one verdict, one set of findings, and one judgment.

Where three condemnation proceedings at time of trial were in same court, between same parties, and were being prosecuted for condemnation of three adjoining parcels of land belonging to defendant, and court made an order consolidating them, three verdicts, three sets of findings, and three judgments will be treated as one verdict, one set of findings, and one judgment, since by consolidation three proceedings became one proceeding and should have been determined by a single verdict, single set of findings, and single judgment.

8. Eminent domain ⇨246(2)—After final judgment, plaintiff was without power to abandon any one of three original condemnation proceedings consolidated for trial without abandoning all.

Where three condemnation proceedings for condemnation of three adjoining parcels of land

belonging to defendant at time of trial were in same court, between same parties, and court made order consolidating them, plaintiff was without power to abandon any one of original proceedings after final judgment without abandoning all of them, and therefore defendant could not be injured by partial abandonment.

Appeals from Superior Court, Amador County; C. P. Vicini, Judge.

On petition for rehearing. Petition denied. For former opinion, see 278 P. 476.

James F. Peck, Chas. F. Rafferty, and F. J. Solinsky, all of San Francisco, T. A. Farrell, of Sacramento, and Wm. G. Snyder, of Jackson, for appellant.

T. P. Wittschen, of Oakland, C. Irving, and T. G. Negrich and Ralph McGee, both of San Francisco, for respondent.

PER CURIAM. [1, 2] The appellant has filed a petition for a rehearing.

It is again urged that physical contiguity of different parcels of land is not necessary to entitle the owner in a condemnation proceeding to severance damages, and that the statement to the contrary in *Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 399, 153 P. 705, is dictum. The appellant in that case had insisted in the trial court "that the physical separation was negligible because unity of use and not physical contiguity was the controlling factor." The trial court held adversely to this contention. In affirming the judgment the Supreme Court held that unity of use was not the controlling factor and, after quoting from section 1248 of the Code of Civil Procedure, relative to severance damages, said: "This very language limits in terms the award of damages to the property taken and the resultant damages to contiguous property injured by severance of the property taken." This language is not dictum. "Where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other." *Union Pac. R. Co. v. Mason City & Ft. D. R. Co.*, 199 U. S. 160, 26 S. Ct. 19, 50 L. Ed. 134; *Williams v. Southern Pac. Co.*, 54 Cal. App. 571, 579, 202 P. 356.

[3-5] It is further argued that the trial court unduly restricted the cross-examination of the plaintiff's witnesses. It is true that wide latitude should be allowed in the cross-examination of witnesses, but it is equally true that a trial court has "discretionary power over cross-examination which will be disturbed on appeal only in case of an abuse thereof." 27 Cal. Jur. 97. The field of inquiry in cross-examination for the purpose of testing the credibility of a witness and the weight of his testimony is so exten-

sive that the trial court must be given a wide discretion in order to keep such examination within reasonable bounds; otherwise the trial of cases would be overlong. When an appellate court is called upon to decide whether such discretion has been abused, the inquiry is whether a sufficiently wide range has been allowed to test such credibility and weight rather than whether some particular question should have been allowed. *People v. MacDonald*, 167 Cal. 545, 547, 140 P. 256. The 5,000 pages of the reporter's transcript abundantly bear witness to the extreme liberality of the trial court in permitting a wide cross-examination of the witnesses in this case. When a question is asked for the ostensible purpose of testing the credibility of a witness or the weight of his testimony, the trial court has a reasonable discretion to determine whether that is in fact the purpose of the question or whether its real purpose is "to get the substance of the inquiry before the jury as an evidentiary fact." *People v. Weber*, 149 Cal. 325, 343, 86 P. 671, 678; *People v. Ferdinand*, 194 Cal. 555, 562, 229 P. 341. In this case the trial court was justified in the belief that the defendant's real purpose in attempting, by the cross-examination of the plaintiff's witnesses, to show the present selling price of water and electric power was to get those facts before the jury as evidence upon which to base calculations as to the prospective returns to be received by the plaintiff after the completion of the project. That such belief was not without foundation is shown by the argument of counsel for defendant before the jury, during which there was exhibited computations such as the following: "Available supply for domestic use, 200,000,000 gallons daily. Sale of water for domestic use at 10c per 1000 gallons, 200,000 times 10c, \$20,000 per day. 365 x 20,000, \$7,300,000 per year." The rulings of the trial court in excluding proof of the prices mentioned and similar evidence upon which to base speculative profits do not constitute an abuse of discretion under the authorities cited in the opinion.

Appellant contends that the cases cited in the opinion in support of the doctrine of relation of title "relate to rights respecting the land being condemned, intervening between the filing of suit, or *lis pendens*, and the payment of the award." There is nothing in the opinion of contrary import, and, since the titles finally acquired by the plaintiff to the lands in the first two suits relate back to the commencement thereof, the defendant's contention that he had established physical union between the lands in the third suit and the Arroyo Seco lands through the medium of those in the first two suits was certainly the assertion of "rights respecting the land being condemned" in those suits. If the owner of the lands in the third suit had retained the ownership thereof and had purchased all of the defendant's lands, with knowledge of

the pendency of the first two suits, it would hardly be contended, the other circumstances being the same as stated, that he would be entitled to damages by reason of the severance of the lands in the third suit from the Arroyo Seco lands. It does not appear that the defendant's rights are in any respect different.

[6] Appellant says, in substance, that the plaintiff could have abandoned the first two proceedings at any time within 30 days after final judgment and at the same time could have taken the lands in the third proceeding and that, in such event, under the doctrine of relation as stated in the opinion, the defendant would have been deprived of severance damages to which he would have been entitled. Since the land was being condemned for reservoir purposes, it was absolutely necessary for the plaintiff to acquire at least the greater part of the lands in each suit. To have abandoned any one of the proceedings, therefore, would have been to abandon the project, for it seems clear that the plaintiff in a condemnation suit cannot, in effect, grant himself a new trial by the simple expedient of abandoning the proceeding after final judgment and then commencing another proceeding to condemn the same property. *Central of Georgia Ry. Co. v. Thomas*, 167 Ga. 110, 144 S. E. 739; *Chicago, R. I. & P. R. Co. v. City of Chicago*, 143 Ill. 641, 32 N. E. 178; *Robertson v. Hartenbower*, 120 Iowa, 410, 94 N. W. 857; *Northern Pac. Ry. Co. v. City of Georgetown*, 50 Wash. 580, 97 P. 659.

[7, 8] The three proceedings, at the time of the trial, were in the same court, between the same parties, and were being prosecuted for the condemnation of three adjoining parcels of land belonging to the defendant. The court made an order consolidating them. By such consolidation the three proceedings became one proceeding and should have been determined by a single verdict, "a single set of findings and a single judgment." *Stanton v. Superior Court*, 202 Cal. 478, 484, 261 P. 1001, 1003. There are in fact three verdicts, three sets of findings, and three judgments, but under the authority of the *Stanton Case* they are to be treated as one verdict, one set of findings, and one judgment. It logically follows that the plaintiff was without power to abandon any one of the original proceedings after final judgment without abandoning all of them and that, therefore, the defendant stood in no danger of being injured by a partial abandonment.

By the statement in the opinion that "the evidence would have supported a larger verdict" it was by no means intended to imply that the defendant was entitled to a larger award. It is equally true that there is evidence which would justify a smaller award. There is nothing in the record to warrant a holding on appeal that the award is not fair and just.

The petition is denied.

99 Cal. App. 714

BURGE v. MIDWAY PACIFIC OIL CO.★
(Civ. 6221.)

District Court of Appeal, Second District, Division 1, California. July 3, 1929.

Rehearing Denied July 19, 1929. Hearing Denied by Supreme Court Aug. 29, 1929.

1. Corporations ⇄99(2)—Issuance of stock for extension of time to pay for oil property held not void, notwithstanding subsequent decree canceling seller's claim (Const. art. 12, § 11).

Issuance of stock to good faith claimant of oil property in his possession in consideration of extending time for payment of moneys due under contract of corporation's assignor to purchase it held supported by some consideration, and hence not void under Const. art. 12, § 11, as not issued for money paid, labor done or property actually received, notwithstanding subsequent decree canceling claim, where there was no evidence of fraud and corporation obtained actual possession of land and was taking large quantities of oil therefrom when obligation became due.

2. Corporations ⇄99(1)—Some consideration for issuance of stock emanating from legitimate transaction not tainted with fraud and intended to benefit corporation, satisfies Constitution (Const. art. 12, § 11).

Where there is some consideration, emanating from a legitimate transaction not tainted with fraud and intended to redound to benefit of corporation, requirement of Const. art. 12, § 11, that stock be issued for money paid, labor done, or property actually received, is satisfied so far as corporation or its stockholders are concerned.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by E. D. Burge against the Midway Pacific Oil Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Hyams & Himrod, of Los Angeles, for appellant.

Charles D. Swanner, of Santa Ana, for respondent.

CONREY, P. J. The defendant corporation is, and at all times referred to in this action was, engaged in business as the owner and operator of oil properties. In April, 1910, the plaintiff, then claiming to be the owner of a placer mining claim (oil property) in Kern county, entered into an agreement for the sale of the claim to one Atwood, who thereafter assigned to defendant corporation all of his rights under said agreement. Thereafter, on July 18, 1911, pursuant to an agreement between plaintiff and defendant, the defendant corporation issued to the plaintiff 20,000 shares of its capital stock, in consideration of the extension by plaintiff of the time for

payment of moneys which had then become due under the Atwood agreement. In further consideration of the issuance of said stock, the obligation for the unpaid balance was placed in the form of a mortgage upon said oil lands, to become due at a date several years later. On January 18, 1913, an additional 20,000 shares of capital stock of defendant corporation was issued, in consideration of a further extension of the due date upon said mortgage.

The answer of the defendant rests upon its claim that said shares were issued without consideration; and that they were not issued for money paid, labor done, or property actually received by the defendant, and that the issuance thereof was void. The record shows that in a certain action of the United States of America against Brookshire Oil Company and others in the United States District Court for the Southern District of California, and in which both plaintiff Burge and the defendant Midway Pacific Oil Company were defendants, a final decree was entered on the 24th day of December, 1919. It was therein decreed that neither of the defendants "had at any time, or has, or have now," any estate, right, or title in or to the property described in said decree. The property so described included the property covered by the Atwood contract and by the mortgage made by defendant to plaintiff herein. In December, 1920, the board of directors of defendant passed a resolution declaring the cancellation of said shares of stock issued to plaintiff Burge, but did not take any proceedings in court to establish the cancellation thereof. In the present action judgment has been entered quieting plaintiff's title to said 40,000 shares of stock, and declaring that plaintiff is entitled to share with other stockholders in any dividend paid or to be paid and in any dividend of the capital assets of the corporation, in accordance with his ownership of said stock. From this judgment the defendant appeals.

[1, 2] The findings follow the complaint, and do not state any of the specific facts as to the consideration paid or given for the stock. The two principal findings upon this point are that the stock was issued for a valuable consideration, and that it is not true that said stock was issued without consideration, or that the same was not issued for money paid, labor done, or property actually received, by said corporation, or that the same was or is void. The sole point presented on this appeal is that the evidence does not sustain these findings. The evidence to which we have referred establishes beyond controversy that the plaintiff never had any right, title, or interest in the said oil lands. The decree in favor of the government established that fact, and by its terms declared "that the pretended placer mining claim * * * be, and hereby is, cancelled, set

aside and declared null and void from the inception thereof."

Under the provisions of the Constitution (article 12, § 11) the issuance of said stock to plaintiff was void unless so issued "for money paid, labor done, or property actually received." We are of the opinion, however, that the evidence is sufficient to sustain the findings, notwithstanding the above-mentioned failure in defendant's title to the land conveyed by him to the plaintiff. So far as appears, the deed may have conveyed to defendant only the plaintiff's right, title, and interest in the land. Indeed, according to testimony of the witness Beazley, this was the fact. Plaintiff was the claimant in possession, and it is not shown that he was not making his claim in good faith. We have before us no evidence showing what fault or failure to meet legal requirements caused the claim to be lost. In the brief of appellant it is asserted that the claim was annulled on grounds of fraud, but there is no evidence in support of that assertion. By means of plaintiff's conveyance defendant obtained actual possession of the land, and thus was enabled to take from the land large quantities of oil. While thus in possession and while obtaining value from the land, defendant's obligation became, or was about to become, due. So far as appears, both parties at that time believed that the obligation was enforceable. It was under these circumstances that appellant transferred the shares of stock to plaintiff, and by that means obtained his agreement to postpone maturity of the contract, and (later) of the note and mortgage. This agreement having been fully performed, it became on both sides an executed agreement. We think that under the foregoing facts there was some consideration for the issuance of the stock. The rule applies, as stated by the Supreme Court in *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, 704, 227 P. 723, 735: "And it is the rule that if there is some consideration emanating from a legitimate transaction, one not tainted with fraud, and intended to redound to the benefit of the corporation, the constitutional and statutory requirements for the issue of corporate bonds, in so far as the corporation or its stockholders are concerned, are satisfied. (*McKee v. Title Ins. Co.*, 159 Cal. 206 [113 P. 140]; *Cal. Trona Co. v. Wilkinson*, 20 Cal. App. 694 [130 P. 190])."

In the case of *O'Sullivan v. Griffith*, 153 Cal. 502, 95 P. 873, 96 P. 323, plaintiff sued to recover \$2,700 alleged to be due as the purchase price of all the right, title, and interest of plaintiff in certain street railroad franchises. The defendant alleged in his answer that because of the fact that "the proceedings by which the alleged franchises were granted to the original grantees were so defective in several particulars that they were wholly void and that, in consequence,

the grants of the franchises were void, or, in other words, that the grantors of the defendant had no title to the franchises they attempted to convey to Griffith, that he received nothing for the transfer, and hence, that there was no consideration." Following a thorough consideration of the point involved, including a review of the authorities, the Supreme Court reached the conclusion that, in the absence of fraud or mistake, a simple grant whereby the grantor purports to convey only his right, title, and interest is a mere deed of quitclaim and "the grantee is not relieved from the obligation of paying the purchase price merely because the grantor had no title to the franchises." Syllabus.

The judgment is affirmed.

I concur: HOUSER, J.
YORK, J., absent.

99 Cal. App. 591

PEOPLE v. ALLARD. (Cr. 1782.)

District Court of Appeal, Second District,
Division 2, California. June 24, 1929.

Burglary $\Leftrightarrow$ 6—House in which owner and family resided was inhabited, though they were temporarily absent on night of burglary; "inhabitant"; "residence" (Pen. Code, § 460).

House in which owner and his family lived was "inhabited," as required by Pen. Code, § 460, to authorize conviction of unarmed person for first degree burglary, though they were temporarily absent therefrom on particular night; "inhabitant" of house being one who resides therein, and "inhabitant" and "residence" synonymous terms.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, *Inhabit*; *Inhabitant*; *Inhabitant*; *Residence*.]

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Joseph Albert Allard was convicted of first degree burglary, and he appeals. Affirmed.

Whelan, Whelan & Smith, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John D. Richter, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was found guilty of first degree burglary, and was sentenced accordingly. He appeals, and bases his claim for reversal upon alleged insufficiency of the evidence to sustain the verdict.

It appears that a house, the property of one R. P. Low, was burglarized by defendant, who at the time was unarmed. The crime was committed in the nighttime, and the house was not occupied on that particular night. Low and his family lived there, but,

as testified by him, "were just away for two or three days."

The argument presented by appellant is that, under these circumstances, the house was not "inhabited" as required by section 460 of the Penal Code, in order that the burglary may be first degree where the person committing the crime is not armed with a deadly weapon.

An inhabitant of a house is one who resides therein, and "inhabitaney" and "residence" are synonymous terms. *Harding v. Standard Oil Co. (C. C.)* 182 F. 421. It has never been held that a person loses his residence by reason of a brief absence from the house where he lives, and without evidence of an intention to depart therefrom and go to live in some other place. Under a statute similar to ours, where a family lived in the house but were away on vacation, it was held to be an inhabited dwelling house. *Mason v. State*, 27 Ohio Cir. Ct. R. 526.

We consider the evidence in this case entirely sufficient.

The judgment is affirmed.

I concur: IRA F. THOMPSON, J.

Owing to the absence of WORKS, P. J., he does not join in this opinion.

99 Cal. App. 557

FOUCH v. WERNER. (Civ. 3807.)

District Court of Appeal, Third District, California. June 21, 1929.

1. Appeal and error ⇨1002—Appellate court is bound by jury's fact finding on conflicting evidence.

Finding of fact by jury on conflicting evidence is binding on appellate court.

2. Automobiles ⇨171(9)—Failure to conform to statute respecting headlights is negligence per se, entitling plaintiff to recover, if proximate cause of accident (Motor Vehicle Act, § 99).

Failure to comply with Motor Vehicle Act (St. 1923, p. 517) § 99, requiring motor vehicles from half hour after sunset to half hour before sunrise and at any time when there is not sufficient light to render clearly discernible a person, vehicle, or other substantial object on highway, to be equipped with lighted headlights, is negligence per se, and, if lack of such lights proximately contributes to collision and injuries to plaintiff, defendant is liable for damages, in absence of contributory negligence.

3. Evidence ⇨6—Court judicially notices when sun rises and sets and may so instruct jury (Code Civ. Proc. § 2102).

Court will take judicial notice of the time when sun rises and sets, and may so instruct the jury under Code Civ. Proc. § 2102.

4. Automobiles ⇨245(16, 52)—Where time of collision was in doubt, jury was required to determine whether headlights were required to be lighted, whether they were lighted, and whether omission proximately caused accident (Motor Vehicle Act, § 99).

Where time of collision between plaintiff's motorcycle and defendant's automobile was in doubt, in rendering judgment for plaintiff it was necessary for jury to first determine whether, pursuant to Motor Vehicle Act (St. 1923, p. 517), § 99, the time of night or insufficiency of daylight required defendant's headlights to be lighted, whether they were actually lighted, and, if not, whether this omission proximately caused the accident, and verdict for plaintiff presupposes answering of all these questions adversely to defendant.

5. Automobiles ⇨246(10)—Trial ⇨243—Instructions which, after quoting statutes regulating automobiles, stated that violation of statute regulating traffic is negligence creating liability for proximate injuries caused thereby, held not inconsistent nor erroneous (Motor Vehicle Act, §§ 99, 129(a), 130(a)).

In action growing out of automobile and motorcycle collision at intersection, instructions which, after quoting Motor Vehicle Act (St. 1923, p. 517) §§ 99, 129(a), and part of 130(a), respecting headlights, giving visible warning signal before turning, and necessity of going to left of central intersecting point in turning, stated that a violation of provision of statute or ordinance regulating conduct of people while using streets is of itself negligence, and if such violation is proximate cause of injury to another, former becomes liable to one so injured for all damage proximately resulting to latter thereby, provided latter was not himself guilty of negligence proximately contributing to injury, held neither inconsistent nor erroneous.

6. Negligence ⇨6—Application of general statutory rule defining negligence will be modified if unusual conditions exist, but existence of such conditions is matter of defense (Civ. Code § 1714).

Application of general rule stated in Civ. Code, § 1714, that negligence is omission to do something which ordinarily prudent person would have done under given circumstances, or the doing of something which an ordinarily prudent person would not have done under such circumstances, and is not absolute but always relates to circumstances of time, place, and person, will be modified by presence of unusual or extraordinary circumstances affecting transaction, but such unusual conditions are matters of defense, and when one claims existence of no such extraordinary circumstances and offers no instructions regarding them, he may not complain of instruction confined to a declaration of the general rule.

7. Trial ⇨260(1)—Refusal of instruction covered by instructions given was not prejudicial error.

Refusal of defendant's requested instruction sufficiently covered by other instructions was not prejudicial error.

8. Automobiles ⇨171(9)—Arm signals required in turning are intended, not only for drivers in rear, but for drivers of other vehicles which may be reasonably affected (Motor Vehicle Act, § 130).

The arm signals required by Motor Vehicle Act (St. 1923, p. 517) § 130, in making a turn are intended as a warning, not only to drivers of machines in the rear, but also to drivers of any vehicles which may reasonably be affected by such movement.

9. Automobiles ⇨246(10)—It was unnecessary to charge entire language of statute respecting arm signal in turning, where sufficiency of such signal was not challenged (Motor Vehicle Act, §§ 99, 130).

Where motorcyclist injured in collision with defendant's automobile on a dark and rainy night did not challenge sufficiency of nature of arm signal given by defendant in making turn, but testified that defendant turned at intersection "without a horn, or any warning whatever," and placed his chief reliance on claim that defendant's headlights were not lighted as required by Motor Vehicle Act (St. 1923, p. 517) § 99, it was unnecessary for court to give jury entire language of section 130 in charging it that before turning onto public highway driver shall give a signal plainly visible to driver of other vehicle.

10. Evidence ⇨471(10)—Refusal to strike out motorcyclist's testimony that, if defendant's automobile headlights had been on, he would have seen them, held not error as being conclusion (Motor Vehicle Act, § 99).

In action for injuries in collision between plaintiff's motorcycle and defendant's automobile at intersection on a dark and rainy night, in which chief controversy was whether defendant's headlights were lighted at time of accident as required by Motor Vehicle Act (St. 1923, p. 517) § 99, refusal to strike out plaintiff's testimony that if defendant's headlights had been on he would have seen them, on ground that it was a conclusion, held not error.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Charles L. Fouch, by George W. Fouch, his guardian ad litem, against Clarence W. Werner. Judgment for plaintiff, and defendant appeals. Affirmed.

Irving D. Gibson, of Sacramento, for appellant.

Martin I. Welsh, of Sacramento, for respondent.

THOMPSON, J. This is an appeal from a judgment for damages for injuries sustained in a motorcycle accident.

The plaintiff was employed at a gas station located at Thirtieth and M streets in the city of Sacramento. At 6:30 p. m. on April 1, 1927, he mounted his motorcycle and started for home, traveling down Thirtieth street to Stockton boulevard, and thence southerly along the proper side of the boulevard to the

point where it was intersected from the southwest by Thirty-Fifth street, which entered it at an angle of about 45 degrees. It was a dark and rainy night. The plaintiff was traveling at a speed of about 15 miles an hour. His headlight was lighted. There were no street lights at this particular corner. The defendant was driving his Chrysler automobile northerly along Thirty-Fifth street on his way to the office of the Sacramento Union where he was employed. There is evidence from which the jury may reasonably have inferred that his view to the left may have been obscured by side curtains, and that he failed to turn on his headlights. Arriving at the intersection of Thirty-Fifth street with Stockton boulevard, the defendant stopped his machine and then slowly turned to his left into the boulevard, running in intermediate gear not faster than 8 or 10 miles an hour. He did not observe the plaintiff's motorcycle approaching from the north. The front end of his machine had scarcely reached the middle line of Stockton boulevard when the crash occurred. The plaintiff claimed that in the driving rain and darkness he was unable to clearly see an object at a distance greater than from 10 to 50 feet, and that the defendant had no headlights lighted; that he first saw the defendant's machine about 10 feet ahead of him and directly in the course he was driving. The pavement was wet and slippery. He immediately applied his brakes but was unable to avoid the collision. His motorcycle struck the left rear fender and wheel of the defendant's car, which was whirled about by the force of the impact, and the plaintiff and his motorcycle were hurled along the pavement some distance. Probably as a result of his contact with the defendant's machine, the plaintiff sustained a very bad comminuted fracture of the lower left limb. The ankle and bones of his left foot were also crushed to an extent that the attending physician testified there would be a permanent defect which would impair his ability to walk. He was confined to the hospital 46 days, and was required to have the fracture reduced by means of an operation and the anchoring of the shattered bones by means of a silver plate. He endured great pain, and was walking with crutches at the time of the trial, six months after the accident occurred. The jury rendered a verdict of damages in the sum of \$10,000.

[1] The chief controversy is over the question as to whether defendant's headlights were lighted at the time of the accident. There was a flat contradiction regarding this subject, and therefore, upon appeal, under the well-established rule, this court will be bound by the judgment.

The plaintiff testified as follows:

"It was raining at the time, was dark, and I turned on my lights and started down 30th

street * * * to Stockton boulevard. * * *
It was about a quarter to seven. * * *

"Q. You say it was dark and stormy? A.
Yes. * * * It was dark.

"Q. Could you see the length of this room?
A. No sir. * * *

"Q. Could you see ahead as far as 200 feet?
* * * A. Just a blur. * * * I observed
the speedometer. * * * I was going at
the rate of about 15 miles an hour. * * *
As I approached 35th street and the Stockton
boulevard, I was going along, operating my
machine about 15 miles an hour, observing
the traffic ahead of me, and as I came to 35th
street, all of a sudden, this car appeared di-
agonally in front of me, without lights, with-
out a horn, or any warning whatsoever. * * *
I applied my brakes.

"Q. How far was the car from you? A.
About ten feet. * * *

"Q. You do not know whether or not Mr.
Werner, the driver of the car that you ran in-
to, had headlights or not. A. They were
not on. * * * I could see his headlight.
* * *

"Q. Was that lit or not? A. It was not."

Mr. Perry, who was following in a machine
about 100 feet behind the plaintiff at the time
of the accident, testified that it was dark and
drizzling and that the plaintiff was traveling
about 15 miles an hour, and that he could
discern objects only about 50 feet away. He
said:

"Q. I will ask you * * * if the auto-
mobile that was involved in the collision had
on headlights? A. I did not see any. * * *
I was looking straight forward. * * *

"Q. During all that time you saw no head-
light? A. No."

Mr. Graham also testified on behalf of the
plaintiff regarding this subject:

"Q. Did you see the lights of the defend-
ant's car as it came into the upper Stockton
boulevard? A. No, I did not see no lights.
* * * I did not examine the car. * * *
I turned over there [where it was parked]
and looked at it; there were no lights on it."

The record leaves no real controversy over
the fact that it was dark enough at the time
of the accident to require the use of head-
lights pursuant to the Motor Vehicle Act.
The defendant himself testified:

"Q. When you left your home was it dark
or light? A. It was dark.

"Q. Did you have your headlights on when
you left the house? A. My headlights were
on when I left."

[2] Section 99 of the Motor Vehicle Act of
California (St. 1923, pp. 517, 546) provides
that: "Every vehicle when upon any public
highway within this state during the period
from a half hour after sunset to a half hour
before sunrise and at any other time when
there is not sufficient light to render clearly
discernible a person, vehicle or other substan-
tial object on the highway at a distance of
two hundred feet ahead, shall be equipped

with lighted lamps and lighted headlights as
herein respectively provided. * * *

Failure to conform to the foregoing statute
with respect to the use of headlights is negli-
gence per se. If the lack of such lights prox-
imately contributed to the collision and con-
sequent injuries which were sustained by the
plaintiff, in the absence of contributory negli-
gence on the part of the plaintiff the defend-
ant would be liable for damages. *Chalmers
v. Hawkins*, 78 Cal. App. 733, 740, 248 P. 727;
Fenn v. Clark, 11 Cal. App. 79, 103 P. 944; 19
Cal. Jur. 632, § 65.

[3] It is true that the court will take judi-
cial notice of the time when the sun rises and
sets (*Jones on Evidence* [3d Ed.] 171, § 129;
People v. Chee Kee, 61 Cal. 404; *People v.
Mayes*, 113 Cal. 618, 45 P. 860), and may so
instruct the jury. (Section 2102, Code Civ.
Proc.) It is also true that the sun set at 6:29
o'clock p. m. on April 1, 1927, according to
the government weather bureau reports.

[4] Since the exact time when the accident
occurred is somewhat in doubt, in rendering a
judgment for plaintiff it became necessary for
the jury to first determine: (1) Whether, pur-
suant to statute, the time of night, or the in-
sufficiency of daylight, required the head-
lights to be lighted; (2) whether they were
actually lighted; and (3) if not, whether this
omission proximately caused the accident.
The verdict of the jury presupposes the an-
swering of all these questions adversely to
the defendant, and while there is a direct con-
flict of testimony, the record contains sub-
stantial evidence upon which to support the
judgment upon each of these issues.

There was some testimony on the part of
the defendant tending to impeach the plain-
tiff respecting the rate of speed at which he
contended his motorcycle was traveling at the
time of the accident. But in view of the con-
flict of evidence the verdict of the jury is also
conclusive on this subject.

[5] The appellant contends that the court
erred in giving certain instructions which he
claims are conflicting and inconsistent. At
the request of the plaintiff the court quoted
sections 99, 129(a), and a portion of 130(a) of
the Motor Vehicle Act, with respect to the
necessity of maintaining lighted headlights on
the automobile, the giving of a visible warn-
ing signal before changing the course of a ma-
chine on a public highway, and the necessity
of turning the course of a machine by going
to the left of the central intersecting point of
streets, and added the following: "A viola-
tion of a provision of a statute (or ordinance)
intended to regulate the conduct of people
while in the use of the streets or highways is
of itself negligence, and if such violation on
the part of any person so using the streets or
highways is the proximate cause of an injury
to another, the former would thereby be lia-
ble to the one so injured for all of the dam-
age proximately resulting to the latter there-
by, provided that the latter was not himself

guilty of negligence which proximately contributed to his own injury."

At the request of the defendant the court also instructed the jury that "unless it was proven by a preponderance of the evidence that he (the defendant) failed to use ordinary care, the verdict must be in favor of the defendant."

These instructions, which were given in the language of the statute, were neither inconsistent nor erroneous. *Pemberton v. Arny*, 42 Cal. App. 19, 183 P. 356; *Squier v. Davis Standard Bread Co.*, 181 Cal. 533, 185 P. 391; 19 Cal. Jur. 764, § 157. Ordinarily injuries sustained as a result of the violation of a statute are actionable on the theory that such conduct constitutes negligence per se. The exercise of ordinary care requires the observance of statutes or ordinances with relation to a particular subject. 19 Cal. Jur. 632, § 65; 20 R. C. L. 38, § 33; 1 Thompson's Comm. on Neg. 12, § 10. The omission to observe the mandates of a regulatory statute is itself evidence of negligence. *Mora v. Favilla*, 186 Cal. 199, 202, 199 P. 17. If this failure to conform to the statute proximately contributes to the accident complained of, it will become the basis of an action for damages. Circumstances may exist which refute the assumption of negligence for the breach of a regulatory statute, such as the necessity for prompt action in an emergency, the obstruction of a portion of the highway along which it is ordinarily proper to drive compelling the operator of a machine to use the wrong side, or the sudden disconnecting of the wiring system of an automobile causing the extinguishing of the headlights. But such unusual circumstances become matters of defense, the burden of proving which rests upon the one who is charged with a violation of the statute. In the present case no such unusual conditions or circumstances existed or are relied upon by the appellant. There was therefore no error in the giving of these instructions.

The appellant contends that the foregoing instructions with relation to the violation of the Motor Vehicle Act are inconsistent with the following charge, which was given to the jury: "Negligence is either the omission of a person to do something which an ordinarily prudent person would have done under given circumstances or the doing of something which an ordinarily prudent person would not have done under such circumstances. It is not absolute or to be measured in all cases in accordance with some precise standard but always relates to some circumstance of time, place and person. * * *"

[6] This appears to be a correct statement of the law. It is true that an essential ingredient of actionable negligence is the omission to perform a duty which the law imposes upon one (1 Thompson's Comm. on Neg. 4, § 3), and that the term "negligence" has no fixed or invariable application, but, as the court says in the last-quoted instruction, it must

depend upon surrounding circumstances and conditions. 19 Cal. Jur. 549, § 4. A definition of what constitutes negligence must therefore be relative and variable in its application, dependent upon the surrounding circumstances. The standard of care employed in section 1714 of the Civil Code, the purport of which was given in the last-quoted instruction, is a mere adoption of Baron Alderson's familiar definition of the term negligence as it appears in the celebrated case of *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 784. It accepts as the test the standard of an ordinarily prudent man under normal circumstances, and leaves it for the jury to determine what such an individual would do under such circumstances. The presence of unusual or extraordinary circumstances affecting the transaction will always modify the application of the general rule. These unusual conditions are, however, matters of defense, and when one claims the existence of no such extraordinary circumstances and offers no proposed instructions regarding such exceptions, he may not complain of a charge to the jury which is confined to a declaration of the general rule. *Mora v. Favilla*, 186 Cal. 199, 199 P. 17.

[7-10] There was no prejudicial error in refusing defendant's instruction C respecting the credibility of witnesses and the weight of testimony, for the reason that they were sufficiently covered by defendant's instructions T and U. Nor was the modification of defendant's instruction D erroneous. There was no serious controversy regarding the nature or seriousness of plaintiff's injuries. The portion of the instruction which was eliminated is sufficiently covered by plaintiff's instruction No. 2, which was given and which clearly charges the jury that the burden is upon the plaintiff "to prove his case by a preponderance of the evidence." The same observation also applies to the modification and refusal of defendant's instructions Q and V, respectively. It was unnecessary for the court to give to the jury the entire language of section 130 of the Motor Vehicle Act in charging it that before turning onto a public highway the driver "shall give a signal plainly visible to the driver of such other vehicle" indicating his intention so to do. The nature or sufficiency of the signal was not challenged by the plaintiff. It was not contended that an improper signal was given. The plaintiff testified that the defendant turned into Stockton boulevard "without a horn, or any warning whatever." The defendant did testify that he extended his arm in the proper manner before turning into the boulevard. He offered no instruction upon this subject. The arm signals required by statute are intended as a warning not only to drivers of machines in the rear but also to the drivers of "any other vehicle (which) may reasonably be affected by such movement." Moreover, it is quite evident from the record

that the chief act of negligence relied upon was the claim that defendant's headlights were not lighted. If defendant's machine could not be seen by the plaintiff, the operating signals would be unavailing. The jury was quite fully instructed regarding the material issues of the case. There appears to have been no prejudicial error in the court's charge. There was no error in refusing to strike out the plaintiff's reply to the effect that if the defendant's headlights had been on he could have seen them. It does not appear to be a conclusion for one to state he could have seen lighted headlights under the circumstances disclosed by the record. Nor does there appear to have been prejudicial error in any of the other rulings of the court respecting the introduction of the evidence.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 589

LOS ANGELES COUNTY v. DELAHUNT
et al. (Civ. 5464.)

District Court of Appeal, Second District, Division 2, California. June 22, 1929.

1. Bail ☞89(2)—Absence of notice to appear after long silence held unavailable to surety not pleading statute of limitations.

Contention that parties to bail bond should not be held responsible for principal's failure to be present when called for arraignment after silence of over six years, without notice that case would then be called for trial, held unavailable to surety not pleading statute of limitations, but relying solely on plea of laches in bar of stale demand.

2. Bail ☞75—Failure to aver timely call for arraignment or trial, notice to appear, excuse for delay, and acts constituting felony charged, held not open to surety on bail bond.

Alleged defects in complaint and attached bail bond in not showing that principal was called for arraignment or trial within 60 days after being held to answer or notified or called to appear on date case was called for arraignment, nor alleging excuse for long delay between filing of information and arraignment date, erroneously alleging that act charged constituted a felony, and not specifying nature of felony charged, held not open to surety.

3. Pleading ☞8(6)—Allegation of complaint in action on bail bond, that case was duly and regularly called for arraignment, held not mere conclusion.

Allegation of complaint in action on bail bond, that case was duly and regularly called for arraignment, held sufficient as against contention that it stated a mere conclusion.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Los Angeles County against M. J. Delahunt and Mrs. H. C. Eggleston. From a judgment against defendant Eggleston, she appeals. Affirmed.

Scherrer & McCarty, of Los Angeles, for appellant.

E. W. Mattoon, Co. Counsel, and McIntyre Faries, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, J. The respondent county of Los Angeles instituted an action upon a bail bond furnished by one James E. Merritt and signed by the defendants, Delahunt and Eggleston. Mrs. Eggleston's demurrer to the complaint having been overruled, she was given ten days within which to answer, but failed to do so, whereupon her default was entered. Judgment was accordingly rendered, entered, and docketed against the last-named defendant for the amount specified in the undertaking, with interest and costs, and she appeals therefrom.

The complaint alleged that on August 29, 1919, complaint was filed in the justice's court, charging Merritt with having committed lewd and lascivious acts, a felony; that after a hearing he was held to answer in the superior court and committed to the custody of the sheriff until he should give bail in the sum of \$500. It appears that on September 2, 1919, such bond was signed by the defendants, that it was filed on September 8, 1919; and it is alleged further that "the said James E. Merritt was under and solely by virtue of the terms of said bail bond, released from the custody of the sheriff of Los Angeles county."

The bond is attached to the complaint as an exhibit, and in paragraph IV, which is the center of attack, it is averred: "That within thirty (30) days after said commitment, the district attorney of the county of Los Angeles, state of California, filed in the superior court of the state of California, in and for said county, a certain information entitled 'The People of the State of California vs. James E. Merritt,' No. 14579 on the records of said court; that thereafter the said case was duly and regularly called for arraignment on January 25th, 1926, in Department 18 of said court; * * * that at said time the said James E. Merritt did not appear and was not present in court and did not render himself amenable to the order and process of said court, whereupon the court ordered that the bail of said defendant, James E. Merritt, be forfeited, which forfeiture was duly entered upon the minutes of said court."

The bond in question required that: "James E. Merritt, the defendant in the action pending as aforesaid, will appear and answer to the charge above mentioned, in whatever court it may be prosecuted, and will at all times hold—self amenable to the order and process of the court. * * *"

[1] The principal grounds of demurrer relied upon are that the complaint is uncertain, ambiguous, and unintelligible, in that it cannot be ascertained therefrom that the defendant "was ever at any time or at all advised or notified that on said day he was to be and appear for arraignment before the said or any superior court of the state of California in and for the county of Los Angeles." General authorities holding a defendant and his sureties amenable to orders of the court and responsible for his appearance under the provisions of an undertaking, are not attempted to be questioned by appellant. The effect of her argument is that such provisions should not receive a construction rendering them binding for all time, without notice, that they should be reasonably construed, and that the parties to such an instrument ought not to be legally held responsible for a failure to be present when called for arraignment after a silence of six years and four months, without any intimation that the case would then be called for trial. A complete answer to this contention is, however, that the defendant did not plead the statute of limitations, but seeks to rely solely upon a plea of laches, in bar of a "stale demand," and the authorities cited in her behalf involve equity proceedings. *Kleinclaus v. Dutard*, 147 Cal. 245, 81 P. 516, and *Wadleigh v. Phelps*, 149 Cal. 627, 87 P. 93, were, respectively, for the declaration of an express trust, and to have certain formal deeds declared mortgages in fact. No authority is cited, and we are aware of none, denying the right to recover moneys admittedly due upon an obligation in writing after unusual delay, where, as here, the only defense consists of a general demurrer upon the ground that the complaint fails to state a cause of action.

[2, 3] Particular alleged frailties in the complaint and accompanying exhibit specifically attacked by the demurrer are, that it does not appear that the defendant was called for arraignment or trial within sixty days after he was held to answer, or that he was notified or called to appear on January 25, 1926; that there is no allegation attempting to excuse the long delay between the filing of the information and the date set for arraignment; that the allegation that defendant Merritt was charged with lewd and lascivious acts, a felony, and the recital of the attached bond as an exhibit that he was held for examination "upon a charge of * * * a felony," is insufficient in that lewd and lascivious acts do not constitute a felony, and the bail bond does not attempt to specify the nature of the felony, if any, with which he was charged. These issues are not open to the appellant. Her obligation does not provide that she shall be relieved of liability in case the indictment is void or if the prosecution shall fail for any reason, but only if the

defendant shall appear as stipulated. *County of Los Angeles v. Rickert*, 84 Cal. App. 403, 258 P. 134; *Southern Surety Co. v. United States*, 23 F.(2d) 55 (C. C. A.); *St. Lawrence County v. Goldberg*, 175 App. Div. 88, 161 N. Y. S. 641. The attempted criticism that the allegation that "the case was duly and regularly called for arraignment" states but a conclusion, is not well taken. It has repeatedly been held that this expression is sufficient, and that it is not subject to the subtle refinement here asserted. *Gurnsey v. Northern California Power Co.*, 7 Cal. App. 534, 94 P. 858. Other points advanced do not require discussion.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

COMEAU v. BANK OF ITALY. (Civ. 5438.)★

District Court of Appeal, Second District, Division 2, California. June 24, 1929.

Hearing Granted by Supreme Court Aug. 22, 1929.

1. Limitation of actions $\S$ 58(4)—Right of action against stockholder for corporation's debts accrues at same time as that against corporation.

Right of action against stockholder on his liability as such for debts of corporation accrues at same time as that against corporation.

2. Corporations $\S$ 244(2)—Executor of one transferring stock in brokerage corporation before it sold pledged bonds held not liable to pledgor for damages.

Executor, whose testator transferred his stock in brokerage corporation before it sold pledged bonds for less than amount thereof to pay pledgor's indebtedness to it held not liable to pledgor for damages by corporation's breach of contract; its liability being only that of ordinary bailee of personal property until pledgor's debt to it accrued and it exercised right to dispose of bonds for satisfaction thereof.

3. Trial $\S$ 397(1)—Findings held sufficient as against contention that there was no finding respecting brokerage corporation's alleged agreement not to sell pledged bonds without demanding payment of debt.

In actions to enforce stockholders' liability for indebtedness of brokerage corporation to pledgor of bonds sold by it for less than amount thereof to pay pledgor's debt to it, findings including agreement showing no stipulation that plaintiff's securities should not be sold without demand on plaintiff for payment of sums due, as alleged, and stating that no other or different special contract was made concerning them, and that bonds were sold on plaintiff's order, held sufficient as against contention that there was no finding as to such allegation.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Actions by W. A. Comeau against the Bank of Italy, a corporation, as executor of the last will and testament of A. T. Connard, deceased, and another. Judgments for defendants, and plaintiff appeals. Affirmed.

Wiley & Harvey, of Bakersfield, for appellant.

F. E. Borton and James Petrini, both of Bakersfield, for respondent.

CRAIG, J. Appellant herein brought actions against the respective parties above named to enforce an asserted stockholders' liability against A. M. Kean and the Bank of Italy as executor of the estate of A. T. Connard, deceased, as stockholders of Wm. H. Reid & Co., Inc., a corporation. After trial in the superior court of both cases on the same evidence, judgment was rendered in each in favor of the defendants, and the plaintiff appeals from each judgment.

The facts involved are as follows: Wm. H. Reid & Co., Inc., was a California corporation engaged in conducting a stock and bond brokerage business at Taft, Cal. On December 29, 1923, the plaintiff Comeau, opened a trading account with the corporation, whereby Reid & Co., as ordered, agreed to buy or sell, for the account of Comeau stocks, bonds, and securities for the purpose of securing the payment by the latter of any sums for which he might become obligated to the corporation. He deposited with it five bonds of the Brandram-Henderson Company, a corporation, two of which were of the denomination of \$500 each and three of which were of the denomination of \$1,000 each. On March 11, 1924, Connard transferred stock of the corporation then belonging to them. In June, 1924, Reid & Co. sold the bonds deposited with them for \$3,536.38. On the last-named date Connard owed Reid & Co. \$249.67, and the difference was never paid.

[1,2] Upon these facts but one issue of law is presented; that is, did the liability of Reid & Co. to the plaintiff accrue before or after Kean and Connard ceased to be stockholders of Reid & Co.? The right of action against the stockholder upon his liability as such for debts of the corporation accrues at the same time as against the corporation. *Miller v. Lane*, 160 Cal. 90, 116 P. 58. The authorities principally relied upon by appellant may be distinguished from the case before us without difficulty. The leading decision of *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, 153 P. 939, involved the purchase of goods to be delivered at a later date. It was an unconditional purchase at a fixed price, containing no element of uncertainty as to accrual of the liability of the corporation either as to event, time or

amount of payment. The same is true of *Chambers v. Farnham*, 182 Cal. 191, 187 P. 732, and other lease cases cited by appellant.

We think the California case most similar to this one is *Cutting v. Oliphant*, 27 Cal. App. 120, 148 P. 940. The Cutting company made an arrangement by which it turned over to the Oliphant company 1,000 cases of tomatoes, upon an understanding with the last-named company that it was to sell them, and, if necessary to meet its obligations, use the proceeds for that purpose. This it did, but failed to pay the Cutting company the price of the tomatoes and certain other incidental items. Suit was brought against the defendants as stockholders of the Oliphant company. It was held that the liability of this corporation accrued on the date of the actual receipt and use of the money derived from the sale of the tomatoes. Until the cases were sold no obligation existed to pay the Cutting company anything. Up to that time the liability was contingent and while so the stockholders were free from this burden.

The situation in the instant case is similar in this respect. While the bonds were merely held by Reid & Co., at least before appellant became indebted to them, no liability had accrued in his favor which could give rise to this cause of action. The bonds were held as a pledge, and the pledgor could have secured their possession at any time; but he could not have maintained an action against the pledgee for their value, based upon their contract, nor for damages for its breach. This is obvious. The right had not come into being. Its birth was still contingent upon the happening of certain events. Until, pursuant to the contract between them, some debt accrued in favor of Reid & Co., and until it exercised its right to dispose of the bonds to satisfy that right, it rested under no liability to the pledgor except that of an ordinary bailee of personal property; until then no debt was incurred by the Reid company. Before that had been done there could have been no breach of contract by the pledgee, and until such a breach occurred no stockholders' liability could have existed, since it is based on a claim for damages for breach of contract. *Coulter Dry Goods Co. v. Wentworth et al*, supra.

[3] The findings are sufficient. Apparently appellant's criticism of them is not much relied upon nor strongly urged. It is said that there is no finding as to the allegation that plaintiff's securities should not be sold without demand upon him for payment of any sums which he might owe Reid & Co. The findings include the agreement which shows no such stipulation. They further state that no other or different special contract was made between the parties concern-

ing the bonds than that stated, and that the bonds were sold on the order of appellant.

No other points require consideration.

The judgment is affirmed.

I concur: IRA F. THOMPSON, J.

Owing to the absence of Presiding Justice WORKS, he does not join in this opinion.

99 Cal. App. 700

BARNES v. COCKE. (Civ. 6557.)

District Court of Appeal, Second District, Division 2, California. July 2, 1929.

Appeal and error ⇨766—Leave will be given to correct four-page brief, under heading "Statement of Case," not showing nature of point to be discussed, though insufficient (Rules of Supreme Court and District Courts of Appeal, rule 8).

Leave will be given to correct brief consisting of about four pages, all under heading "Statement of Case," without showing nature of point to be discussed, in violation of Rules of Supreme Court and District Courts of Appeal, rule 8, requiring briefs to present each point separately under appropriate heading, though insufficient.

Appeal from Superior Court, Los Angeles County; Arthur P. Will, Referee.

Action by Peter Barnes against R. V. Cocke, in which defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals. On motion to dismiss appeal. Motion denied, with directions.

M. W. Conkling, of San Diego, for appellant.

W. A. Alderson, of Los Angeles, for respondent.

IRA F. THOMPSON, J. This is a motion to dismiss the appeal in this action on the ground that appellant has failed to comply with that portion of rule VIII of the Rules of the Supreme Court and District Courts of Appeal, reading as follows: "The briefs must present each point separately, under an appropriate heading, showing the nature of the question to be presented." The brief here consists of about four pages of printed matter, all under the heading "Statement of the Case." There is no pretense of a heading to show the nature of the point to be discussed. It evidences an entire disregard of the rule—probably on the theory that, since the brief is short, this court could with little labor read it in its entirety. In cases of a direct violation of the rule, where are we to draw the line, if not by requiring a substantial compliance with the rule? If four pages can be filed without incurring the penalty of dismissal,

why not twice or five or ten times that number, and so on until the rule becomes a dead letter? We think we must require compliance with the rule in all cases. Appellant's brief was filed April 27, 1928. No substantial prejudice can result to respondent by giving appellant an opportunity to correct his error.

Appellant's brief is stricken from the files, and he is given 30 days within which to file his opening brief.

I concur: CRAIG, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

99 Cal. App. 656

METZLER v. LOS ANGELES RAILWAY CORPORATION et al. (Civ. 6213.)

District Court of Appeal, Second District, Division 1, California. June 28, 1929.

Carriers ⇨339—Gross negligence of carrier in rate of speed does not make it liable to passenger whose negligence was proximate cause of accident.

Where negligence of passenger was proximate cause of accident, carrier is not liable for her injury, though it may have been guilty of gross or wanton and willful negligence in operation of its train at an excessive rate of speed.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Stephine Olga Metzler against the Los Angeles Railway Corporation and another. Judgment for defendants, and plaintiff appeals. Affirmed.

E. B. Drake, of Los Angeles, for appellant. Gibson, Dunn & Crutcher, Paul Blackwood, and Norman S. Sterry, all of Los Angeles, for respondents.

YORK, J. Plaintiff and appellant brought this action to recover for personal injuries sustained by her as result of alleged negligence of the defendants. Defendants denied the negligence, and in their answers affirmatively alleged contributory negligence on the part of plaintiff. Upon trial of the issues thus presented, the court, sitting without a jury, rendered judgment in favor of defendants.

Appellant now maintains that the findings made by the court are not responsive to the issues presented by the pleadings, that they are uncertain, vague, unintelligible, not precise or exact, and do not support the judgment, and urges that the court should have found upon the *degree* of defendants' negligence, and further, that the findings show defendants guilty of gross negligence and that

contributory negligence is not a defense thereto.

The court found that the defendant corporation maintained a station at the place of the accident, that the relation of carrier and passenger existed at the time of the accident, and that defendant Chase negligently operated the train at a high rate of speed, but that plaintiff's contributory negligence was the proximate cause of the injury.

Upon a thorough examination of the record before us, which came up on a judgment roll only, we are of the opinion that the findings are responsive to the issues presented by the pleadings and are sufficient to support the judgment.

It was a question for the trial court to determine, from the evidence offered at the trial, whether the negligence of defendants or the contributory negligence of plaintiff was the proximate cause of plaintiff's injury. Having decided that plaintiff's negligence was the proximate cause of the accident, it was not incumbent upon the court to find as to the degree of defendants' negligence.

In the case of *Sego v. Southern Pacific Co.*, 137 Cal. 405, 70 P. 279, it was held by the Supreme Court that, even though a railroad company may have been guilty of gross or wanton and willful negligence in operating a train at an excessive rate of speed, still, where it appeared that plaintiff was guilty of contributory negligence proximately the cause of the accident, a judgment of nonsuit was proper. For a discussion of this and other analogous cases, see *Atkins v. Bouchet*, 86 Cal. App. 294, 260 P. 828; *Trulsson v. Southern Pacific Co.*, 42 Cal. App. 404, 183 P. 686. The difficulty with appellant's case is that we have not before us the evidence. So far as here appears, the evidence may have proved as a fact that the negligence of appellant was the proximate cause of the accident.

The judgment of the trial court is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

99 Cal. App. 589

AMERICAN MULTIGRAPH SALES CO. v.
CHARLES W. CRADICK CO. (Civ. 5347.)

District Court of Appeal, Second District, Division 2, California. June 24, 1929.

Judgment  301—After dismissal of claim and delivery case, court could not amend to render judgment for defendant for return of property or its value (Code Civ. Proc. §§ 520, 581, subd. 1).

Where, in action in claim and delivery, on failure of defendant to post redelivery bond, property was seized and delivered to sheriff, and, on demurrer to complaint being sustained, judgment of dismissal was entered, providing for re-

covery by defendant of costs, *held*, that court was without authority to thereafter amend judgment to provide that defendant receive back property or its value; such judgment not being authorized by Code Civ. Proc. §§ 520, 581, subd. 1.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action in claim and delivery by the American Multigraph Sales Company against the Charles W. Cradick Company. Judgment for defendant, and plaintiff appeals. Reversed.

John A. Wallis, of Los Angeles, for appellant.

Charles W. Cradick, of Los Angeles, for respondent.

IRA F. THOMPSON, J. The plaintiff instituted a claim and delivery action against defendant, gave bond as required, and commanded the sheriff to take the personal property described in the complaint. Upon failure of the defendant to post a redelivery bond, the sheriff, who had seized the property, delivered it to the plaintiff. The defendant interposed a demurrer to the complaint, which on September 14, 1925, was sustained. Instead of amending his pleading, the plaintiff, on the same day, filed a dismissal of his action with the clerk. Thereafter, and on September 28, 1925, the court below entered a judgment of dismissal, which provided that defendant have and recover his costs "taxed at \$——." Subsequent to the date of this judgment, and on February 2, 1926, the court below amended its judgment of September 28, 1925, adjudging, among other things, "that defendants receive back that certain property taken from them by the sheriff [describing it], or, in the event such delivery cannot be had, the value thereof, to wit, four hundred twenty dollars, together with the sum of one hundred dollars as damages for the taking and the withholding of said property." It is from this judgment that plaintiff prosecutes this appeal.

The facts which we have recited are taken from the appellant's brief under the authority of rule V of the rules for the Supreme Court and District Courts of Appeal, the respondent having failed to file any reply brief although the opening brief was filed in this court more than two years ago. Subdivision 1 of section 581 of the Code of Civil Procedure provides that an action may be dismissed "by the plaintiff, by written request to the clerk, filed with the papers in the case, at any time before the trial, upon payment of his costs: Provided, a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defend-

ant, who may have his action thereon." Section 520 of the same Code provides that the notice, undertaking and affidavit originally handed to the sheriff, together with his proceedings thereon shall be delivered to the clerk within 20 days after the property is taken. That the plaintiff here sought and was allowed a provisional remedy there can be no doubt. That the first-quoted section provides a manner and method whereby the defendant may obtain relief in such a case as this is equally free from doubt. That the defendant would also have an action against the plaintiff for the wrongful taking and conversion of the property is the holding in *Tapscott v. Lyon*, 103 Cal. 297, 37 P. 225, involving a similar dismissal after answer filed. But it must be apparent that after the dismissal of the action the court was without authority to render a judgment in favor of the defendant, for the reason that nothing was therein pending.

Judgment reversed.

I concur: CRAIG, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

99 Cal. App. 594

BRANDON v. FARIA et ux. (Civ. 6747.)

District Court of Appeal, First District, Division 1, California. June 25, 1929.

1. Homestead $\S$ 167—Conveyance from husband to wife did not impair homestead or destroy right of survivorship created thereby.

Conveyance of property from husband to wife, although as between them vesting property in wife as her separate property, did not impair homestead or destroy right of survivorship created thereby to extent of interest conveyed.

2. Homestead $\S$ 158—Interlocutory divorce decree did not impair homestead nor destroy right of survivorship.

Interlocutory decree of divorce did not impair homestead nor destroy right of survivorship created thereby.

3. Homestead $\S$ 200—Although claimant is entitled to hearing on petition in proceeding for appraisement of homestead, no formal trial of issues nor any findings are contemplated.

Although claimant is entitled to hearing on petition in proceeding for appraisement of homestead, no formal trial of issues nor any findings are contemplated by statute.

4. Homestead $\S$ 200—Where judgment valid on face is shown and execution has been levied on homestead appearing to be of greater value than \$5,000, appraisers should be appointed.

Where judgment valid on its face is shown and execution has been levied on homestead which appears to be of greater value than \$5,000, appraisers should be appointed.

5. Fraudulent conveyances $\S$ 298(4)—Facts found in previous action, that deed from husband to wife was made with intent to defraud husband's creditors, were prima facie evidence of intent to defraud subsequent creditors.

Facts found in previous action, that deed from husband to wife was without consideration and made with intent and purpose to delay, hinder, and defraud creditors of husband, were prima facie evidence of an intent to defraud subsequent creditors.

6. Fraudulent conveyances $\S$ 211—Assignee of creditor could assert fraud in previous conveyance from husband to wife.

Assignee of creditor could assert fraud in previous conveyance from husband to wife.

Appeal from Superior Court, Alameda County; H. V. Alvarado, Judge.

Proceeding on execution by A. Brandon against Frank F. Faria and wife. From an order confirming a report of the appraisers, the wife appeals. Affirmed.

See, also, 276 P. 106.

O. H. Speciale and Owen D. Richardson, both of San Jose, for appellant.

E. H. Christian, of Oakland, for respondent.

PER CURIAM. An appeal from an order confirming a report of appraisers appointed in a proceeding on execution against certain property selected by appellant, Adeline Faria, as a homestead.

The declaration of homestead was recorded on October 25, 1922. The family of the claimant consisted of her husband, Frank F. Faria, and two minor children, the issue of the marriage. On April 4, 1924, Frank F. Faria by deed of gift conveyed the property to appellant, who, on October 27, 1926, by a similar deed conveyed the same to the two minor children mentioned, reserving to herself a life estate therein. On July 26, 1926, in an action brought by appellant against her husband for divorce on the ground of extreme cruelty, an interlocutory decree was entered, awarding her the custody of the minor children and requiring her husband to pay a sum monthly for her support and the support of the minors, but making no assignment or other disposition of the homestead. On February 17, 1927, an action, numbered 93935, was brought in the superior court of Alameda county by respondent Brandon against appellant, her two minor children, and her husband, Frank F. Faria, alleging that on February 5, 1927, a money judgment for \$432.76 was entered against the latter in favor of respondent, who was an assignee, and that an execution issued thereon had been returned wholly unsatisfied. The complaint further alleged that the above deed of gift was without consideration and made with the intent and purpose to hinder,

delay, and defraud creditors of Faria, including the assignors of respondent, and prayed judgment that as to respondent the deed be declared void. Frank F. Faria defaulted, and appellant, with the minor children, who appeared by a guardian ad litem, answered, denying the alleged insolvency of Faria and the fraudulent purpose of the deed.

The court found in accordance with the allegations of the complaint, and on June 13, 1927, entered judgment against appellant for the amount of the money judgment referred to in the complaint, which amount she had previously deposited in court, and the judgment so last entered was satisfied on June 23, 1927.

According to the petition in the present proceeding—which was filed on June 29, 1927, and the allegations of which are not denied—a judgment was entered against Faria and in favor of the respondent on the same day in an action in the superior court of Alameda county, which was numbered 96338. This judgment, the evidence shows, was for \$2,829.53, and was entered upon a claim assigned to petitioner. It was further alleged that on the same day an execution was issued thereon and levied upon the property claimed as a homestead; that no previous execution arising out of the judgment had been levied thereon; and that Faria had no other property subject to execution. It was also alleged that the property was of a value greater than \$5,000. Appellant answered the petition, alleging the conveyance to her by her husband; that he had no further interest in the property; and that the same was owned by the minor children, subject to her life estate therein; and further that an interlocutory decree of divorce had been entered in the divorce action mentioned.

After a hearing an order appointing three persons to appraise the property claimed as a homestead was made. Thereafter a report by the appraisers was filed, in which the property with the improvements thereon was appraised at the sum of \$19,000, the improvements consisting of a dwelling house, barn, and outbuildings, being appraised at the sum of \$1,000. The appraisers further reported that the property could be divided without material injury, and described a portion which was alleged to be suitable for a homestead. After a hearing thereon the report was confirmed, an order was made directing the appraisers to set apart to appellant and her husband as a homestead the portion of the land described in the order and permit execution of the judgment upon the remainder.

Appellant contends that it was not shown that Frank F. Faria had any interest in the property on or after June 29, 1927, the date of the entry of the judgment sought to be enforced in the present proceeding, or that the deed to appellant was fraudulent as to the

assignors of respondent, and that consequently the order was erroneous.

[1, 2] It is not claimed that the homestead was selected from appellant's separate property, but whether the selection was from the community property or the property of her husband does not appear. She was entitled, however, to select from either (Civ. Code, § 1238), and the conveyance of the property subsequently executed by her husband as between them vested the same in her as her separate property, but did not impair the homestead or destroy the right of survivorship created thereby to the extent of the interest conveyed. *Wall v. Brown*, 162 Cal. 307, 122 P. 478; *Estate of Beer*, 178 Cal. 56, 171 P. 1062. Nor did the interlocutory decree of divorce have that effect. *Remley v. Remley*, 49 Cal. App. 489, 193 P. 604; *Strupelle v. Strupelle*, 59 Cal. App. 526, 211 P. 248; *Radich v. Radich*, 64 Cal. App. 605, 222 P. 182.

[3-6] Appellant suggests that subsequent to the entry of the order appealed from a final decree was entered in the divorce action, but this fact, if true, is not material to the question whether the order previously made was erroneous. As held in *Stone v. McCann*, 79 Cal. 460, 21 P. 863, while a claimant is entitled to a hearing upon a petition in a proceeding for the appraisal of a homestead, no formal trial of the issues nor any findings are contemplated by the statute. If a judgment valid on its face be shown, and the execution has been levied on the homestead, which appears to be of greater value than \$5,000, appraisers should be appointed. Appellant, however, relying upon the deed from her husband, answered the petition, claiming that he had no further interest in the property. No evidence touching this issue is disclosed in the record except the deed mentioned and the judgment roll in action No. 93935, which, as stated, contains the finding that the deed was without consideration and made with the intent and purpose to delay, hinder, and defraud the creditors of Faria. When the debt sought to be enforced in the present proceeding was incurred does not appear. Assuming, however, that it was after the execution of the deed, the facts found above were prima facie evidence of an intent to defraud subsequent creditors (*Hemenway v. Thaxter*, 150 Cal. 737, 90 P. 116), which fraud respondent as the assignee of a creditor could assert (*Kemp v. Enemark*, 194 Cal. 748, 230 P. 441); and if the question of Faria's interest was material in this proceeding, as appellant claims, the order appointing appraisers impliedly determined the issue against her, and the evidence supports the decision. If, on the other hand, as contended by respondent, the question of title is not involved in a proceeding of this character, appellant's claim of ownership, if valid

against creditors, can be established in a proper action.

We find no merit in the appeal, and the order is accordingly affirmed.

SCHNITMAN v. HUSTED et al. (Civ. 6824.)

District Court of Appeal, First District, Division 2, California. June 29, 1929.

1. Landlord and tenant §37—Lease must be considered in its entirety to ascertain intention of parties (Civ. Code, § 1641).

Under Civ. Code, § 1641, lease must be considered in its entirety to ascertain intention of parties, and interpretation of language used is not to be arrived at by considering questioned clause as if it stood alone, but by consideration of entire instrument, and, if it appears therefrom that parties have used word or expression in certain sense, that meaning will be imported which parties have shown they intended by other parts of instrument.

2. Landlord and tenant §148(1)—Under lease providing lessor should pay taxes, and that lessee could extend term on same terms, except regarding amount of rent, which should be 4½ per cent. net on appraisement, lessor must pay taxes during renewal term.

Under lease providing that lessor should pay taxes on real estate, and that income from rental should be net to lessor, and not subject to deduction or expense connected with maintenance of property, and providing that lessee could extend term for additional ten-year period on same terms, except as to amount of rent which was to be calculated at rate of 4½ per cent. net on appraisement of land, lessor must pay taxes on real estate during renewal term.

3. Appeal and error §882(6)—Defendants could not remove from case, after adverse ruling, issue they tendered.

Defendants, the appellants, could not remove from case, after adverse ruling, issue which they tendered.

4. Landlord and tenant §53(2)—Successors in interest of lessors could not claim they were not bound by understanding between original parties, where they sought to bind successor in interest of lessee.

Successors in interest of lessors could not claim they were not bound by understanding between original parties as regards renewal of lease when they sought to so bind successor in interest of lessee.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Mary Schnitman against R. L. Husted and another to fix the amount of rent during a renewal term. From the judgment, defendants appeal. Affirmed.

Sullivan & Sullivan and Theo. J. Roche and R. L. Husted, all of San Francisco, for appellants.

M. C. Sloss and Frederick W. Kant, both of San Francisco, for respondent.

KOFORD, P. J. Plaintiff and defendants are, respectively, successors in interest of the lessee and lessors under a lease of real property in San Francisco. The lease provided for a renewal term of ten years without definitely fixing the amount of rental for such renewal term. The parties being unable to agree upon the amount, and the arbitration provided for in the lease having failed, the plaintiff brought this action in the superior court, and had the court fix by judgment the amount of rent to be paid under the terms of the lease during the renewal term. The defendants appeal from the judgment, claiming that the court erred in its interpretation of the lease, because it decided that defendants should continue to pay taxes assessed upon the land, notwithstanding the lease contained a clause to the effect that such rent should be calculated at the rate of 4½ per cent. net on the appraisement of the land. The appraised value of the land was determined by the appraisement committee of the San Francisco real estate board pursuant to stipulation of the parties.

It is only necessary to set out herein two clauses of the lease, but it should be stated that, at the time of the original lease, the land was vacant, and the lessee agreed in the lease to erect a certain building thereon. These two provisions follow:

"8. The lessor to pay all state, city and county taxes which may be assessed upon the real estate only. The lessee to pay all like taxes that may be assessed on the improvements during the entire term hereby created, and the same shall be paid to the first party at least five days before the same shall become delinquent by law and said second party agrees to pay all assessments that may arise out of the improvements on said property or of the streets or sidewalks surrounding the same, *to the end that the income from the rental above specified may be net to said first party and not subject to deduction or expense of any kind connected with the ownership or maintenance of said property.*" (Italics ours.)

"16. That the lessee may extend the term of this lease an additional period of ten years on the same terms and conditions as herein stated, except as to the amount of rent; that the rent for said additional period shall be, before and within sixty days before the commencement of said additional term, settled and fixed between the parties hereto if they can agree thereon. If the parties hereto cannot agree upon said rental for the succeeding ten years then the same to be submitted to appraisement. The parties each to select an appraiser and if they in turn cannot agree, the appraisers to select a third whose deci-

sion shall be final. The amount of the rent to be calculated at the rate of $4\frac{1}{2}\%$ *net* on the appraisement of the land." (Italics ours.)

At the trial, the appellants took the position that the terms of the lease were ambiguous, and evidence was offered to show the intention of the original parties with respect to the payment of taxes. The finding of the court upon this evidence was adverse to appellants, and they claimed in their opening brief herein that the finding was not supported by the evidence. Respondent replied, showing the finding to be based upon conflicting evidence and indicating testimony to support the decision on that point. She also raised the point that appellants' bill of exceptions is insufficient to permit an attack upon the decision for insufficiency of evidence because the bill fails to specify the particulars in which the evidence is alleged to be insufficient, as required by section 648 of the Code of Civil Procedure. Upon the oral argument, appellants concede the latter point to be good, but contend that the judgment roll alone shows the decision to be erroneous. While clause 16 states the rent shall be fixed at a net amount, the judgment requires the lessors, the appellants, to pay the taxes upon real estate as distinguished from the improvements thereon. Appellants cite definitions of the word "net," and from these definitions argue that net rent means that the lessee shall pay such taxes.

[1] A full copy of the lease is set out in the judgment roll—in the findings of fact. The lease must be considered in its entirety to ascertain the intention of the parties. Civ. Code, § 1641. The interpretation of the language used by the parties is not to be arrived at by considering the questioned clause as if it stood alone, but by consideration of the entire instrument, and, if it appears therefrom that the parties have used a word or expression in a certain sense, that meaning will be imported which the parties have shown they intended by other parts of the instrument. *Pringle v. Wilson*, 156 Cal. 313, 104 P. 316, 24 L. R. A. (N. S.) 1090.

In clause 8, above quoted, the parties have defined the sense in which they have used the word "net," and in that paragraph it is plainly apparent that, whatever other deductions they contemplated should be made to arrive at the net rent, taxes on the land was not one of them. There they say in almost direct words that, if the lessors pay the taxes levied against the land, and the lessee pays other taxes and assessments, the rent reserved in a definite amount for the first ten years will be considered to be a net rental to the first party, the lessors.

[2] Applying the rule of interpretation which requires harmony among clauses to

the end that one clause will not nullify another, we find that to give to the word "net" the definition contended for by appellants would nullify the direct and expressed provisions of the lease which require the lessors to pay taxes levied upon the land. While that clause is primarily directed to the first ten-year period, still all the terms and conditions of the lease by clause 16 are made applicable to the renewal term of ten years, "except as to the amount of the rent." If the parties had intended that the lessee should pay the taxes on the land during the renewal term, we should naturally expect them to have written "upon the same terms and conditions except as to the amount of rent and the payment of taxes" instead of merely "except as to the amount of rent." Clause 16 contemplates that the amount of rent shall be settled and fixed in advance of the beginning of the ten-year renewal term. This could not be done accurately by fixing a definite and stated amount in advance, because the taxes will vary from year to year during the term. The tax covenant could only be changed by changing paragraph 8, which is not a term and condition relating to the amount of rent, but one relating to taxes and assessments.

[3, 4] Appellants, by affirmative allegations in their answer to the complaint, set forth that the parties to the original lease meant and intended by the language of paragraph 16 of the lease that the lessee should pay, among other charges, the taxes levied upon the land. By statements of their counsel at the trial, and by the introduction of evidence of parol declarations, appellants actively led the court to make a decision or finding upon the issue thus tendered. The evidence on that point being conflicting, and appellants admittedly being unable to attack the sufficiency of such testimony, the decision upon that point also requires an affirmance of the judgment. Appellants cannot remove from the case, after an adverse ruling, the issue which they tendered; nor can they now claim they are not bound by the understanding between the original parties when they thus sought to so bind the respondent, who is likewise a successor to one of the original parties. There is no conflict between the findings and any particular clause of the lease because the findings set forth the lease as an entirety.

Whether the lease should be interpreted by considering its language alone or by resort to extrinsic evidence, the same conclusion is reached.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

99 Cal. App. 617

In re WITHINGTON'S ESTATE.★

WITHINGTON v. WITHINGTON et al.

(Civ. 6462.)

District Court of Appeal, Second District, Division 2, California. June 26, 1929.

As Modified on Denial of Rehearing July 25, 1929. Hearing Denied by Supreme Court Aug. 22, 1929.

1. Wills ⇨324(3)—Undue influence in procuring execution of will held insufficient for jury.

Evidence in will contest relative to undue influence in procuring execution of will held insufficient to justify submission to jury.

2. Wills ⇨81—Will with small express bequests and residue to testator's brothers and sisters, with understanding that widow shared in community property, was valid.

Will disposing of estate appraised at more than \$878,000, with express bequests aggregating \$40,000 and residue to testator's brothers and sisters with the understanding that widow was entitled to her share of community property, was valid.

3. Wills ⇨166(7)—Evidence of opportunities and circumstances creating suspicion of attempted unfair advantage is insufficient to justify court in overturning will otherwise valid.

Evidence that relations and actions of persons surrounding testator furnished opportunities and circumstances which might create a suspicion of attempted unfair advantage in procuring execution of will is insufficient to justify a court in overturning plain directions of last will and testament which is otherwise valid.

4. Wills ⇨327—Directed verdict for proponents of will was proper, where verdict or judgment for contestant would have necessitated order setting it aside on motion.

Where evidence in will contest was such that verdict or judgment in favor of contestant would necessitate an order setting it aside upon motion therefor, trial court properly directed jury to find a special verdict on each of issues presented in favor of proponents.

5. Wills ⇨164(5)—Evidence of beneficiary's disreputable character and occupation 13 years prior to will held inadmissible as tending to show undue influence.

Evidence in will contest relative to disreputable character and occupation of one beneficiary 13 years prior to date of will, and of testator's knowledge thereof, held properly excluded as too remote in point of time and wholly unconnected with any other evidence showing exercise of undue influence.

6. Pleading ⇨129(2)—Failure of answer to deny manner in which undue influence was alleged to have been exercised was unnecessary on failure of proof thereof.

Where contestant of will was unable to prove that undue influence in any manner entered into transaction, the failure of answer to deny allegations as to manner in which undue

influence was alleged to have been exercised, or opportunity therefor was obtained, was immaterial.

7. Appeal and error ⇨882(5)—Will contestant introducing evidence in attempted proof of allegations could not complain of insufficiency of answer.

Where will contestant introduced evidence in attempted proof of allegations in pleading, as though fully denied, she could not on appeal complain of insufficiency of answer in such regard.

Appeal from Superior Court, San Diego County; Eugene Daney, Jr., Judge.

Proceeding by Lysle Woodward Withington and others for the probate of the will of Carl Withington, deceased, contested by Georgia May Withington. Judgment for proponents, and contestant appeals. Affirmed.

Luce & Swing and Albert J. Lee, all of San Diego, for appellant.

Ed. P. Sample and Harden & Green, all of San Diego, for respondents.

CRAIG, J. On October 23, 1925, Carl Withington died testate at San Diego, Cal., leaving him surviving a widow, Georgia May Withington, contestant and appellant herein, and a brother and three sisters. By his will, dated October 15, 1925, he gave, devised, and bequeathed to Louis Kucick and Peter Donarlache \$10,000 each, to one Lucille Moore, \$20,000, and to his brother and sisters the rest, residue, and remainder of his estate, share and share alike, "understanding that my wife, Georgia May Withington, takes by operation of law, upon my death, certain of our community property." The widow contested the will upon various grounds, and at the conclusion of her evidence the jury were instructed to return a verdict in favor of the proponents. Judgment having been rendered accordingly, she appealed therefrom.

Three grounds or causes of action were asserted in the petition for revocation of the will, and for letters of administration: First, insanity was alleged, in that from some period prior to October 15, 1925, to the date of his death, the testator was not of sound or disposing mind or memory to make a will or to dispose of his property, or to understand his relations to other persons. Second, that Lucille Moore had caused him to separate from his wife, and had prevented a reconciliation; that he had lived in illicit relations with Miss Moore, who, by threats and otherwise had caused him to fear her, and that she, together with the decedent's sisters, had secured domination and control over his mind and actions, and caused him to dispose of his estate by will, whereas he had intended and promised the contestant that it would be distributed during his lifetime. Third, that Lucille Moore had falsely accused the contestant of infidelity, and lack of affection or

sympathy for the decedent during his illness, protesting her own love and sympathy for him, falsely representing that his wife did not wish a reconciliation; that she refused to permit the contestant to visit her husband, or to communicate with him. This count or ground of contest attempts to charge statements, representations, and acts in the nature of fraud, and alleges that the testator was caused to rely thereon, and to believe that he could not return to his home, as a result of all of which he executed the will in controversy, making substantial bequests to Lucille Moore which he would not otherwise have made, and that by his said will the testator deprived "his said wife of her just, rightful and proper share of his estate"; and that "the said Carl Withington would not have executed the purported will herein mentioned were it not for the said acts and conduct of the said Lucille Moore mentioned herein."

It appears that both the testator and the appellant had previously had other spouses, but that notwithstanding that fact they had maintained exceedingly intimate relations. She testified that she herself had been attacked by the decedent's former mate for her associations with him, prior to the time she married him, and censured by Withington for visiting the Tia Juana resort of, and being friendly with, one Grundy. Withington had for many years been engaged in conducting saloons, gambling houses, and assignation resorts, in California and in Mexico, prior to and during his marriage with appellant, with some of which she was familiar, and from one of his places of business at Tia Juana she had drawn considerable sums of money. Their marital relations were not blessed with constant congenial peace and quiet; they discussed the subject of divorce, each suggesting that the other obtain a decree, and Withington upon one occasion told the appellant, "Either you get a divorce or I will." Shortly thereafter appellant proposed, "I would get a divorce, and I would go my way, and he could go his," if he would "do the right thing" by her in a financial way. She testified that they had "little disputes," and that at one time, after complaining that she did not love him, and that he had heard rumors, he knocked her down. About the month of May, 1925, Mrs. Withington consulted an attorney regarding divorce proceedings, when she was informed that Withington was living with Lucille Moore, although she had not seen him since January, 1924, and did not see him until August, 1925, or two months after the deceased first entered the hospital for treatment. There were then negotiations between the parties toward a property settlement, Mrs. Withington demanding \$350,000, and her husband offering \$250,000, which she declined, and filed suit, praying the appointment of a receiver, an accounting, and division of the property. Dur-

ing the attempted compromise Withington, appellant testified, came to her weeping and hysterical, and considered returning home, suggesting that they "bury the hatchet," stating that he was trying to get his health back, and was sorry for past difficulties; that he said: "I cannot give you such money as you are asking;" "I am trying to do the right thing by you and do not intend to beat you out of a thing." During direct examination she testified further regarding this phase of the controversy: "I asked him if he had made a will and he said no." "He grasped me and kissed me good bye;" "he was to come back in ten days, but he did not come back"; "I asked him, 'What about my attorney's fees?' He says, 'Well, I will pay them';" "he wanted to bring his nurse there too"; "I met Dr. Rees and Dr. Brown in front of Jedlick-Heim's, on the corner of Broadway—or on the corner of Sixth and C, and talked to them one night in regard to his condition, and why he could not come home, or why it was he was not coming home, and they said he was too sick." Shortly thereafter the decedent was again removed to the hospital, and, following blood transfusions and operations which proved of no avail, appellant learned of his demise.

Lucille Moore continued with or near the testator during all of the several months of his last illness, both at her home and at the hospital, preparing his meals, and caring for him. Appellant visited the house last mentioned, upon at least one occasion bearing flowers, but she testified that she made no effort to learn what hospital he had entered; "I did not think it my duty to find out about his condition"; "This other woman was there with him all the time he was in the hospital, and until he died, and at the funeral"; "my pride would not permit me to attend his funeral; I sent no flowers"; that she had no reason to write him, and "was never going to run after him." She also testified that she feared Lucille Moore was having quite a bit of influence over the decedent, and that he was giving her "a portion of my community property," but that she knew that the law would allow her one-half of the community property, and that he could not will it away. Upon the other hand, all of the testimony upon the subject indicates that Lucille Moore and Withington did not agree, that she drank to excess, and was at times angry, hysterical, and abusive toward him; that she stated that, having cared for him during all of his illness and tribulations, it would break her heart should he return to his wife. A nurse testified that Miss Moore during one fit of intoxication procured a revolver and threatened to shoot the decedent, but that she disarmed her by force. Various quarrels and arguments occurred, but at none of these times does the subject of a will, or of a property allowance, appear to have been the cause of any such unpleasantness, or to have been mentioned. There is a striking absence of

evidence of even a suggestion by Lucille Moore, or by any of the testator's relatives, as to a will or regarding his property. To the contrary, close attendants and friends who were present during his illness swore that they did not hear the subject mentioned, except when Withington sent for an attorney, and when the will was produced, witnesses were summoned, and the document was executed. One witness did say that Lucille Moore remarked before the will was signed that she was not satisfied with its provisions, but there is no testimony tending to indicate that Miss Moore was in any manner instrumental in or connected with its preparation, or that she actually knew its contents.

There was absolutely no proof as to insanity or incompetency of the testator, as charged in the first ground of contest. All of the witnesses, including the attending physician and nurses, testified that he was not only of sound mind at all times, but that he was exceedingly keen and alert up to and including the last hours of his life.

[1] We have especially scanned those features of the evidence tending to exhibit the intimate relations of the testator and Miss Moore, and have made a careful and exhaustive review of the entire record, which embraces the judgment roll, and the testimony, as well as the hospital charts and the proceedings in probate. From it all, we are unable to find support for the allegations that this beneficiary, either alone or in conjunction with Withington's relatives, attempted to persuade or coerce him to make a will, or to make any disposition of any portion of his estate. Conceding, for argument's sake, that her protestations of love for him, and her statements that appellant did not care for him, were false and were made solely for the purpose of appealing to his sense of benevolence, it cannot be said, in the absence of substantial proof of effective dishonesty upon the part of the beneficiary, that a sane man was unduly influenced to give her what he deemed appropriate. Testimony was also adduced tending to show that he realized the existing jealousy between his wife and Lucille Moore, and that he desired to protect them both, but that if he pleased either he would incur the wrath of the other. A witness testified that Withington quarreled with appellant and with Miss Moore, and that apparently there was "no affection between any of them." Under all of the evidence before us, we are impelled to conclude that the testator may well have been deemed by the trial court as having exercised normal faculties and to have merely exercised his undoubted right to make such disposition of his property by will as he saw fit. There is no evidence that his sisters were parties to any wrongful influence in this respect. Whenever the decedent considered returning to his wife they favored it; they were present during his illness, and at the time of the execution of his

will, but, aside from such not unusual occurrences, their connection with the case is insignificant.

We have thus treated the second and third counts or grounds simultaneously, since the alleged confidential and illicit relationship between Withington and Lucille Moore, claimed to have resulted in the separation of the decedent and appellant, the preventing of a reconciliation, and the procurement of a will depriving the contestant of a substantial portion of her share of the estate, constitute the substance of each. We conclude that the testator was neither directly nor indirectly caused by undue influence, fear, or fraud to make the will which he did make, nor is there sufficient evidence, tending to indicate that he was at that time insane or incompetent to do so intelligently, to require or justify a reversal.

[2] It is no less apparent that the will itself is valid in its provisions for various beneficiaries, and conveys no property to those other than the widow which the testator might not legally have devised and bequeathed to them without jeopardizing her share of the community. Of an estate appraised at more than \$878,000, which had been accumulating for many years prior to the marriage of the contestant and the decedent, which existed but about six years, he gave to two intimate friends, one of whom aided him materially, \$10,000 each, and to Miss Moore \$20,000. To his brother and sisters he gave the rest, residue, and remainder of his estate, "understanding that my wife, Georgia May Withington, takes by operation of law, upon my death, certain of our community property." Express bequests aggregating but \$40,000, from an estate of such comparatively large proportions, though doubtless disconcerting, cannot upon the record before us be held legally injurious to the interests of the contestant.

[3] Appellant testified that the testator promised that he would make no will, and that he handed her a list of his properties, promising to furnish her with other papers and documents, the nature of which she did not state; that she was informed—and certain witnesses corroborated her in asserting—that Lucille Moore may have obtained from Withington's effects a box and some moneys or securities which were secreted and withheld from the estate. Contestant attempts to infer from these and other facts and circumstances heretofore set forth that Miss Moore had custody and control of the decedent and his affairs, and that she succeeded in preventing appellant from receiving her share of the estate, and that the will was unnatural. It is nowhere ventured, however, that Withington at any time promised the contestant more than her share of the community property. In any event, he was legally entitled to change his mind, and to make a will otherwise disposing of his sepa-

rate property and his share of the community. As already observed, his condition mentally, and his environment, were such that no unnatural or improper influence or coercion appears to have diverted his dispositive act from his true intentions. The most that can be said of the relations and actions of persons about him is that they furnished opportunities and circumstances which might create a suspicion of attempted unfair advantage. But this is not sufficient to justify a court in overturning the plain directions of a last will and testament which is otherwise valid. It therefore follows that the will in controversy is legally a natural one, and that its provisions do not exceed the legal bounds of the testator's properties, or infringe upon the statutory rights of the contestant.

This case is not appreciably unlike that presented in *Estate of Langford*, 108 Cal. 608, 41 P. 701, wherein the grounds of contest were similar to those here urged, against the provisions of a will conveying to another more of the estate than the contestants anticipated or approved. It was submitted to a jury, who declared it invalid, and in reversing the judgment the Supreme Court said:

"The consideration of the question whether or not a will is 'unnatural'—by which is meant, we suppose, different from what it might have been expected to have been—is of no importance except in a case where there is some evidence immediately tending to show mental incapacity, fraud, or undue influence; in which event it might serve to help out a weak case. But there is no evidence in the case at bar that could be thus helped out. A will cannot be upset because in the opinion of a jury or court it is unnatural. In the opinion of the *McDevitt Case* [95 Cal. 17, 30 P. 101], it is said: 'Although I do not think it of special interest here, it is well to remember that one has the right to make an unjust will, an unreasonable will, or even a cruel will. Generally, such questions turn our thoughts, as they are often intended to, from the only question at issue, which always is, only, Is the will the spontaneous act of a competent testator? Of course, juries lean against wills which to them seem unequal or unjust. But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper.' (See, also, *Latham v. Udell* [38 Mich. 238], supra.) And, indeed, if it were important to consider it, we do not see how the will in the case at bar can be considered unnatural in such extreme sense as to be remarkable. * * *

"If the law is to be changed, and the right of disposing of one's property by will, the policy of which has been sanctioned by the wisdom and experience of many generations of men, is to be taken away, that result must be effected by the legislative department of the government. As the law now stands that right cannot be frittered away after the death of the testator according to the tastes and notions of others. It is quite likely that in the case at bar the provisions of the will did not meet with the approval of the jurors; but their approval was not necessary."

In the recent decision of the *Estate of Smith*, 200 Cal. 152, 252 P. 325, the testator's will was contested by his widow upon grounds of alleged incompetency, fraud, undue influence, and persuasion to make a will while in a "dazed" condition. The cardinal principles in such cases are announced in an exhaustive opinion by the court, upon a thorough review of nearly all of the authorities of this state, in the following language:

"The actual mental condition of the decedent at the time of the execution of the will is the question to be determined upon a contest based on his alleged incompetency and evidence tending to show unsoundness of mind either before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will. (*Estate of Perkins*, 195 Cal. 699, 235 P. 45; *Estate of Casarotti*, 184 Cal. 73, 192 P. 1085; *Estate of Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 P. 695.) To overcome the presumption of sanity the contestant must show affirmatively and by a preponderance of the evidence that the testator was of unsound mind at the time he executed his will. (*Estate of Casarotti*, supra; *Estate of Dow*, 181 Cal. 106, 183 P. 794.) * * *

"A testator is of sound and disposing mind and memory if at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, and to understand and recollect the nature and situation of his property and to remember, and understand the relations to, the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument. (*Estate of Sexton*, 199 Cal. 759, 251 P. 778; *Estate of De LaVeaga*, 165 Cal. 607, 133 P. 307; *Estate of Huston*, 163 Cal. 166, 124 P. 852.) * * *

"Undue influence has been repeatedly defined to be 'the exercise of acts or conduct by one person toward another person by means of which the mind of the latter is subjugated to the will of the person seeking to control it' (*Estate of Newhall*, 190 Cal. 709, 717, 28 A. L. R. 778, 214 P. 231, 234), that 'In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testa-

tor by which the will which he executes is not the expression of his own desires. * * * The presumption of undue influence is not raised by proof of interest and opportunity alone. In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made.' * * *

"The fact that the will of a testator may be unnatural, unfair, or unjust creates of itself no presumption that the decedent was incompetent or that the instrument was procured by undue influence, nor does it shift the burden of proof to the proponent. In *Estate of Martin*, 170 Cal. 657, 663, 151 P. 138, 141, it is declared that 'a testator has the right to make an unjust or an unreasonable, or even a cruel will and that no will may be legally set aside upon the mere establishment that it is such a will.'"

[4] Under the facts of the case last quoted, which we need not relate, incompetency, misrepresentations, influences, and bequests contrary to antecedent expressions of intention, all contributed to suggest the unnatural character of the will, if not its unreasonableness, far more strongly than do those of the instant proceeding. Yet it was said in effect that, measured by these rules, the contest was not sufficiently supported by substantial evidence to show that the will in suit was not the true expression of the testator's desires. Hence, if the will is in all respects legal and valid, and the evidence is not of a preponderating weight sufficient to warrant any judgment for the contestant, it would not only be an idle act, but perhaps an expensive and inexpedient one, to submit the issues to a jury for decision. It follows that this case falls within the ruling applicable to non-suits, since a verdict or judgment in favor of the contestant would necessitate an order setting it aside upon motion therefor. *Estate of Bryson*, 191 Cal. 521, 217 P. 525; *Estate of Caspar*, 172 Cal. 147, 155 P. 631; *Estate of Luckenbach* (Cal Sup.) 270 P. 961. It was not error for the trial court to direct, as it did, that the jury find a special verdict upon each of the issues presented, in favor of the proponents.

[5] It is further contended that the contestant was erroneously precluded from introducing, over the objection of the proponents, evidence of disreputable character and occupation of Lucille Moore 13 years prior to the date of the will, and of the testator's knowledge thereof. It was represented during the trial that two witnesses would testify that, in 1912 this beneficiary was a prostitute, and an inmate of a house of ill fame at Taft, Cal., in which Withington then had an interest. It is argued that such evidence would tend to show the probability of her scheming to obtain his property, and the unnatural character of the will through which

she benefited. It is not suggested, however, that she continued thereafter to follow a dissolute life or occupation as before, nor do we coincide with appellant's assertion that there is any evidence upon which this proof, though it be a fact, would tend to throw light favor to her cause. It is appropriately within the exception noted by the contestant's authorities as "too remote in point of time or wholly unconnected with any other evidence showing the exercise of undue influence." The most that can be said of the proffered proof is that it *might* have contributed to the mere furnishing of opportunity for undue influence, but in the absence of substantial proof of the principal issue, evidence of opportunity therefor, as we have seen, is of no probative force or effect whatever.

[6, 7] Finally, it is insisted that paragraph VI of proponents' answer by its insufficiency as a specific denial of certain allegations of the contestant's petition constitutes admissions of facts which, if taken as true, would render a verdict for the former erroneous. By five subdivisions, said paragraph of the petition alleged that the decedent's will, if executed at all, was procured by the undue influence of Lucille Moore, aided and abetted by the testator's three sisters, and was not the free and voluntary act of Carl Withington. As grounds of this alleged conclusion, it recites: (1) That Withington and Lucille Moore had lived together illicitly; (2) that he was in fear of her, and that by threats and other means she secured domination and control of his actions; (3) that their relations had been illicit and confidential, and that she had assumed the position and authority of his legal wife, and dictated the management and disposition of his properties; (4) repeating various of the foregoing allegations, it is averred that Withington permitted Miss Moore to assume and exercise such control; and (5) that Withington separated from his wife through his own fault, thereafter desiring a reconciliation, which was prevented by Miss Moore. Other facts and circumstances, claimed by the contestant to have constituted undue influence and coercion, as heretofore stated, are then charged, and it is alleged that but for the same a reconciliation would have been effected, that the decedent would have returned home, and would not have executed the will in question. The proponents deny that said will was procured or caused to be executed by undue influence of Lucille Moore, or any other person, or that it was the result of any undue influence, or was not the free and voluntary act of the testator. It is quite apparent that this is not a specific denial of each and every detailed circumstance of the petition, yet if, under the pleadings as issue was joined, the contestant was unable to prove that undue influence in any manner entered into the transaction,

denial of the manner in which it was alleged to have been exercised or opportunity therefor was obtained would be unnecessary. It appearing that said will was the free and voluntary act of the testator, proof of his relations with said beneficiary, as already observed, bears no probative force in this proceeding. Again, since the contestant introduced evidence in attempted proof of the allegations of her pleading, as though fully denied, she may not now complain of the insufficiency of the answer, if it be insufficient in this regard. *Henderson v. Northam*, 176 Cal. 493, 168 P. 1044.

The judgment is affirmed.

I concur: IRA F. THOMPSON, J.

Owing to the absence of WORKS, P. J., he does not participate in this opinion.

99 Cal. App. 649

MADERA CANAL & IRRIGATION CO. v. K. ARAKELIAN, Inc., et al. (Civ. 3842.)

District Court of Appeal, Third District, California. June 27, 1929.

Appeal and error ⇨623—Clerk's transcript filed on appeal on June 17, where proceedings for settlement thereof were terminated on June 15, was filed in time (Code Civ. Proc. § 953a, 660, 939; Rule I, § 1, of Supreme and District Courts of Appeal).

Where clerk's transcript was certified by clerk on June 30, 1928, and filed in District Court of Appeal on June 17, 1929, and proceedings for settlement of transcript were terminated by dismissal in trial court on June 15, 1929, clerk's transcript on appeal prepared under provisions of Code Civ. Proc. § 953a, was filed in time under Rule 1, § 1, of Supreme and District Courts of Appeal, and appeal was effective, at least as to judgment roll, though motion for new trial was denied by operation of law by virtue of expiration of time for passing on the motion under Code Civ. Proc. § 660, and though 30-day period thereafter for appeal had expired under section 939.

Appeal from Superior Court, Madera County; E. N. Rector, Judge.

Action by the Madera Canal & Irrigation Company against K. Arakelian, Inc., and others, in which defendant named interposed a cross-complaint. From the judgment, defendant named appeals. On motion to dismiss appeal. Motion denied.

Lindsay & Gearhart, of Fresno, for appellant.

Walter C. Maloy, of Covina, for respondent.

FINCH, P. J. This is a motion to dismiss defendant's appeal on the ground that no

bill of exceptions or other record on appeal has been prepared or filed. The following facts appear from the clerk's certificate and the affidavits on file:

"During the course of the trial * * * and after the evidence therein was fully taken and before the said cause was decided, * * * a full and complete transcript of the evidence and proceedings had during said trial was made by the court reporters who reported said cause, and the original of said transcript was left with the judge of said court, * * * and a copy thereof furnished to the attorney for said plaintiff and to the attorney for said defendant." Judgment was entered February 20, 1928. March 2, 1928, the defendant filed notice of intention to move for a new trial. March 29, 1928, notice of the entry of judgment was served on defendant. The court's power to pass on a motion for a new trial expired 60 days thereafter. Code Civ. Proc. § 660. The defendant had 30 days after the expiration of such 60-day period in which to appeal. Code Civ. Proc. § 939. June 12, 1928, the defendant filed notice of appeal and also filed with the clerk a request for a transcript as provided for by section 953a of the Code of Civil Procedure. The latter notice stated that the "appellant has arranged personally with the stenographic reporter for his compensation." No further steps were taken in the proceeding for a new trial. February 2, 1929, the plaintiff served the defendant with notice that "the motion for a new trial * * * was, by operation of law, denied on the 25th day of August, 1928." February 12, 1929, the original copy of the reporter's transcript, made as stated during the progress of the trial, was delivered to the clerk. June 30, 1928, the clerk's transcript was certified by the clerk, and it was filed in this court on June 17, 1929. Proceedings for the settlement of a transcript under the provisions of section 953a of the Code of Civil Procedure were terminated by dismissal in the trial court on June 15, 1929. Rule I, section 1, of the Supreme and the District Courts of Appeal provides that the time for filing the transcript on appeal prepared under the provisions of section 953a of the Code of Civil Procedure "shall not begin to run until such transcript is approved and certified as required by law, or until the proceeding to obtain the same has been terminated in the court below by dismissal or otherwise." Under the provisions of this rule, the clerk's transcript was filed in time, and therefore the appeal is effective as an appeal on the judgment roll at least. *Locke Paddon v. Locke Paddon*, 194 Cal. 73, 77, 227 P. 715.

The motion to dismiss is denied.

We concur: PLUMMER, J.; THOMPSON, J.

99 Cal. App. 528

SILVEY et al. v. FINK et al. (Civ. 6769.)★

District Court of Appeal, First District, Division 1, California. June 20, 1929.

As Modified on Denial of Rehearing, July 18, 1929.

1. Corporations ⇨617(2)—Corporation, during period of suspension, cannot borrow money, execute notes, or sell stock (Pol. Code, § 3669c, subd. 2).

Corporation and its directors, during period of suspension of powers for failure to pay taxes, under Pol. Code, § 3669c, subd. 2, are without power to borrow money or execute corporation's note therefor, or to enter into contracts of subscription, or to sell stock, and no authority to do such forbidden acts can be conferred by corporation commissioner.

2. Corporations ⇨617(2)—Subscription contracts and stock certificates issued after suspension of powers of corporation were void, and subscribers were entitled to refund of purchase price (Pol. Code, § 3669c, subd. 2).

Subscription agreements made after powers of corporation were suspended for nonpayment of taxes, under Pol. Code, § 3669c, subd. 2, were void, and certificates issued thereunder did not make subscribers owners of stock, and subscribers were therefore entitled to recover money paid for the stock on ground of failure of consideration.

3. Corporations ⇨617(2)—Subscribers to stock of corporation whose powers were suspended for nonpayment of taxes, were not estopped to demand refund, where ignorant of suspension (Pol. Code, § 3669c, subd. 2).

Person subscribing for stock in corporation after suspension of its powers for nonpayment of taxes, under Pol. Code, § 3669c, subd. 2, held not estopped from demanding return of amount paid, in suit against directors, where subscribers were not aware of the fact that the corporate powers had been suspended.

4. Corporations ⇨617(2)—Subscribers to stock, ignorant of suspension of corporation's powers, were not precluded from recovering refund, as in *pari delicto*, though plaintiffs subscribed on specially favorable terms (Pol. Code, § 3669c, subd. 2).

Where subscribers to stock of corporation were ignorant at the time that powers of corporation had been suspended for nonpayment of taxes under Pol. Code, § 3669c, subd. 2, subscribers were not precluded from seeking refund of amount paid, as having been in *pari delicto*, though parties to transaction intended that plaintiff should subscribe for stock on more favorable terms than others.

6. Contracts ⇨102—Intended violation of law not actually effected will not prevent recovery on contract.

Intention to violate the law will not prevent recovery on contract, where violation of law, though intended, is not actually effected.

6. Corporations ⇨617(2)—Refund to subscribers of part of amount paid under stock subscription contract would not prevent recovery of balance, where corporation's powers were suspended (Pol. Code, § 3669c, subd. 2).

That part of the amount subscribed for stock of corporation whose powers were suspended for nonpayment of taxes under Pol. Code, § 3669c, subd. 2, had been refunded, would not prevent recovery of balance of purchase price paid by subscribers, where the amount recovered by plaintiffs was but part of that to which they were entitled.

7. Corporations ⇨617(2)—That corporation incurred debts after suspension of powers did not prevent subscribers from recovering amount paid on subscription contracts (Pol. Code, § 3669c, subd. 2).

Fact that corporation, since time of suspension of its powers for nonpayment of taxes, under Pol. Code, § 3669c, subd. 2, may have incurred debts, did not prevent subscribers from recovering amount paid under subscription contract entered into after date of suspension, since corporation could incur no valid contractual obligations.

8. Corporations ⇨617(2)—Failure of subscribers to return stock certificates or part of refund under subscription contracts, entered into after suspension of corporate powers, did not preclude refund (Pol. Code, § 3669c, subd. 2; Civ. Code, § 1691, subd. 2).

Fact that subscribers retained certificates issued by corporation and part of refund of stock subscriptions did not prevent maintenance of action for recovery of balance of price of stock, where certificates were void and without value on account of suspension of corporation's powers for nonpayment of taxes at the time of the stock transaction, under Pol. Code, § 3669c, subd. 2; return of certificates being unnecessary, under Civ. Code, § 1691, subd. 2.

9. Appeal and error ⇨882(4)—Directors of corporation answering amended complaint and proceeding to trial on theory that they were properly joined, could not object that amendment to original complaint, filed against corporation alone, was improper (Pol. Code, § 3669c, subd. 2).

In action by subscribers to stock of corporation, originally filed against corporation alone to recover amount paid for stock, directors subsequently joined as defendants could not complain that amended complaint by which they were joined after plaintiff's discovery that powers of corporation had been suspended, under Pol. Code, § 3669c, subd. 2, introduced different cause of action, where no objection was made to sufficiency of complaint, and answer was filed and trial proceeded on theory that action was one to recover amount from directors.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by John L. Silvey and another against Paul Martin Fink and others. Judgment for defendants, and plaintiffs appeal. Reversed.

James M. Thomas, of San Francisco, for appellants.

Philip C. Boardman, Louis P. Dunkley, and John R. Tyrrell, all of San Francisco, for respondents.

PER CURIAM. An action to recover the sum of \$5,000 from persons acting as the board of directors of Supreme Paint, Varnish & Enamel Company, a domestic corporation, the powers of which were suspended under the provisions of section 3669c of the Political Code.

Plaintiffs alleged that this amount was loaned by them to the corporation, and was evidenced by a promissory note dated December 1, 1923, purporting to have been executed on its behalf, and that, at the time of the transaction, the powers of the corporation, unknown to plaintiffs, had been suspended for nonpayment of its license taxes for the year 1923. The defendants by their answer averred that the above amount was paid as a subscription for shares of the capital stock of the company after its powers were suspended, as alleged in the complaint, but pursuant to authority to sell the stock granted by the commissioner of corporations, and that the note was executed merely as an accommodation and without consideration, and that plaintiffs received for the above amount and retained 500 shares of the preferred and 125 shares of the common stock of the company, and in addition the sum of \$750 paid as a commission on the amount of their subscription.

The court found in accordance with the averments of the answer, and entered judgment for the defendants.

It appears without dispute that the powers of the corporation were suspended at the time of the transaction, and it is admitted by the pleadings that plaintiffs were without knowledge of the fact. This suspension took place on the first Monday in March, 1923, and so far as shown, the powers of the company have never been revived. Theretofore, on November 15, 1922, the corporation had obtained from the corporation commissioner a permit to sell certain of its capital stock, consisting of preferred and common stock, and on May 10, 1923, an amended order was issued, authorizing it to sell 10,000 shares of its preferred stock and 2,500 shares of common stock in units of one share of preferred and one-fourth share of common for the price of \$10 per unit, subject to a selling expense of not to exceed \$2 per unit. The permit provided that, unless subscriptions for 1,250 shares of its preferred stock should have been obtained, and \$12,500 in cash paid thereon such sums to be deposited with a depository named by the commissioner, on or before January 1, 1924, such subscriptions might be rescinded by the subscribers. It is admitted that subscriptions for that amount were received, the proceeds deposited in escrow as

directed by the permit, and that they have since been withdrawn by respondents.

The court found that plaintiffs, on August 17, 1923, subscribed for certain of the shares, and on December 1, 1923, the date of the note, subscribed for and purchased 500 additional shares of the preferred and 125 shares of the common stock, for which they paid \$5,000, and that this sum was deposited as provided by the permit, and subsequently withdrawn by respondents, and that, at the time of the last subscription, it was agreed that plaintiffs should receive, through A. Murray, the agent of the corporation, the commission payable for the sale of the stock, to wit, 15 per cent. of the subscription price, which amount, after the fund was received from the depository, was paid to plaintiffs. It was also found that plaintiffs, at the time of making their subscription, stated that, if they invested the above sum in the stock of the corporation, they might be in need of money, and requested that the note of the company be executed to them, that they might in that event, negotiate the same, and that defendants, acting as the board of directors of the company, thereupon caused the note in question to be executed; it being agreed that, should the same be negotiated by the plaintiffs, the latter would pledge to the company as security for its payment 500 shares of preferred and 125 shares of its common stock, but that the instrument was not negotiated.

While the evidence thereon was conflicting, the findings last mentioned were sufficiently supported and cannot be disturbed.

Subdivision 2 of section 3669c of the Political Code at the time of this stock transaction provided that, "after 6 o'clock p. m. of the Saturday preceding the first Monday in March in any year, the corporate rights, privileges and powers of every domestic corporation which has failed to pay said tax and money penalty shall, from and after said hour of said day, be suspended, and incapable of being exercised for any purpose or in any manner, except to defend any action brought in any court against such corporation, until said tax with all accrued penalties, and all taxes and charges due the state under the Corporation License Act are paid," etc. The section further provided that, until such taxes, penalties, and charges should be paid, every person who attempts or purports to exercise any of the rights, privileges, or powers of any delinquent corporation should be guilty of a misdemeanor, and every contract made in violation of the section be void.

[1, 2] Under the above section, the corporation and its directors, as such, were without power, during the period of suspension, to borrow money or execute the corporation's note therefor, as plaintiffs claim was done, or to enter into contracts of subscription for, or to sell its stock (*Van Landingham v. United Tuna Packers*, 189 Cal. 353, 208 P.

973), and no authority to do the acts forbidden by the statute could be conferred by the corporation commissioner. It is admitted that the note was void; nor can it be contended that the subscription agreements were valid contracts of the corporation, or that the subscribers thereby became owners of the stock which the certificates issued purported to represent. Pol. Code, § 3669c, subd. 2; *Finch v. Finch*, 68 Cal. App. 72, 81, 228 P. 553. In either case there was a failure of consideration for the amount paid by plaintiffs; and, unless they are estopped from making the claim, or the asserted illegality of the transaction forbids relief, that amount, less the sum which they had received, should be refunded. *Smith v. Bach*, 183 Cal. 259, 263, 191 P. 14.

[3-5] The plaintiffs having previously subscribed for stock in the company and received certificates purporting to represent the same, it is urged that they were stockholders and familiar with the terms of the permit, and that, having paid their subscription and received the certificates, they are estopped from demanding a return of the amount paid; furthermore, that they were parties to a contract declared illegal by the section quoted, and by the agreement for the refund of part of their subscriptions, were parties to a transaction which was a fraud upon other subscribers and the creditors of the company (citing *Quartz Glass, etc., Co. v. Joyce*, 27 Cal. App. 523, 150 P. 648), and should be denied relief.

We find no merit in either of these contentions, as plaintiffs in making the subscriptions were ignorant of the fact which rendered void the subscription contracts and the certificates issued in both transactions, namely, the suspension of the corporate powers. Their ignorance in this respect also disposes of the claim that, by attempting to make a contract forbidden by the section, they were in *pari delicto* with the trustees. No contract between the corporation and the plaintiff having been created, that the parties to the transaction intended that plaintiffs should subscribe for stock on more favorable terms than others is immaterial. An intention to violate the law will not prevent a recovery where such is not the effect of the transaction. *Cannon v. Cannon*, 26 N. J. Eq. 316; *Neel v. Commissioners, etc.*, 94 Ga. 216, 21 S. E. 516, 517; *Sutton v. Workmeister*, 164 Ill. App. 105, 109; 13 Corp. Jur. "Contracts," § 341, pp. 411, 412.

[6] That part of the amount subscribed was refunded pursuant to an agreement to which, for the reason stated, the corporation was not a party, would not prevent a recovery, as this sum was but part of that to which plaintiffs were entitled; there being as to them a complete failure of consideration.

[7] The court found that the corporation since the above transaction had incurred considerable indebtedness; and it is contended by respondents that it would be inequitable to permit a recovery under such circumstances. Its powers having been suspended, the corporation could incur no valid contractual obligations (*Van Landingham v. United Tuna Packers, supra*; *Ransome-Crummey Co. v. Superior Ct.*, 188 Cal. 393, 205 P. 446); and, if in ignorance of the suspension—which it was the duty of respondents to prevent—debts have been incurred by them, this furnishes no ground for denying relief to plaintiffs.

[8] It appears that the certificates issued to plaintiffs had not been restored, and that they also retained the amount paid to them by respondents. The certificates being void and without value, their return was unnecessary (Civ. Code, § 1691, subd. 2; *Martin v. Lawrence*, 156 Cal. 191, 103 P. 913), and plaintiffs were entitled in any event to the moneys received by them (*Kales v. Houghton*, 190 Cal. 294, 212 P. 21).

[9] The original complaint was filed against the corporation alone. Subsequently plaintiffs discovered that the powers of the corporation had been suspended, and filed an amended complaint against those acting as its directors. Respondents claim that the amendment introduced a different cause of action and was improperly allowed. This contention may be disposed of by pointing out that no objection to the sufficiency of the complaint to state a cause of action against respondents, who answered the same, was made, and the trial proceeded on the theory that the action was one to recover from respondents amounts received by them which equitably they should restore. It appeared that there was a total failure of consideration for the money paid by the plaintiffs.

Respondents should refund this amount less that already paid; and, it being further shown that there were no circumstances which equitably forbid restitution, the trial resulted in a miscarriage of justice, and the judgment is accordingly reversed.

LUBARSKY v. CHAVIS et al. (Civ. 6818.) *

District Court of Appeal, First District, Division 2, California. June 26, 1929.

Rehearing Denied July 26, 1929. Hearing Denied by Supreme Court Aug. 22, 1929.

1. Quieting title ⇨39—In suit to rescind agreement to purchase chicken ranch, defendant's request for judgment quieting title held cross-complaint demanding answer from plaintiff.

In suit to rescind agreement for purchase of chicken ranch for failure of consideration and for fraudulent representations, defendant's request for judgment for termination of plaintiff's interest in contract and to quiet defendant's title on account of plaintiff's nonpayment of installments of interest held to be cross-complaint demanding answer from plaintiff and not merely an answer, since it asked for affirmative judgment.

2. Pleading ⇨150—Plaintiff's failure to answer cross-complaint confessed allegations therein.

Plaintiff's failure to answer defendant's cross-complaint confessed allegations therein.

3. Pleading ⇨349—In suit to rescind agreement to purchase ranch for failure of consideration and fraud, admission by failure to answer cross-complaint's allegations of plaintiff's nonpayment of installments held not to authorize judgment for defendant on pleadings.

In suit to rescind agreement for purchase of chicken ranch for failure of consideration and fraudulent representations, in which defendant filed cross-complaint alleging plaintiff's nonpayment of interest installments, plaintiff's admission of such fact by failure to answer cross-complaint held not to negative his cause of action, and defendant was not entitled to judgment on pleadings, since issues, if decided in favor of plaintiff, would entitle him to judgment notwithstanding truth of cross-complaint.

4. Vendor and purchaser ⇨15—In sale of chicken ranch, failure to deliver automobile, shortage in number and defective quality of chickens, and defective condition of water supply, do not represent failure of consideration.

In sale of chicken ranch for \$11,000, failure to deliver automobile worth \$300, shortage in agreed number of chickens, defective quality of chickens, and defective condition of pipe and water supply, represent breaches of contract rather than failure of consideration, and an action for such breaches must be supported by allegation and proof of performance by plaintiff.

5. Vendor and purchaser ⇨123—Plaintiff suing to rescind contract for failure of consideration or fraud need not show he has kept up payments.

In action for rescission on grounds of failure of consideration or fraud, plaintiff need not show that he has kept up payments required of him by contract; rule being different than in action for breach of contract, which must be supported by allegation and proof of performance by plaintiff.

6. Vendor and purchaser ⇨123—Complaint presented issue of rescission of agreement to purchase chicken ranch for failure of consideration by destruction of building.

In suit for rescission of agreement to purchase chicken ranch for failure of consideration and for fraudulent representations, complaint held broad enough to present issue of right of rescission for failure of consideration caused by destruction of \$3,000 building on property, total purchase price of which was \$11,000, since such building must be held to have been material part of inducement and consideration of contract.

7. Vendor and purchaser ⇨123—After notice of rescission, purchaser suing to rescind agreement held not required to allege abandonment of property.

After purchaser's notice of rescission offering in writing to return everything of value received on condition that vendor restore to him everything received in transaction, purchaser suing to rescind agreement was not obliged to allege that he had abandoned property.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Suit by Moses Lubarsky against C. Pauline Chavis and another to rescind an agreement for the purchase of a chicken ranch. Judgment for defendants, and plaintiff appeals. Reversed.

W. F. Cowan and J. O. Kroyer, both of Santa Rosa, for appellant.

Wm. J. Hayes, of San Francisco, and Chas. H. Patterson, of Oakland, for respondents.

PER CURIAM. Plaintiff commenced this action to rescind an agreement by which he had purchased and entered into possession of a chicken ranch in Sonoma county. Defendant agreed to sell, and plaintiff agreed to buy, certain described real property for \$11,000, payable as follows:

\$2,000 cash and "the balance in five years from date; such balance to draw interest from date at the rate of five per cent per annum, interest payable semi-annually and if not so paid then to be compounded or at the option of the party of the first part the entire sum shall become immediately due and payable without notice in which event the amounts already paid shall be forfeited and shall become the property of party of the first part as compensation for the use and occupation of said premises and party of the second part will forfeit all right, title or interest in or to said payments or to said property under this contract.

"Party of the first part covenants that the payments being made as herein agreed that she will when the full sum is paid execute a good and sufficient deed conveying said property to party of the second part. * * *

"Party of the second part shall have immediate possession of said premises.

"Party of the second part shall pay all tax-

es or assessments of whatever nature which are now a lien or which may hereafter become a lien upon said premises and shall maintain fire insurance upon the house to the extent of three thousand dollars (\$3,000.00)."

The grounds for rescission were stated in two causes of action. The first was failure of consideration in several particulars, and the second for fraudulent misrepresentations inducing the making of the contract. To this complaint defendant demurred and at the same time answered and filed a cross-complaint asking for judgment against the plaintiff for the termination of his interest in the contract and to quiet defendant's title to the property on account of plaintiff's nonpayment of installment payments of interest on the unpaid purchase price. Plaintiff thereupon demurred to the cross-complaint. The demurrer is plainly labeled "demurrer to cross-complaint," and the body of the demurrer leaves no doubt whatever that the plaintiff well understood the cross-complaint to be a cross-complaint and not merely an affirmative defense in the answer. The demurrer was overruled, and the plaintiff was given ten days to answer the cross-complaint. Plaintiff failed or refused to answer. Defendant thereafter gave notice of motion for judgment upon the pleadings upon the ground that plaintiff had confessed the cross-complaint by default. This motion was granted by the court, and defendant was given judgment quieting her title to the ranch and terminating plaintiff's interest in the ranch under the contract. The plaintiff appeals from this judgment.

[1] We think there is no doubt that the defendant's cross-complaint was in fact a cross-complaint demanding an answer from the plaintiff. Plaintiff understood it as such as shown by the wording of his demurrer thereto. The subject-matter of the cross-complaint also clearly showed it was a cross-complaint and not merely an answer. It asked for an affirmative judgment. The matter it set up was not merely by way of defeating plaintiff's cause of action.

[2, 3] Plaintiff's failure to answer the cross-complaint confessed the allegations therein. The cross-complaint, however, did not tender any new issue except the allegation that plaintiff had failed to keep up his payments under the contract since a certain date. Plaintiff's complaint alleged the payment of the first semiannual installment of interest on the unpaid balance of purchase price. The cross-complaint, however, alleged the nonpayment of the second semiannual installment, and this allegation was confessed by plaintiff's failure to answer the cross-complaint. The plaintiff's admission of this fact did not deprive him of the right to have the other issues in the case tried, if in fact there were other issues material to a full determination of the rights of the parties under the contract. In *Langford v. Langford*, 136 Cal. 507,

69 P. 235, it was said: "The failure of the plaintiff to answer the cross-complaint did not deprive him of the right to establish the cause of action set forth in his complaint. A verdict upon the cross-complaint in favor of the defendant would not, ipso facto, extinguish his claim against her or defeat his right to have the issue thereon determined. Each of the parties was seeking a money judgment against the other, and if the defendant should establish her claim upon the cross-complaint the court would enter judgment in favor of the one who should establish the greater claim, but only for the difference between the two." See, also, *Brooks v. White*, 22 Cal. App. 719, 136 P. 500. It is the claim of plaintiff and appellant that there were such issues because his complaint stated a cause of action for rescission upon the ground of fraud and upon the ground of failure of consideration. This case presents a strong analogy to *Langford v. Langford*, supra. Here both parties were asking for a termination of the contract—the defendant on account of alleged breach, and the plaintiff on account of alleged fraud and alleged failure of consideration. The correct ultimate judgment between the parties could not be arrived at until the issues tendered by the complaint were decided. Those issues would determine whether plaintiff could recover back the money paid or would forfeit it.

[4-6] The briefs contain no argument upon the sufficiency of the cause of action stated in the complaint for rescission on the ground of fraud. It seems to be sufficient. The cause of action upon the ground of failure of consideration contained allegations of unfulfilled representations, some of which are insufficient in amount or materiality to amount to such a failure of consideration as would entitle plaintiff to rescind or furnish him an excuse for not keeping up the payments. These allegations include failure to deliver one automobile of the value of \$300, shortage in the agreed number of chickens, defective quality of the chickens, defective condition of pipe and water supply, and the like. These things represent breaches of contract rather than failure of consideration. An action for such breaches of contract must be supported by allegation and proof of performance of the contract upon the part of plaintiff. In an action for rescission, however, upon the grounds of failure of consideration or fraud, plaintiff need not show that he has kept up the payments required of him by the contract. *De Bairos v. Barlin*, 46 Cal. App. 665, 674, 190 P. 188. These representations, however, are repeated in the cause of action upon fraud. There was also a more material allegation of failure of consideration in the complaint. It was alleged that there was a dwelling house on the purchased ranch of the value of \$3,000, which was a material part of the agreement and which burned after the making of the contract through no fault of the plaintiff. It

was also alleged, rather imperfectly, that defendant had collected \$3,000 insurance, but failed to credit plaintiff with that amount or to reconstruct the dwelling. It was alleged that defendant agreed to keep the building insured and to reconstruct it in case of loss by fire, but the contract of purchase which was annexed to the complaint as an exhibit, contained a provision that plaintiff should maintain \$3,000 fire insurance upon the house. The complaint, however, does not allege who bought the insurance which is alleged to have been collected by defendant.

In *White v. Gilman*, 138 Cal. 375, 71 P. 436, it was held that both vendor and vendee under an executory contract for the sale and purchase of real property had an insurable interest in the improvements, and that the insurance money in case of fire belonged to the one who had bought the insurance. If the complaint here sought only the insurance money, the plaintiff should show that he purchased the insurance; but he also claims the right to rescind on account of the destruction of the building regardless of insurance.

In *Conlin v. Osborn*, 161 Cal. 659, 120 P. 755, it was held that the vendee was entitled to rescind for failure of consideration upon the destruction by fire of the improvements upon the real property agreed to be purchased. The purchaser there had not taken possession, and the final documents effecting the transfer had not been made and delivered, but the vendee had paid a large deposit and the vendor had agreed to the terms of the sale. The transaction was awaiting examination of title. The vendor had not yet delivered possession, but that fact has not been considered a distinguishing circumstance in California. The case has been followed where the vendee was in possession and where title had not passed.

In *Kirtley v. Perham*, 176 Cal. 333, 168 P. 351, the loss of personal property by destruction was held to fall upon the vendor who had retained title although the vendee had possession. In *Cooper v. Huntington*, 178 Cal. 160, 172 P. 591, the destruction of land by erosion was held to be ground for rescission for failure of consideration at the instance of the vendee in possession. This decision at page 166 of 178 Cal. (172 P. 593) makes it plain that the doctrine of the case of *Conlin v. Osborn*, supra, is not to be limited to where the vendee is not in possession. It was followed in *Wong Ah Sure v. Ty Fook*, 37 Cal. App. 465, 469, 174 P. 64; *La Chance v. Brown*, 41 Cal. App.

500, 183 P. 216; and *Ogren v. Inner Harbor Land Co.*, 83 Cal. App. 197, 200, 256 P. 607. See, also, *Potts Drug Co. v. Benedict*, 156 Cal. 322, 334, 104 P. 432, 25 L. R. A. (N. S.) 609; *Smith v. Phoenix Insurance Co.*, 91 Cal. 323, 27 P. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191; 22 A. L. R. 575, 578, note; Civ. Code, § 1689, subd. 4.

In the case at bar the clause in the written contract requiring the vendee to keep the building insured and the allegation in the complaint that the vendor agreed to keep the building insured give rise to uncertainty, but that uncertainty relates to the plaintiff's claim for the insurance money or credit for the same. The complaint is still broad enough to present the issue of right of rescission upon the ground of failure of consideration caused by the destruction of the \$3,000 building on the property the total purchase price of which was \$11,000. The building must be held to have been a material part of the inducement and consideration of the contract, and it is so alleged in the complaint.

We conclude, therefore, that the plaintiff's complaint tendered a good issue of fraud and a good issue of failure of consideration which, if supported by evidence, would entitle plaintiff to rescind the agreement and recover back the money paid. If the plaintiff had the right of rescission upon either of these grounds, he was not obliged to keep up his payments under the contract. His failure to keep up his payments would not bar his right of rescission on these grounds. *De Bairos v. Barlin*, supra.

The plaintiff's confession by default of the allegations of the cross-complaint did not, therefore, negative his cause of action set out in his complaint. Defendant was not entitled to judgment upon the pleadings because the issues made by the complaint and answer thereto, if decided in favor of plaintiff, would entitle plaintiff to judgment notwithstanding all the allegations of the cross-complaint be true.

[7] The plaintiff's notice of rescission offered in writing to return and restore to defendant everything of value received by him upon condition that defendant restore to him everything received by defendant in said transaction. After this offer in writing the pleadings do not show that plaintiff remained in possession of the property in such a manner as to waive his right to rescind. He was not obliged to allege that he had abandoned it.

The judgment is reversed.

99 Cal. App. 658

SMITH v. SMITH. (Civ. 6211.)★

District Court of Appeal, Second District, Division 1, California. June 28, 1929.

Rehearing Denied July 18, 1929. Hearing Denied by Supreme Court Aug. 26, 1929.

1. Divorce $\Rightarrow$ 182—Allowance of temporary alimony pending appeal, where previous allowance for support had been made, was not cumulative.

Where previous allowance for support had been made, order for temporary alimony pending appeal was not cumulative.

2. Divorce $\Rightarrow$ 182—\$250 attorneys' fees and \$50 costs incident to defense of first appeal in divorce action on application for supersedeas held reasonable.

Allowance of \$250 attorneys' fees and \$50 costs incident to defense of first appeal in divorce action on application for supersedeas held reasonable.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Martha A. Smith against Lewellyn J. Smith. From an order modifying order for alimony, and order granting temporary alimony, counsel fees, and costs, defendant appeals. Affirmed.

R. E. Wallace and W. W. Kaye, both of Los Angeles, for appellant.

Hewitt, Ford & Crump, J. F. Moroney, and J. Thomas Russell, all of Los Angeles, for respondent.

YORK, J. This record discloses that there are two orders from which appeals are taken. See opinion on application for supersedeas, 201 Cal. 217, 256 P. 419.

The first order appealed from was an order modifying a prior order by which modification defendant was required to pay plaintiff \$100 per month for three years and \$50 per month for an additional three years. Pending the appeal, the plaintiff moved the trial court for an order granting her \$100 per month temporary alimony and \$250 attorneys' fees, and \$50 costs incident to the defense of the first appeal. Upon this motion being granted, defendant again appealed.

It is argued by appellant that no necessity was shown for the making of either order, and that, in the absence of direct evidence as to the exact amount that was necessary for the support of plaintiff and the education of her son, both of the orders of the trial court should be reversed by this court.

The record does disclose sufficient evidence to justify the court in making both of the orders complained of. As to the ability of defendant, he actually was before the court, and, regardless of his property, the court found from testimony given that he was able to earn the amounts ordered paid.

[1, 2] Upon the evidence shown by the rec-

ord, it does not appear that the trial court abused its discretion in making the order, requiring the defendant to pay plaintiff the amount fixed by the first order appealed from, or that the trial court erred or abused its discretion in not granting defendant's motion to vacate such order.

The second order complained of requiring defendant to pay a certain allowance for support pending the appeal, and attorneys' fees and costs incident to the appeal, was made without the introduction of additional evidence of any change of circumstances other than the appeal itself would imply. But this is of no importance, since we are affirming the previous allowance for support, and as to that allowance the second order is not cumulative. The allowance for attorneys' fees and expenses on the appeal is clearly reasonable and not excessive.

Affirmance of both of the orders of the trial court will, of course, result in defendant having to pay all of the attorney's fees and costs in both orders, but will not have the effect of compelling him to pay both items of \$100 per month specified in the orders for the support and maintenance of the plaintiff and Elden L. Smith, the minor child of plaintiff and defendant. This part of the second order being only a duplication of the first order in this particular, the payments of \$100 per month as such support money on either order will satisfy that item in the other order.

Both orders appealed from are, therefore, affirmed.

We concur: CONREY, P. J.; HOUSER, J.

99 Cal. App. 660

In re INGRAM'S ESTATE.**INGRAM v. BOSTER et al.**

(Civ. 6650.)

District Court of Appeal, Second District, Division 2, California. June 28, 1929.

1. Executors and administrators $\Rightarrow$ 20(8)—Court must make and sign written findings to support refusal of petition for appointment as administrator (Code Civ. Proc. §§ 632, 633, 1716, 1717).

Under Code Civ. Proc. §§ 632, 633, made applicable to probate proceedings by reference in sections 1716, 1717, court must make and sign written findings on issues framed to support refusal of petition for appointment as administrator of decedent's estate.

2. Executors and administrators $\Rightarrow$ 20(8)—Trial judge's oral opinion, stating reasons for denying petition for appointment as administrator, is not part of findings (Code Civ. Proc. §§ 632, 633, 1716, 1717).

Trial judge's oral opinion, stating his reasons for sustaining opposition to petitioner's appointment as administrator of decedent's es-

late, appointing another as administrator and denying petition, is not part of findings, required by Code Civ. Proc. §§ 632, 633, made applicable to probate proceedings by sections 1716, 1717.

3. Executors and administrators ⇨20(10)—**Trial judge's oral opinion, stating reasons for denying petition for appointment as administrator, is not properly part of record on appeal (Code Civ. Proc. § 1369).**

Trial judge's oral opinion, stating reasons for denying petition for appointment as administrator of decedent's estate, is not properly part of record on appeal, and may be stricken from transcript on motion, so that Court of Appeal cannot consider question whether petitioner was incompetent, as trial court was required to find, under Code Civ. Proc. § 1369, to authorize denial of petition.

4. Executors and administrators ⇨20(10)—**Appellant, not demurring to opposition to his appointment as administrator, cannot urge its insufficiency to put his competency in issue (Code Civ. Proc. § 1369).**

Where opposition to appointment of petitioner as administrator of decedent's estate was not attacked by demurrer, and parties went to trial on theory that it was sufficient, petitioner cannot urge its insufficiency to put his competency in issue, under Code Civ. Proc. § 1369, on appeal from order denying petition.

5. Appeal and error ⇨882(9)—**Appellant cannot complain of hearsay testimony on his own cross-examination.**

Appellant cannot complain of admission of hearsay testimony adduced on his own cross-examination.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Petition by Joseph M. Ingram for appointment as administrator of the estate of Esau A. Ingram, deceased, opposed by Charles G. Boster, who filed a similar petition, and others. From orders sustaining the opposition, appointing Boster as administrator, and denying the petition of Ingram, the latter appeals. Reversed.

J. E. Light, of Glendale, for appellant.

Eugene A. Tucker, of Los Angeles, for respondents.

IRA F. THOMPSON, J. Esau A. Ingram died intestate in Los Angeles county on January 8, 1929, leaving surviving him a brother, who is the petitioner in this matter, a sister, Mary E. Thrasher, one of the respondents, who waived her claim to letters of administration, and nephews and nieces, who are the other contestants and respondents. On January 21, 1929, Joseph M. Ingram filed his petition for appointment as administrator of the estate of his deceased brother. On January 25, 1929, Charles G. Boster, one of the contestants filed a similar petition, and, in addition thereto, all of the contestants filed opposition to the appointment of Joseph M. In-

gram, alleging as grounds therefor as follows: "That the said Joseph M. Ingram is more than seventy-five (75) years of age, and for some time past, and at the present time, is incompetent to transact business, and would be wholly incompetent to take charge of said estate, and to manage the same for the best interests of those interested in said estate." The answer to the opposition denies that petitioner is incompetent either by reason of age or otherwise to serve as administrator, and alleges that he is possessed of all his mental faculties and competent in every way to manage the business of the estate. Upon those pleadings the cause was tried by the court, resulting in an order sustaining the opposition of the contestants, the appointment of Charles G. Boster administrator, and the denial of the petition of Joseph M. Ingram. This appeal is prosecuted by the petitioner from all the orders thus made.

[1] The principal ground relied upon by appellant is that the trial court failed to make any findings upon the issues framed; that without such decision there is no adjudication to support the refusal of the court to appoint the surviving brother of the deceased to administer his estate. Sections 1716 and 1717 of the Code of Civil Procedure by reference make sections 632 and 633 of the same Code applicable to the trial and determination of issues of fact in probate proceedings as in ordinary civil actions. These latter sections render it necessary for the court to make its decision in writing, i. e., to sign findings. It has been said by this court that "the right to findings is a substantial right, as inviolate, under the statute, as that of trial by jury under the Constitution. * * * 'The right to have a material issue presented by the pleadings in a cause determined by a finding of the court is one important to the parties to a suit, and the failure to make such a finding results in prejudicial error entitling the complaining suitor to reversal.' (Huntington v. Vavra, 36 Cal. App. 355, 172 P. 168. See, also, Tucker v. United Railroads, 171 Cal. 704, 154 P. 835.)" *Frascona v. Los Angeles Ry. Corp.*, 48 Cal. App. 135, 191 P. 968.

[2,3] When the trial judge orally announced his opinion upon the subject-matter of the contest, he gave his reasons for making the orders appealed from, and counsel for respondents has quoted from this opinion as though it constituted the findings. With this assumption we cannot agree. "Such opinions are not part of the findings." *Estate of Felton*, 176 Cal. 663, 169 P. 392. They are not properly a part of the record on appeal. *Clas-sen v. Thomas*, 164 Cal. 196, 128 P. 329. And, as is said in 2 California Jurisprudence, 235: "When it (the opinion) is incorporated in the transcript, it may be stricken out on motion." We are therefore confronted with orders made depending upon an issue of fact joined

without a determination of that question, and without an adjudication by the court that the petitioner was incompetent to execute the duties of the trust as required by section 1369 of the Code of Civil Procedure, and by authority. See *Estate of Gordon*, 142 Cal. 125, at page 133, 75 P. 672.

[4] We have assumed in the discussion so far that the allegation of the respondents was sufficient to put the competency of petitioner in issue. It certainly lacks that degree of certainty which would commend it to the thoughtful pleader. In view of the fact, however, that it was not the subject of an attack by demurrer and the parties went to trial upon the theory that it was sufficient, the appellant can hardly be heard to urge its insufficiency on appeal.

[5] The appellant also assails the orders on the ground that the testimony does not support them. In view of the fact, however, that it will be necessary to retry the issue of the competency of the appellant, it seems to us improper to discuss the state of the evidence other than to observe that hearsay testimony to which appellant objects was adduced on his own cross-examination.

Orders reversed.

I concur: CRAIG, J.

Owing to the absence of WORKS, P. J., he does not participate in this opinion.

99 Cal. App. 599

DELLAROWE v. KIRCHNER et al.
(Civ. 5406.)

District Court of Appeal, Second District, Division 2, California. June 25, 1929.

1. Appeal and error ⇨994(3)—**Trial judge has sole right to believe or reject testimony of witness in trial before court.**

In case tried before court, trial judge has the sole right to believe or reject the testimony of a witness.

2. Pledges ⇨36—**Evidence held to sustain finding that defendant refused to redeliver collateral, though under his possession and control at time of tender of sum advanced, with interest.**

Evidence held to sustain finding that notes were delivered to defendant as collateral for loan, only a part of which defendant had advanced, and which was not represented by a note or other evidence of indebtedness, and that defendant refused and neglected to redeliver collateral on demand therefor and tender of amount loaned, with interest, at time when defendant had control and possession of such collateral.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by A. K. Dellarowe against Emil Kirchner and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

Harrah, Louis & Quillian and H. B. Pool, all of Los Angeles, for appellant.

Ernest B. Coil, of Los Angeles, for respondent.

IRA F. THOMPSON, J. The plaintiff recovered a judgment in the court below in the sum of \$1,500 against the defendants Kirchner and Bartel, the complaint having been dismissed as to the defendant Scoville. The defendant Emil Kirchner prosecutes this appeal from the judgment.

The facts necessary to an understanding of the case are as follows: Some time during November, 1922, the defendant George Bartel executed and delivered to plaintiff's assignor, Jack L. Dawson, eight promissory notes, in the principal sum of \$200 each, bearing interest at 7 per cent., and maturing at intervals of 30 days apart. In addition to being signed by the defendant Bartel, the notes were also executed by his wife, Frances Lee Bartel, and one Louise Dawson. Shortly after the execution of the notes, plaintiff's assignor made application to the appellant for a loan, offering as collateral security seven of the notes. Appellant was unwilling to state the amount he would loan, but did agree to and did advance \$150, and requested Jack L. Dawson, plaintiff's assignor, to call back within a day or two, and appellant would state the amount he was willing to loan. Dawson made several trips to appellant's office thereafter, but was unable to find him in for 10 or 15 days. About 30 days after the advance was made the appellant indorsed the seven notes, which had been indorsed and delivered over to him as collateral to the defendant George Bartel.

The court has found the foregoing facts, and, in addition, that Dawson offered to appellant and to Bartel the principal sum of \$150, together with interest thereon, and demanded redelivery of the notes, but that each of them refused. The principal contention of appellant is that he had a right to assign to the defendant Bartel his claim for \$150 (or to indorse the note therefor, which, however, the court has found upon substantial evidence was not executed) and as an incident thereto to transfer the collateral security. He therefore asserts that the following portions of findings Nos. 2 and 3 are not supported by the testimony:

(1) From finding No. 2: "That the said Emil Kirchner at that time agreed to and did advance to the said Dawson the sum of \$150 and requested the said Dawson to call by his office within a day or two, and he would be able to state just how much money he would loan to the said Dawson upon said security, and that in the meantime he would investigate the security. That no note or other

written evidence of indebtedness was executed or delivered by the said Dawson to the said Kirchner to represent the said advance of \$150."

(2) From finding No. 3: "That subsequent to said assignment and transfer and prior to the commencement of this action, the plaintiff caused demand to be made upon each of said defendants George Bartel and Emil Kirchner for the delivery of the possession of said seven notes, at the time of said demand he offered to pay the said sum of \$150, together with any and all accrued interest thereon, which said offer and demand was by each of said defendants refused.

"That within 30 days after the delivery of said notes by the said Jack L. Dawson to the said defendant Kirchner, the said defendant Kirchner, without the knowledge of the said Dawson, and against the will and without the consent of said Dawson, sold and transferred the said notes and each of them to the said defendant George Bartel, and caused a delivery of said notes to be immediately made to the said Bartels for a consideration.

"That the said plaintiff was, at the time demand for the possession of said notes was so made as aforesaid, prior to the commencement of said action and at all times thereafter, up to the commencement of said action, ready, able, and willing to pay the said sum of \$150 so advanced to the said Jack L. Dawson, together with any and all accrued interest thereon, and upon condition that the said notes be surrendered. That the said Jack L. Dawson at the time he made demand for the possession of said notes, prior to said assignment to the plaintiff herein, was ready, able, and willing to repay the amount of said advancement, namely, \$150, together with accrued interest thereon, upon condition that the said notes be returned to him."

[1, 2] In so far as the first quoted portion of the finding is concerned, it is sufficient to say that it is substantially the testimony of plaintiff's assignor, which, of course, the trial judge, under a well-known rule of law, had the sole right to believe or reject. By virtue of this finding it would follow that appellant had not the right to transfer the collateral until the amount of the loan and its terms had been settled, and it becomes of no great importance to determine whether the second quoted portion of finding No. 3 is supported or not. However, appellant testified that he transferred the notes to the defendant Bartel about 30 days after the \$150 was advanced to Dawson; that the reason he transferred them was because he "had been informed that there was some trouble brewing or differences in the sale of the drug store from Mr. Dawson to Mr. Bartel, and" he "did not want to be involved." Mr. Kirchner also stated on the stand that, when he sold the \$150 note, he received \$150 as principal, to-

gether with \$1.50 as interest, which interest, if computed at the legal rate, would indicate that his transfer to Bartel had been considerably more than 30 days after the money was advanced. In the meantime, according to the testimony of plaintiff's assignor, and about 10 or 15 days after he received the \$150 from appellant, he found the appellant in his office and told him, "if he did not want to advance * * * any more money, that" he would take up the notes, and offered to repay the \$150 and interest, to make which payment he says he was then prepared. This witness further testified that appellant at this early date said that he did not have the notes in his possession, but had sent them to the bank at Tujunga.

Inquiry at the bank and of the defendant Bartel failed to disclose their whereabouts. Obviously the testimony to which we have referred is sufficient to support all those parts of the finding necessary to support the judgment as against this appellant. Not only did the appellant refuse and neglect to redeliver the collateral at a time when confessedly it was under his control and possession, but the testimony is subject to the construction that he united or co-operated with the defendant Bartel in inflicting a wrong upon plaintiff's assignor.

Judgment affirmed.

I concur: CRAIG, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

99 Cal. App. 682

PEOPLE v. MAZZOLA. (Cr. 1789.)★

District Court of Appeal, Second District, Division 2, California. July 1, 1929.

Rehearing Denied July 15, 1928. Hearing Denied by Supreme Court July 29, 1929.

1. Criminal law $\S$ 1209—Single offense cannot be divided for purpose of inflicting double punishment.

Single offense cannot be carved into different parts in order to inflict double punishment.

2. Intoxicating liquors $\S$ 173—Defendant having possession of still for some time before it was set in operation could be convicted on separate counts for possessing and operating still, since two offenses were involved.

Prosecution under two counts of information for possessing and operating still held to involve separate offenses permitting two judgments to be entered, where testimony was sufficient to authorize conclusion that defendant had possession of still for some time before it was set up and put to work.

3. Criminal law $\S$ 511(1)—**Testimony of accomplices held sufficiently corroborated to sustain conviction for possessing and operating still** (Pen. Code, $\S$ 1111).

In prosecution for possessing and operating still, testimony of accomplices establishing guilt of defendant *held* sufficiently corroborated under Pen. Code, $\S$ 1111, in view of testimony as to defendant's presence at and flight from scene of operations and finding of self-incriminating note.

4. Criminal law $\S$ 511(2)—**Evidence corroborating accomplice's testimony, where defendant's connection with crime may fairly be inferred therefrom, is sufficient** (Pen. Code, $\S$ 1111).

Evidence corroborating accomplices required by Pen. Code, $\S$ 1111, need not establish actual commission of offense, but is sufficient if connection of defendant with crime may fairly be inferred therefrom.

5. Criminal law $\S$ 823(16)—**Erroneous instruction that defendant aiding "or" abetting in crime might be convicted as principal held harmless, in view of other instructions and court's use of conjunction "and" in other places.**

In prosecution for possessing and operating still, error of trial court in permitting jury to convict defendant as principal if he aided "or" abetted in commission of crime *held* harmless, where in same instruction court properly used conjunction "and," and stated that it was sufficient if defendant was concerned with some other person in operating still, and court employed language of Pen. Code, $\S$ 31, defining persons concerned in commission of crime.

* Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Antonio Mazzola was convicted of possessing and operating a still, and he appeals. Affirmed.

W. T. Kendrick, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James W. Howie, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J. The defendant, together with Rafael Cervantes and Orville H. Kilbourne, was charged by information filed by the district attorney of San Bernardino county with the offenses of possession of a still and operating a still; the first count alleging the possession and the second the operation. Cervantes and Kilbourne pleaded guilty. The jury found the defendant guilty of both counts, and he appeals from the judgment and order denying his motion for a new trial.

The grounds set up by appellant as reasons for a reversal are four, as follows: (1) "The appellant was tried for two crimes based upon one transaction, which, under the law, constitute one crime only"; (2) "two judgments in the case are pronounced against ap-

pellant for one crime"; (3) there is no testimony other than that of accomplices connecting or tending to connect appellant with the offenses; (4) the court erred in giving certain instructions.

[1, 2] It is to be noticed that the first two points raised by appellant are substantially the same, and both will be determined by finding an answer to the question: Was the only act of possession of the still necessarily involved in that of operating the still? If the possession of which the appellant was found guilty was necessary and incidental only to that of operating the still, then he was guilty of but one offense, and it cannot be carved into pieces whereby to inflict double punishment. *Schroeder v. United States* (C. C. A.) 7 F.(2d) 60, and cases there cited. If, however, there was possession for a substantial period of time which was not necessarily incident to the operation of the proscribed utensils, the appellant could be found guilty of both offenses. In *re Chaus* (Cal. App.) 268 P. 422, and cases there cited. Aside from the force of precedent, however, it is obvious that a person might have a still in his possession for an appreciable period of time without attempting to or without any idea of operating the same, and then determine to and actually put it into use. Under such circumstances no doubt could exist concerning the commission of both offenses. The testimony in the instant cause was sufficient to authorize the conclusion that appellant had had possession of the still for some time prior to the time it was set up and put to work where it was found by the officers. We are compelled, therefore, not to agree with appellant that he was guilty of only one offense.

[3, 4] The testimony of the accomplices establishes beyond question the guilt of the appellant. It remains, however, to inquire whether there is independent evidence tending to connect him with the offenses. On the day of the arrest of Cervantes and Kilbourne, i. e., on December 2, 1928, and while the officers were still at the place where the still was found, two men approached the house. Mrs. Cervantes called to the officers, whereupon the men ran. They were not found, but a Studebaker automobile was found on the north side of the premises, of which the police took possession. They discovered that it belonged to a Mr. Walker of Lomita. Walker testified that he was visiting the appellant on this same day; that about four o'clock the appellant told the witness that he was taking his (Walker's) automobile for about 20 minutes; that appellant did not return; and the next time the witness saw his machine was when it was turned over to him by the police. There was also introduced in evidence a note in the handwriting of the appellant, which he had given to one Ray Fowler, the stepfather of Orville Kilbourne, with directions to the

former to deliver it to the latter, reading as follows: "You bought the barrels from my wife, you had not been working for me for 10 days. You never saw me on the place at all. I had nothing to do with it at all. And say that the Mexican had nothing to do with the place either, all he was doing there was living there and was to start to work for the owner of the ranch planting trees. You plead guilty and claim ownership of everything and stick to it. I have it all fixed to get you out on parole. And don't let nobody tell you different. Stick to this story and we will all get out O. K. After you have read this about four times destroy it! We all have the same story." Mrs. Cervantes, the wife of appellant's codefendant, also testified to the possession of the still prior to the time it was set up and put into operation at Upland; that she was present when it was set up at the place where it was found; and that the first day there it was operated by the appellant and Kilbourne; that on the day of the arrest appellant did not appear until between 4 and 4:30 o'clock in the afternoon; that when she saw him coming through the trees she called to the officers; that when appellant saw the officers he turned and ran "toward the mountains." She also testified that appellant told her to say she didn't know "anything about it" and that he would supply her with provisions. It cannot be seriously contended that there is not evidence tending to connect the appellant with the commission of the offenses, separate and apart from that of his accomplices. Our attention has not been called to any testimony indicating that Mrs. Cervantes was an accomplice. But aside from her testimony we have the evidence of the presence of appellant at and flight from the scene of the operations by the circumstances attending the finding of the Studebaker automobile, and also the self-incriminating note which he attempted to deliver to one of his codefendants. The books abound with declarations that the corroborating evidence required by section 1111 of the Penal Code need not establish the actual commission of the offense; that it is sufficient if, from the corroborating testimony and circumstances, the connection of the accused with the crime may fairly be inferred. See *People v. Yeager*, 194 Cal. 452, 229 P. 40; *People v. Nikolich* (Cal. App.) 269 P. 721.

[5] The error of which appellant complains in the instructions is found in those which deal with the duty of the jury to convict as a principal one who, though he has not directly committed the act, has aided and abetted in its commission, or, not being present, has advised and encouraged its commission. Unfortunately, and erroneously (see *People v. Dole*, 122 Cal. 486, 55 P. 581, 63 Am. St. Rep. 50), the court, while giving three instructions, used the disjunctive "or" between

the words "aid" and "abet" on two occasions. In the same instructions, however, and on the three occasions, he properly used the conjunction "and." In addition thereto, in each instance in which the word "or" was used it immediately followed a statement that it was not essential that the defendant actually operate or physically possess the still, but it was sufficient if he was concerned with some other person in possessing or operating. Also the court employed the language of section 31 of the Penal Code defining what is meant by persons who are "concerned in the commission of a crime" as being not only those who directly commit the act but also those who "aid and abet in its commission, or, not being present, have advised and encouraged its commission." Taking the context of the instructions as a whole into consideration, as well as the circumstances of the instant cause, we are bound to conclude, as did the Supreme Court in *People v. Dole*, supra, and in *People v. Arnold*, 199 Cal. 471, 250 P. 168, that the error was not prejudicial.

Judgment and order affirmed.

I concur: CRAIG, J.

Owing to the absence of WORKS, P. J., he does not participate in this opinion.

99 Cal. App. 651

CITY OF ALBANY v. MEYER. (Civ. 6782.)★

District Court of Appeal, First District, Division 2, California. June 28, 1929.

Rehearing Denied July 27, 1929. Hearing Denied by Supreme Court Aug. 26, 1929.

1. Constitutional law ☞90—Constitutional right of free speech extends to every citizen in expressing sentiments on all subjects (Const. art. 1, § 9).

Privilege granted by Const. art. 1, § 9, to speak and write on all subjects goes to every citizen of state in matter of free expression of sentiments on all public subjects; citizen being responsible only for abuse of that right.

2. Constitutional law ☞90—Constitutional privilege of free speech controls over any provisions of Code specifying privileged communications between persons (Const. art. 1, § 9; Civ. Code, § 47).

Constitutional privilege of free speech in Const. art. 1, § 9, controls over any provisions of Civ. Code, § 47, specifying privileged communications as between persons.

3. Libel and slander ☞80—Complaint by municipality for libel, if maintainable, alleging publication was false and malicious, did not meet requirement of allegation that publication was abuse of constitutional right of free speech (Const. art. 1, § 9).

Complaint by municipality to recover damages for libel, if maintainable, alleging writing

was false and malicious, does not meet requirement of allegation that publication was abuse of right of free speech guaranteed by Const. art. 1, § 9.

4. Libel and slander 73—Municipal corporation cannot sue citizen for libel in publishing circular charging city with bankruptcy in opposing school bond issue (Const. art. 1, § 9).

Action by municipal corporation to recover damages for libel against citizen publishing pamphlet charging city with bankruptcy in opposing bonds for new school *held* not maintainable under Const. art. 1, § 9, giving every citizen freedom to speak, write, and publish sentiments.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the City of Albany against William F. Meyer. Judgment for defendant, and plaintiff appeals. Affirmed.

Lovett K. Fraser, of San Francisco, for appellant.

Clark, Nichols & Eltse, of Berkeley (Reece Clark, of counsel), for respondent.

NOURSE, J. The plaintiff, a municipal corporation, sued for libel in the sum of \$5,000 for damages to its good name, reputation and credit and asked for an additional sum of \$5,000 as punitive damages. A general demurrer to the complaint was sustained without leave to amend, and, from the judgment in favor of defendant which followed, the plaintiff has appealed upon a typewritten transcript.

The complaint alleged that the defendant wrongfully and maliciously and with intent to injure the plaintiff published a false, libelous, and defamatory article reading as follows: "Financial Condition of Albany: The City of Albany now faces bankruptcy, borrowing money from the banks at 7% interest in order to pay employees. No money is available for street improvements. Special assessments will have to be made for repairs." It was further alleged that said article was untrue, and that it was published maliciously with intent to injure the plaintiff in its business, destroy its financial standing, and create doubt in the minds of the people of Albany and others in the bay region as to its solvency and ability to perform its contracts and pay its bonds and debts.

From the briefs it appears that the circular in question was published by the defendant and a number of other citizens of Albany in opposition to a proposal for the issuance of bonds for the erection of a new school building by the city. In support of the demurrer the respondent relies upon the provisions of section 9, article 1, of the Constitution, which gives every citizen freedom to speak, write, and publish his sentiments on all subjects "being responsible for the abuse

of that right," and upon the authority of *City of Chicago v. Tribune Publishing Co.*, 307 Ill. 595, 139 N. E. 86, 28 A. L. R. 1368. The appellant relies upon the English case of *Manchester v. Williams*, 1891, 1 Q. B. Div. 94. An exhaustive search of the authorities discloses that these two cases are the only two reported which involve the question of the right of a municipal corporation to sue a citizen for libel. The English case upon which the appellant relies is not authority for the point cited. That was an action by the city of Manchester against a citizen for libel consisting in the published statement that bribery and corruption existed in certain departments of the city council, and that the city authorities were either parties thereto or culpably ignorant thereof. In holding that the action would not lie the English court said: "A corporation may sue for libel affecting property," and cited the decision of *Pollock, C. B., in Metropolitan Saloon Omnibus Co. v. Hawkins*. The case cited, however, was one by private corporation for an imputation of insolvency, and in the course of that opinion *Pollock, C. B.*, said that a corporation "could not sue in respect of an imputation of murder, or incest, or adultery because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may." It is apparent that in the *Manchester Case* the reference to the *Hawkins Case* was for the purpose of distinguishing between a suit for libel resulting in an injury to property and one which charged corruption or the imputation of crime. There is not in either opinion any intimation that a municipal corporation, as distinguished from a private corporation might sue one of its citizens for libel whether the libel affected the property of the citizen or merely affected the personal reputation of the city or its officers.

In *Chicago v. Tribune Publishing Co.* the action was instituted by the city of Chicago because of published statements reflecting upon the credit and financial standing of the municipality and the mismanagement of its affairs by those then in office. These publications were made during the heat of a political campaign in which the *Tribune* claimed that the city administration was endeavoring to gain political control of the state at large. The court held that the city could not maintain the action principally upon the ground that the right of free speech guaranteed by section 4 of article 2 of the Constitution of the state of Illinois rendered all utterances or publications against the government or the administration then in power, excepting those tending to violate law or overthrow by force or other unlawful means the existing government, absolutely privileged. That section of the Constitution is substantially the same

as the provisions of section 9 of article 1 of the Constitution of this state.

In the course of the opinion in the Chicago Case the court pointed out that the old common-law right of the government to punish or sue for libel which prevailed in the days of the divine right of kings on the theory that the king could do no wrong is fundamentally out of harmony with the whole American system of government, which is based upon the theory that the people are sovereign, that its magistrates, as servants of the people can do wrong, and that the people have the fundamental right to criticise them and to expose their inefficiency and corruption. The opinion carefully points out the distinction between criticism of the administration of government and publications tending to incite to crime or to the overthrow by force or other unlawful means the existing form of government, and also points out that there should be no distinction in principle between criminal prosecutions for libel under the old common-law doctrine and civil actions for damages for libel because in the latter class of actions, if the government should be permitted to sue its citizens for damages for every false or malicious criticism of its ministers who are temporarily conducting its affairs, the punishment of the citizen might be as severe as any that could be obtained under a criminal prosecution.

[1-3] But on the question of privilege arising from the express provisions of the state Constitution, and based upon the fundamental right of liberty guaranteed by the Constitution of the United States, the court said: "It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely." With this principle we agree. The privilege found in the section of the Constitution goes to every citizen of the state in the matter of the free expression of his sentiments on all public subjects, and by the provisions of that section he is responsible only for the abuse of that right. This constitutional privilege controls over any of the provisions of section 47 of the Civil Code specifying privileged com-

munications as between persons. If in any case a municipal corporation might maintain libel actions against one of its citizens for published criticism of the conduct of its affairs or of its administrative officers, an essential element of the complaint would be the allegation that such publication was in abuse of the right of free speech guaranteed by this section of the Constitution. The complaint under consideration does not contain any allegations which charge that this right of the citizen was abused in the publication complained of. The mere fact that it is said to have been false and malicious does not meet the point. Falsity of the publication is not an abuse of the right of free speech, and the charge that the publication was malicious necessarily means that the respondent spoke with malice towards the municipal corporation and not with malice towards the administrative officers thereof, and, if this could under any theory be grounds for an action on the part of the municipal corporation, it would be necessary to go further and allege facts showing such malice, or facts which would take the publication out of the privilege found in the constitutional section.

[4] But aside from any technical objections to the form of pleading, "this action is out of tune with the American spirit, and has no place in American jurisprudence," as said the Illinois court in the Chicago Case, because, if the administrative officers of any branch of the government may use the process in libel, either civil or criminal, to control criticism of their financial policies in the management of the government's business, then the constitutional guaranty of free speech becomes a shadow without a substance. That right means nothing if it does not mean a guaranty of freedom of thought and of speech antagonistic to those in power as well as freedom of that which is favorable to, or commendatory of, them. Mr. Justice Holmes has expressed the view in his dissenting opinion in the recent case of *United States v. Schwimmer* (May 27, 1929, No. 484, October term, 1928) 49 S. Ct. 448, 73 L. Ed. —, that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

99 Cal. App. 604

BURROUGHS ADDING MACH. CO. v. HARRIS. (Civ. 6673.)

District Court of Appeal, First District, Division 2, California. June 26, 1929.

1. Principal and agent $\S$ 103(14) — Salesman had no authority to cancel executed contract for sale of machine on buyer's complaint that machine was unsatisfactory.

Salesman employed to take orders for adding machines had no authority to cancel executed contract for sale of adding machine on statement of buyer that machine was not satisfactory.

2. Pleading $\S$ 36(5) — Defendant admitting execution of sales contract by failure to deny certain allegations of complaint, in action for price, could not assert that contract was incomplete.

Where defendant's answer, in action by seller for purchase price of adding machine, admitted making of contract and delivery of machine by its failure to deny certain allegations of the complaint, defendant could not complain that sales contract was incomplete by virtue of failure of plaintiff to sign it at its executive office.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the Burroughs Adding Machine Company against Bernard Harris, doing business under the name of the Harris Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter E. Dorn and L. W. Lovey, both of San Francisco, for appellant.

Brownstone & Goodman and Herman A. Bachrack, all of San Francisco, for respondent.

KOFORD, P. J. Defendant appeals from a judgment in favor of plaintiff for the agreed purchase price of an adding machine. The machine was delivered to defendant about September 22, 1927, and was returned to the plaintiff October 1. The questions presented by the appeal are whether there was a contract of sale and, if so, was it canceled when the machine was returned?

C. A. Irons, a salesman working either for the plaintiff or for the Adding Machine Exchange store at 562 Market street, San Francisco, obtained the signature of the defendant to an order or contract made out upon a printed form which was apparently prepared and supplied by plaintiff. It read: "Please enter the order of the undersigned for the following secondhand adding machines:" Here follows description of the machine and numerous clauses defining the obligations of the parties. The document contained the further clause: "This order is not binding until accepted by the Company at its Executive Office. Notice of acceptance is hereby waived by the

undersigned." A blank space was provided at the end of the form for the signature of some one on behalf of plaintiff at its executive office.

B. Harris is the defendant and the sole proprietor of the Harris Company. His testimony was that he told Irons that the machine was not satisfactory and that thereupon Irons said, "Send it back and I will cancel the contract," so defendant gave the contract to Irons and sent the machine back to the Adding Machine Exchange store October 1. Mr. Irons, the salesman, was not a witness, and defendant's version of his conversation with him is therefore uncontradicted, except possibly by the following: C. A. Ray, general manager of the Adding Machine Exchange store, testified that upon the return of the machine to his store he telephoned to the defendant's store asking for Mr. Harris, and that whoever answered the phone said the machine was returned pursuant to arrangements made with Mr. Irons for a different and later type of machine, so he let the machine remain.

Mr. Engelhardt, manager of Burroughs Adding Machine Company at San Francisco, testified without objection that no one but himself had authority to take back sold machines and he only upon instructions from the home office; that before delivery of the machine certain attachments had been added at defendant's request. He also testified that he sent letters to defendant. These letters were self-serving in the main part and had no evidentiary value except to show that the return of the machine was not accepted as a rescission or cancellation of the alleged contract.

[1] As a salesman Irons had no authority to cancel the contract if one existed. His authority was to sell and not to cancel the sale after one was made. *Lindow v. Cohn*, 5 Cal. App. 388, 90 P. 485, is directly in point, being much similar in its facts to the case at bar. See, also, *Thomas v. Anthony*, 30 Cal. App. 217, 157 P. 823; *Morton v. Albers Bros. Milling Co.*, 66 Cal. App. 391, 226 P. 809.

[2] The question remains whether a contract of sale had been entered into under the facts. The appellant contends that no contract existed, because it was never signed by respondent at its executive office as contemplated. He contends that this fact brings the case within the general rule that in such case no contract is made until signed by all who are intended to sign. Respondent contends for the application of the exception of that rule, namely, that, where the parties have both acceded to the terms of the contract and acted upon it as if it had been formally entered into as contemplated, then the parties are estopped from asserting that the contract does not exist. *Sparks v. Mauk*, 170 Cal. 122, 148 P. 926; *Vitagraph v. Liberty Theatres*, 197 Cal. 694, 242 P. 709. We

need not determine whether the acts of the parties in this action are such as to bring the case within the exception to the general rule because it has been called to our attention upon the oral argument that the appellant's answer by its failure to deny certain allegations of the complaint has admitted the making of the contract and the delivery of the machine by the plaintiff. The judgment roll shows this to be the fact.

The judgment appealed from is, therefore, affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

99 Cal. App. 545

SAWYER v. BERKELEY SECURITIES CO.
et al. (Civ. 3822.)

District Court of Appeal, Third District, California. June 21, 1929.

1. Taxation ☞658(3)—Tax sale notice held insufficient for failure to state hour of sale (Pol. Code, § 3767).

Notice of tax sale, reciting that property on which taxes were a lien would, "by operation of law, be sold to the State of California, on Wednesday, the 29th day of June, 1921," held insufficient under Pol. Code, § 3767, for failure to state hour when property would be sold.

2. Taxation ☞658(3)—Mailing notice of tax sale less than 21 days before sale to person to whom land was last assessed held void (Pol. Code, § 3771a).

Notice of tax sale mailed to person in whose name property involved was assessed within less than 21 days before date of sale mentioned in notice held void under Pol. Code, § 3771a, even if delinquent taxpayer had actual notice of sale before its date, since length of time during which notice must be given is a substantial requirement, in view of sections 3764, 3771.

3. Taxation ☞734(2)—Assessment showing no dollar mark or other explanation indicating value of property or amount of taxes, and tax sale thereunder, held void (Pol. Code, § 3650).

Where original assessment on which tax sale was based did not show any dollar mark or other mark, sign, word, abbreviation, or explanation to indicate what was meant by figures in column designated to show value of property and amount of taxes, the assessment and tax sale thereunder were void under Pol. Code, § 3650.

4. Taxation ☞814(3)—Amount former owners must pay purchaser at tax sale to recover property held not dependent on validity of statute prescribing penalties or whether state had right to require purchaser to pay penalties (Pol. Code, §§ 3817, par. 2, 3898, subd. 5).

Under Pol. Code, § 3898, subd. 5, amount which former owners of land sold for delinquent taxes should pay to purchaser at tax sale in order to recover property does not depend on

validity of section 3817, par. 2, prescribing penalties, or whether state had absolute legal right to charge penalties therein prescribed and require payment thereof by purchaser at time he received tax collector's deed, as against contention that, as property was not sold to state each year between date of first advertising of sale and date when property was sold, penalties did not attach.

5. Taxation ☞814(1)—Former owners having come into equity to recover property sold for taxes held not entitled to relief without reimbursing tax purchaser.

Where purchaser at tax sale instituted action to quiet title to lands purchased, but former owners asked to be let into possession and for such further relief as to the court might seem just and equitable, held that, since former owners came into equity asking equitable relief to obtain judgment invalidating tax sale and deed, they were not entitled to any relief except on condition that they first repaid tax purchaser the money paid out by him in obtaining whatever title or color of title state possessed.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by J. L. Sawyer against the Berkeley Securities Company, bankrupt, and others. Judgment for plaintiff, and defendants appeal. Reversed, and remanded with directions.

Clark, Nichols & Eltse, of Berkeley, and Brobeck, Phleger & Harrison, and Milton Newmark, all of San Francisco, for appellants.

David Bush, of Oakdale, for respondent.

PLUMMER, J. Plaintiff had judgment quieting title to certain lands situate in the county of Stanislaus, state of California, described as follows: North tract lots E, F, 26 to 30, inclusive, and 15 acres lying southeasterly of above, being east of Sixth avenue, and northwest of south line of E street, in southwest quarter section 11, township 2 south, range 10 east. From this judgment the defendants appeal.

The plaintiff's title is based upon a certain deed of conveyance dated the 30th day of June, 1926, executed by Ed Whitmore, tax collector of the county of Stanislaus, as the party of the first part, to J. L. Sawyer, the plaintiff in this action, as party of the second part, whereby the said party of the first part purported to convey to the plaintiff the lands above described pursuant to the sale made thereof by the party of the first part to the party of the second part on account of delinquent taxes.

At the trial of said action, and upon this appeal, the appellants contend that the deed purporting to convey the above-described premises to the plaintiff was and is void for the following reasons: First, that the notice of the delinquency and sale of said property

on account of the failure of payment of taxes assessed for the year 1920, was irregular and void, in that it did not specify the hour when, by operation of law, said property would be sold; second, that no notice of the sale of said property to the plaintiff was given to the person in whose name said property stood, and to whom it was assessed, as provided by law, the name and address of said person appearing upon the assessment roll; and, third, that the assessment for the year 1920 was and is void, and furnished no basis for a sale of said property and conveyance thereof to the plaintiff. Some other objections are made, but they are only incidental to the three which we have mentioned. The defendants in an answer, in addition to denying the title in the plaintiff, ask that they be let into possession, and for such other and further relief as to the court may seem just and equitable. The record shows that after the execution of the deed to the plaintiff, as above recited, the plaintiff went into and remained in possession of the premises described in the conveyance, and has received the rents, issues, and profits thereof, if any. The noncompliance with the provisions of the Political Code relative to notices and the alleged invalidity of the assessment in the first place, all appear of record and are matters about which there is no dispute, the legal sufficiency or insufficiency constituting the subject of controversy. We will consider the alleged invalid proceedings in the order named herein.

[1] Section 3767 of the Political Code, specifying the notice that shall be given when taxes have become delinquent, and title, by operation of law, will pass to the state unless payment is made, reads as follows: "The publication must designate the day and hour when the property will, by operation of law, be sold to the State, which sale must not be less than twenty-one nor more than twenty-eight days from the time of the first publication, and the place" of sale "shall be in the tax-collector's office." The notice given by the tax collector of the county of Stanislaus, so far as this question is concerned, read as follows: "The real estate upon which taxes are a lien will, by operation of law, be sold to the State of California, on Wednesday, the 29th day of June, 1921." In 24 California Jurisprudence, p. 237, § 300, we find the law as to what shall be stated in the notice and the authorities supporting the necessity for setting forth each particular requirement contained in the section, worded as follows: "Under the Code as amended in 1895, the tax collector is required to append to, and publish with the delinquent list a notice that unless the delinquent taxes, together with the costs and percentages, are paid, the real property upon which such taxes are a lien will be sold, designating the day and hour and place at which the property will be sold to the State. Such notice is designed to afford the property owner protection and enables him to pay

his taxes before title shall pass from him, and is a jurisdictional prerequisite to the making of a valid sale." In the case of *Numerator Gold Mining Co. v. Katzer*, 83 Cal. App. 161, 256 P. 464, this court said: "The notice of the time of sale is statutory and jurisdictional, and the court may not speculate as to the actual date intended to have been inserted." Citing *Lewis v. Tulare Reclamation District*, 56 Cal. App. 52, 204 P. 421; *Simmons v. McCarthy*, 118 Cal. 622, 50 P. 761. And quoting from section 207 of *Black on Tax Titles*, is as follows: "It (the notice) must designate the time and place of the sale with such certainty that there can be no reasonable misconception in regard to it." Citing, also, 3 *Cooley on Taxation* (4th Ed.) p. 2804, § 1415. See, also, *Bernhard v. Wall*, 184 Cal. 612, at page 622, 194 P. 1040. In *Beck v. Wilson*, 49 Cal. App. 281, 193 P. 158, the court, in speaking of the notice required by this section, expressed its views in these words: "The legislature has seen fit to provide that such sales shall be made within a specified time after the first publication of the notice, and there can be no deviation from the rule which requires a strict compliance with such a provision. The rule is so well settled and of such universal application that it would seem an idle act to cite authorities in support thereof." However, a number of authorities are there cited. To the same effect is *Cooley on Taxation* (3d Ed.) vol. 2, pp. 929 and 930, that whatever the provision may be relative to the hour, day, and place specified in the statute, it must be strictly complied with.

[2] The second alleged failure to comply with the Code provisions refers to the mailing of the notice of sale, at which sale the plaintiff became the purchaser. The record shows that the tax collector of the county of Stanislaus mailed a copy of the delinquent list, addressed to the person in whose name the property involved was assessed, giving notice of the sale, and which delinquent list was mailed on June 11, 1926, which was less than 21 days before the date of sale mentioned in said notice. As to the failure of the tax collector in relation to the first notice, the court found as follows: "That while the notice of sale set out in this finding did not specify an hour of sale, that fact did not materially affect the rights of anyone or the authority of the tax collector to make the tax deed mentioned in finding No. 1." And in relation to the failure to mail notice as required by the Political Code, the court found as follows: "That the failure to mail said notice at least twenty-one days before the date of said sale fixed in said addenda was not material and did not materially or substantially affect the rights of the defendants or any of them." While the first notice referred to herein, published in 1921, stated that the property would be sold to the state, it is only by operation of law or fiction of law that we can treat the property as sold to the state. No deed in fact

was ever executed, and thereafter the tax collector proceeded to advertise and sell the property under and in accordance with the provisions of sections 3764, 3771, and 3771a of the Political Code, and the intervening sections which are not material to consider herein. Section 3764, supra, provides that on or before the 8th day of June of each year the tax collector shall publish the delinquent list, which notice shall state a day and hour and place of sale, which must be had not less than 21 nor more than 28 days from the time of the first publication. And section 3771a of the same Code requires "that * * * the tax-collector shall, within five days after the first publication of said delinquent-list, mail a copy of said list or publication, postage thereon prepaid and registered, to the party to whom the land was last assessed next before such sale, at his last known" residence, "said notice to be mailed at least twenty-one days before the date of sale," etc. In 24 California Jurisprudence, p. 351, we find the following: "The notice, when given, must be mailed at least twenty-one days before the date of the sale thereunder, and to the party at his last known post office address, or the sale and deed will be void. The length of time during which a notice must be given is quite as substantial as the requirement that notice of sale shall be given at all." In the case at bar it is simply a question of a failure to give notice for the length of time required by the statute. In *Knight v. Hall*, 28 Cal. App. 435, 152 P. 952, a case involving the mailing of notice as required by the statute as it then read giving three weeks' notice, the notice being mailed on the 2d day of February, and the sale fixed for February 19th, the contention was made that the property owner had received actual notice, and at the trial the appellant offered in evidence a receipt showing that the person to whom the registered letter was addressed had receipted the same. Upon objection this offered testimony was excluded. This ruling was sustained upon appeal, the court in its opinion using the following language: "There was no error in this ruling, since it did not tend to prove a compliance with the provisions of the statute, without which there was no authority in the tax-collector to make the sale." Citing *Cooley on Taxation* (Ed. 1883) p. 335. "Actual notice of the time fixed for the sale cannot be deemed a substitute for the statutory requirement." Hearing of this case in the Supreme Court was denied. In *Joslin v. Shaffer*, 66 Cal. App. 69, 225 P. 307, this court had before it the question of the sufficiency of mailing a notice as provided by section 3771a of the Political Code, and also other sections relating to the mailing of notice, and in holding that a notice mailed, which contained a direction upon the envelope to return to the tax collector within a certain number of days, if not delivered, and which was returned undelivered, insufficient to comply with the statute, and

quoted with approval the case of *Smith v. Furlong*, 160 Cal. 522, 117 P. 527, and *Healton v. Morrison*, 162 Cal. 668, 124 P. 240, where it was held "that, in a sale by the State under the provisions of section 3897" of the Political Code, "publication and mailing of notice 'were both jurisdictional prerequisites to a valid sale by the State, and that a failure to give the latter notice when the condition existed requiring it, rendered the sale and the deed thereunder void.'" A number of cases are cited in the opinion in the case, prepared by Presiding Justice Finch, showing that strict compliance with the Code provision as to the giving of notices is requisite. In *Brady v. Bostwick*, 21 Cal. App. 526, 132 P. 472, one of the earliest cases in which the District Court of Appeal passed upon the questions here involved, we find the following (quoting from the syllabus): "A tax sale is invalid if the tax collector fails to mail a copy of the notice of sale at least three weeks prior thereto, to the party to whom the land is assessed, if his name and address are known." This decision was handed down in 1913, prior to the amendments to the Political Code requiring twenty-one days' notice. To the same effect is the decision of this court in *Cordano v. Kelsey*, 28 Cal. App. 9, 151 P. 391, where, speaking through Presiding Justice Chipman, the court held that failure to give notice for the time specified, renders the sale void. The Code provision at that time required three weeks' notice before the sale. Twenty days' notice, only, was given. The time limit fixed by section 3897 of the Political Code being twenty-one days, and the notice having been mailed only twenty days before the day of sale, was one day short of the requirement of the statute, and, consequently, insufficient. In *Rudell v. Collins*, 174 Cal. 363, 163 P. 204, the court, having before it the sufficiency of a notice under section 3897 of the Political Code as it read in 1913, held as follows: "The mailing of the notice, where the post office address of the party to whom the land was last assessed is known, is a prerequisite to the authority of the tax collector to make the sale." Citing a number of cases. In *Krotzer v. Douglas*, 163 Cal. 49, 124 P. 722, in speaking of the Code provisions requiring mailing of notice, it is said: "That compliance with this requirement is essential to the authority of the tax collector to make the sale is no longer open to question." This decision was rendered in 1912, and was based upon the giving of notice for the requisite time specified in section 3897 of the Political Code. The only limitation relative to the giving of notice is found in the cases where the facts show that the name and address of the person to whom the property was last assessed does not appear upon the assessment roll. This is pointed out in the recent case of *Jacoby v. Wolff*, 198 Cal. 667, on page 681, 247 P. 195, 200. This limitation, or, as sometimes expressed, excuse for not mailing the notice,

does not apply in the case at bar, as the record shows the name and address appeared. Other cases might be cited, but as said in one to which we have made reference, the law as to notice, being jurisdictional and necessary to be given in strict compliance with the Code, is so well settled that the fact only needs to be mentioned.

In answer to the failure to give notice as required by the sections of the Political Code to which we have referred, the respondent relies upon the case of *Scott v. Beck* (Cal. Sup.) 266 P. 951, where it is said, "that the law applicable, at the time of the sale, for delinquent taxes follows through all the proceedings dependent thereon," and contends that as sections 3764 and 3771 of the Political Code were amended in 1921 (section 3771 was divided into two sections, to wit, 3771 and 3771a) the notices provided for therein are not applicable to the case at bar. An examination of the case of *Scott v. Beck*, supra, discloses that the contention is not tenable. That case was decided in April, 1928, but the sale upon which the validity of the title involved in that action depended, took place on July 3, 1919, and, of course, irrespective of the time when the cause was heard, the decision necessarily was based upon the code provisions in force at the date of the sale. Applying the same rule here, the Code provisions in force at the date of the sale to the plaintiff would be as of the time of the sale, to wit, in June, 1926, long after the sections referred to as amended became effective. So far as the giving of notice of sale may be concerned, it has been held that the state has a right to change the requirements in relation thereto, and these requirements apply to any property which has, by operation of law, been sold to the state, and is thereafter sold to private parties; no deed ever having been made to the state. *Buck v. Canty*, 162 Cal. 226, 121 P. 924.

[3] It is finally contended by the appellants that the original assessment for the delinquent taxes alleged to be due, on account of which the property was sold to the state in 1921, is invalid. This contention appears to be well taken. A copy of the assessment roll, in so far as it affects the property involved, for the year 1920, is set forth in the transcript. An inspection of the assessment sheet shows that it does not comply with the requirements of section 3650 of the Political Code, and that it does not give the cash value of the real estate or of the improvements, or the total value of the property, or the amount of the taxes due. The assessment roll contains figures only, and no dollar marks to indicate value, save and except one line of the assessment sheet contains the following words: "30 acres of alfalfa at \$8." As to the real estate under the head of the word "Section," are the figures "11." Under the title of "Township" appears figure number "2." Under the head of "Range," the figure "10."

Under the heading "Number of Acres," the figure "40." Under the heading "Value of Real Estate," the figures "3600." Under the heading "Value of Improvements," the figures "240." Under the heading, "Total Value of Property," "3840." On the first sheet appears the word "over." To the page referred to we find the following: "Total tax," "107 52." "Total School Taxes," "57 60." "First Installment School Tax," etc., "28 80." "First Installment Tax on Personal Property," "53 76." Under the title, "Fifteen Per Cent Added," "8 06." Under the title, "Fifteen Per Cent Added," "4 32." Under the title, "Second Installment, Remainder on School Tax," "28 80." Under the title, "Second Installment, Remainder on Real Estate," "53 76." There is no dollar mark at the beginning or at the heading of any of the columns under which the figures which we have set forth appear. Nor is there any explanation contained upon the assessment roll to indicate values, other than as stated. In *Emeric v. Alvarado*, 90 Cal. 444, 27 P. 356, the court had before it an assessment roll identical with the one which we are considering—the failure of the assessment roll to contain any dollar mark, word, or abbreviation showing what was meant by the figures under the headings of the respective columns where the figures appeared. The court there said: "That such a defect is fatal to an assessment has been too long the established law to be now questioned; it has become a rule of property." Citing *Hurlbutt v. Butenop*, 27 Cal. 57; *Brady v. Seaman*, 30 Cal. 611; *People v. S. F. Savings Union*, 31 Cal. 132; *People v. Hastings*, 34 Cal. 571; *People v. Hollister*, 47 Cal. 408. In *Fox v. Townsend*, 152 Cal. 51, 91 P. 1004, the same question was considered, and the court in its opinion said: "The assessment of this lot, upon which the tax sale was based, shows that there was no dollar mark or other mark, sign, word, abbreviation or explanation on the assessment roll to indicate what was meant by the figures in the column designed to show the value of the property and the amount of the taxes. This being the case, the assessment was void, and the sale and deeds made thereunder are likewise void" (citing the cases above referred to); and then continues: "This omission appearing in the assessment itself necessarily invalidates the proceedings. In this respect this case is to be distinguished from the case of *Carter v. Osborn*, 150 Cal. 620, 89 P. 608, where the omission of the dollar mark or sign was in the delinquent list and not in the assessment." In the case at bar the failure is in the assessment, and therefore renders the assessment invalid and the whole proceeding based thereon likewise invalid. The *Fox Case*, supra, is cited among others as authority in the case of *Lewis v. Tulare Reclamation District No. 749*, 56 Cal. App. 52, 204 P. 421. In answer to these cases the respondent cites *Knobloch v. Associated Oil Co.*, 170 Cal. 144, 148 P. 938.

An examination of the facts recited in that case shows that it is readily distinguishable from the case at bar, in that the dollar mark does appear in the heading of the column showing the total value of the real estate. That was the only question involved in that case, and differs from the facts of the one at bar in that there is no value whatever save and except as to the alfalfa, which we have stated, and the total value of that is not indicated. In the case at bar there is an absolute want of any word, sign, or character to indicate the amount of the tax, and likewise, the value of the real estate assessed.

In view of what has been said, it does not appear necessary to consider the objections urged as to the invalidity of the school taxes, by reason of the fact that the proceedings leading up to the sale and the invalidity of the assessment necessitates a reversal, irrespective of whether the names of the respective school districts were or were not stated.

[4] It is further contended by the appellants that as the property was not sold to the state, each year between the date of the first advertising of sale and the date when the property was sold to the plaintiff the penalties prescribed by the second paragraph of section 3817 of the Political Code do not apply. This question is not really before us to be decided, as the amount which the defendants should pay to the plaintiff does not depend upon the validity or invalidity of the subdivision of the section referred to or whether the state had the absolute legal right to charge the penalties therein prescribed and require payment thereof by the plaintiff at the time he received the tax collector's deed therefor. Subdivision 5 of section 3898 of the Political Code provides that where the purchaser at a tax sale is not finally awarded the property, "no decree of the court shall be given declaring a forfeiture of the property until the former owner, or other party in interest, shall have repaid to the purchaser the full amount of taxes, penalties and costs paid out and expended by him, to be determined by the court, in pursuit of the state's title to the property so sold." As we have said, the state's title or claim of title arose by operation of law or fiction of law, and to obtain the title which is in litigation in this action, the plaintiff was compelled to pay the penalties mentioned in the second paragraph of section 3817, supra.

[5] It is finally argued that as the assessment was void, the defendants should not be required to pay the sums expended by the plaintiff in obtaining a title from the state, nor any sums paid on account of taxes or assessments thereon since the date of the purchase. This question has been variously discussed and decided favorably and adversely by our own courts, the decisions being based in some instances upon what is called a void assessment, and others, upon irregularities in the sale, leading to a decree adjudging the

proceedings void and the deed executed to the purchaser likewise void. We see no distinction between the effect of a decree declaring a deed void, whether that result is brought about by reason of the invalidity of an assessment or the invalidity of the proceedings. The purchaser pays the same in either case. True, the statute speaks of the state's title, but the state, in fact, only had, in any case, a color of title. If the state really possessed the title, and the proceedings were irregular, the state would still hold the title. But better reasoning appears to us to be contained in the cases hereinafter cited which hold that the purchaser is entitled to recover the moneys paid by him in the obtaining of whatever title or color of title the state apparently possesses. Again, the distinction has been made between whether the purchaser or the former owner instituted the proceedings. In the case at bar the purchaser has instituted this proceeding, but the defendants asked to be let into possession, and for such other and further relief as to the court might seem just and equitable. This places the court in the position of doing what, under the circumstances, appears to be just and equitable.

In the case of *Holland v. Hotchkiss*, 162 Cal. 366, 123 P. 258, L. R. A. 1915C, 492, in a well-considered opinion written by Justice Shaw, we find the following: "In view of this weight of authority and the inconsistency of our own cases on the subject, the decisions which deny the applications of the rule to tax cases should be deemed overruled, and the correct principle declared. Where the owner comes into equity asking equitable relief to remove or cancel the tax deed or sale as a cloud upon his title, or to obtain a judgment which, in effect, will invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, or his grantee or assignee, the taxes, penalties, interests, and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession." In *Joslin v. Shaffer*, supra, this court expressed the same view. The appellants ask that this court calculate the amount that should be paid, and direct judgment to be entered. Owing to the fact that the purchaser has been in possession and in receipt of the rents, issues, and profits, if any, it is impossible for this court to ascertain the amount which the appellants should be directed to pay to the plaintiff. The opinion of the trial court that the omissions to comply with the Code provisions herein referred to were not material cannot be allowed to set aside jurisdictional requirements. The proceedings are in invitum, and the cases which we have cited hold that the subjects discussed are all jurisdictional, and courts are not per-

mitted to speculate as to whether failure to observe jurisdictional requirements does or does not result in injury.

The judgment is reversed, and the cause remanded to the trial court, with directions to ascertain and fix the amount which should be paid by the appellants to the plaintiff, and enter judgment to the effect that the plaintiff acquired no title by reason of the purported conveyance to him of the premises involved, by reason of the tax deed involved in this action, and that the appellants be let into possession upon paying to the plaintiff or depositing in court to his credit the amount of the taxes, penalties, and costs expended by the plaintiff as herein referred to, less the rents, issues, and profits, if any, of the premises, received by the purchaser since the 30th day of June, 1926.

We concur: FINCH, P. J.; THOMPSON, J.

99 Cal. App. 728

**PACIFIC-SOUTHWEST TRUST & SAVINGS
BANK v. VALLEY FINANCE CORPO-
RATION. (Civ. 6477.) ***

District Court of Appeal, First District, Division 2, California. July 5, 1929.

Rehearing Denied Aug. 2, 1929. Hearing Denied by Supreme Court Aug. 29, 1929.

1. Bills and notes $\S$ 351—Evidence of contemporaneous agreements between parties to accommodation note held admissible in action thereon by purchaser for value after maturity.

In action against accommodation maker of note by purchaser for value after maturity, evidence of contemporaneous agreements between parties to note was admissible.

2. Bills and notes $\S$ 351—Want of consideration for accommodation note held good defense as against holder for value without notice acquiring note after maturity (Civ. Code, $\S$ 1459, 3097, 3133, 3139).

Where finance company, at request of president of bank, executed and delivered its accommodation note to bank to be used in taking up paper of corporation of which president of bank was also president, because bank held more of corporation's obligations than it was entitled to hold under the law, and bank thereafter sold out to plaintiff and note was delivered to plaintiff nearly a year after its maturity, held, that under Civ. Code, $\S$ 1459, 3097, 3133, 3139, defense of want of consideration was available to maker as against plaintiff, since defendant maker got nothing and plaintiff was not holder in due course, though it bought for value without notice.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by the Pacific-Southwest Trust & Savings Bank against the Valley Finance Corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

H. A. Savage, of Fresno, for appellant.
Christian Hoepfner and Wakefield & Hansen, all of Fresno, for respondent.

STURTEVANT, J. The plaintiff commenced an action to recover on a promissory note. The defendant answered by interposing certain denials, by alleging a guaranty, and by alleging an affirmative defense to the effect that the plaintiff was not the holder in due course and that the note sued on was an accommodation note for which the defendant received no value, and by alleging a further defense that the note was ultra vires. The action was tried before the trial court sitting without a jury. The trial court made findings of fact in favor of the defendant, and the plaintiff has appealed.

As the facts are not clearly set forth in the briefs of either party, we will make an attempt at setting them forth. The note sued on was a renewal note made by the defendant on March 1, 1923, and by its terms was due May 30, 1923. It was made payable to and delivered to the Valley Bank. The payee sold out to this plaintiff and the note was delivered to this plaintiff on March 1, 1924, nearly a year after its maturity.

On August 22, 1922, W. D. Mitchell was president and chief executive officer of the Valley Bank. He was likewise president of the California Motor Transport Association. The defendant corporation was engaged in dealing in automobile paper. It was financially sound and was a depositor in the Valley Bank. About two weeks prior to August 22, 1922, Mr. Mitchell sent for the officers of the defendant, and when they called at the bank he stated that the California Motor Transport Association was embarrassed financially; that it had moneys due it which would be paid in the near future, but that for the time being it was short of cash. He also stated that said corporation had borrowed from the Valley Bank and that the bank held more of the obligations of the Transport Association than it was entitled to hold under the law; that the bank examiner was expected at any time and therefore it was the wish of himself and of the Valley Bank that the amount of the obligations of the Transport Association should be reduced to the extent of \$2,500; and that he and the Valley Bank wanted the defendant to execute an accommodation note which would be used in the following manner: The defendant was to execute its note to the bank, receive from the bank \$2,500 to be deposited in the account of the defendant, and that defendant should thereupon draw its check in favor of the Transport Association. The Transport Association would execute its note in favor of the defendant. That note would be used as collateral to be attached to defendant's note. As fast as the Transport Association could

make collections, the amounts would be paid on its note to the defendant, and as that note was liquidated, at the same time the defendant's note to the bank would be liquidated. Such proceedings were had that a note was written by the Transport Association in favor of the defendant on the 18th day of August, 1922. That note was in the sum of \$2,575. Mr. Mitchell caused said note to be made in the sum of \$2,575 instead of \$2,500 without consulting the defendant and, in fact, defendant never knew until a later date that the variance existed. On the 22d day of August, 1922, the president and secretary of the defendant corporation appeared at the bank and a note dated August 22, 1922, in favor of the bank for the sum of \$2,500 was placed before the officers of the defendant corporation, and they were shown the place to sign and they signed. At the same time a check in favor of the Transport Association in the sum of \$2,500, under the same date, was drawn on the bank and was presented to the officers of the defendant corporation and they were shown where to sign and they signed. At the same time, and as a part of the same transaction, the check was indorsed by the trustee of the Transport Association and was deposited in the account of the Transport Association. Furthermore, a deposit slip was prepared and executed showing a deposit in the Valley Bank by defendant, "Note..... \$2500." Each and all of these acts occurred in the office of Mr. Mitchell in the Valley Bank. Each and all of the foregoing facts were testified to by Mr. Hunt, who was trustee of the Transport Association and messenger for Mr. Mitchell, by Mr. Knapp, secretary of the defendant corporation, and by Mr. Williams, vice president of the defendant corporation. No witness was called in contradiction. It should be added that at the time of the transaction on August 22, 1922, Mr. Mitchell stated that as an official of the bank he could not sign any of the paper, but that he would personally guarantee to protect the defendant corporation from any liability on the note executed by it. At no time and in no manner did the defendant corporation receive anything except as hereinabove stated.

After the defendant had executed its said note dated August 22, 1922, Mr. Mitchell produced the note of the Transport Association dated August 18, 1922, asked the defendant to indorse it, and after it was so indorsed, attached it to the defendant's note as collateral security thereof.

There is not a particle of evidence in the record that at any time the Valley Bank turned over, or agreed to turn over, to the defendant any of the notes of the Transport Association which were at that time held by the bank.

Except as recited above, the defendant never had the physical possession of the note dated August 18, 1922, executed by the Transport Association.

[1] The plaintiff contends the trial court

erred in receiving evidence of contemporary agreements between the parties and it cites and relies on *Leonard v. Miner*, 120 Cal. 403, 52 P. 655; *San Jose Savings Bank v. Stone*, 59 Cal. 183. Neither of those cases involved an accommodation note, and neither case arose since the amendment in 1917 to Civil Code, division 3, part 4, title 15. *Coghlin v. May*, 17 Cal. 515, did involve an accommodation note, and it rules the point against the plaintiff.

[2] The plaintiff's main contention is that plaintiff, for value, bought, without notice, the note from the Valley Bank, and although it so bought after the maturity of the note, the defendant may not set up as a defense the facts above recited. The plaintiff cites and relies on *Bank of Orland v. Harlan*, 188 Cal. 413, 206 P. 75. The defendant states that the case cited is not in point, and then the defendant cites *First Nat. Bank v. Reed*, 198 Cal. 252, 244 P. 368. In reply the plaintiff points out that Reed got nothing and that the rights of no third person were involved. This defendant got nothing, and if the distinction went no further the defendant's answer is sufficient. But the plaintiff stands on the further claim that it is an innocent purchaser for value, and as against this defendant the defense is not sound. In reply the defendant asserts that the plaintiff is not a holder in due course and that it is in no better position than its vendor (Civ. Code, § 3133), and that in this plaintiff's hands the note is subject to the same defenses as if it were nonnegotiable (Civ. Code, § 3139), and that it is statutory law that the transfer of a nonnegotiable instrument transfers "all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement" (Civ. Code, § 1459). And the defendant further claims that: " * * * As regards a remote party other than a holder in due course, the delivery * * * may be shown to have been * * * not for the purpose of transferring the property in the instrument." Civ. Code, § 3097. The exact point has never been decided since the amendment in 1917 to the Civil Code, sections 3082-3206. The point has been much discussed in the reviews and the authorities are not in harmony. In the case of *Bartels v. Suter*, 130 Okl. 7, 266 P. 753, the Supreme Court of Oklahoma entered upon an exhaustive consideration of the question. It reached the conclusion that if all of the sections of that law are read and construed together that, under a similar set of facts, the defense, pleaded by this defendant and found by the court to be true, constitutes a complete defense under the statute. See, also, *Brannan's Negotiable Instrument Law* (4th Ed.) p. 286.

Under these authorities we think the judgment should be affirmed. It is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

99 Cal. App. 677

ANSBACH v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY, et al. (Civ. 6509.) *

District Court of Appeal, Second District, Division 1, California. July 1, 1929.

Rehearing Denied July 18, 1929. Hearing Denied by Supreme Court Aug. 29, 1929.

- 1. Master and servant** $\S$ 419—Court must assume that award includes only items authorized by statute (Workmen's Compensation, Insurance, and Safety Act, as amended).

It must be assumed that in making award of compensation to employee for permanent disability under Workmen's Compensation, Insurance, and Safety Act, St. 1917, p. 831, as amended, department included therein only such items as are expressly authorized by statute or impliedly authorized thereby, and that recovery for past physical pain and mental anguish suffered by employee is not included.

- 2. Master and servant** $\S$ 419—Employer joining employee in action against third party to secure reduction of award, must have items of settlement segregated (Workmen's Compensation, Insurance, and Safety Act, § 26, as amended).

If employer becomes party plaintiff in suit by employee for damages against third party under Workmen's Compensation, Insurance, and Safety Act, St. 1917, p. 831, § 26, as amended by St. 1919, p. 921, § 8, and St. 1927, p. 1213, § 1, no settlement can be effected without employer's consent, and employer should segregate items going to make up total of settlement so as to show how much was allowed for pain and suffering and how much for permanent disability, in order to secure reduction of compensation award.

- 3. Master and servant** $\S$ 419—Department of Industrial Relations held without jurisdiction to deduct from award for permanent disability, amount recovered by employee from insurance carrier's surgeon for malpractice, where proportion of settlement representing damages for past suffering was not shown (Workmen's Compensation, Insurance, and Safety Act, § 26, as amended).

Department of Industrial Relations, having adjusted employee's compensation for injury in employment and injury resulting from malpractice of surgeon attending employee at direction of employer and insurance carrier held without authority, under Workmen's Compensation, Insurance, and Safety Act, St. 1917, p. 831, § 26, as amended by St. 1919, p. 921, § 8, and St. 1927, p. 1213, § 1, to deduct from such award amount received by employee in settlement of action for damages brought against surgeon for malpractice, where employer was notified of employee's commencement of action but failed to join therein, and where it did not appear what part of settlement received by the employee represented damages suffered by reason of past physical and mental suffering claimed in his complaint, since past physical pain and mental anguish would not be proper element of compensation award for permanent disability.

Proceeding under the Workmen's Compensation Act by the Federal Mutual Liability Insurance Company for the reduction of an award of compensation entered in favor of G. M. Ansbach. The Department of Industrial Relations, Division of Industrial Accidents and Safety, entered an order reducing the award, and claimant brings certiorari. Order annulled.

Kirtland I. Perky and Ralph W. Eckhardt, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Commission.

Willis I. Morrison, of Los Angeles, for respondent insurance company.

HOUSER, J. Certiorari. Somewhat condensed, the history of the present proceeding before this court is that, in the course of his employment, petitioner was injured, for which injury, at the instance of the employer and the insurance carrier, petitioner regularly received medical and surgical treatment. Some months after the happening of the accident which caused the injury, and pursuant to the direction of the employer and the insurance carrier, in an attempt to further relieve the employee from the effects of the injury received by him, by reason of the alleged malpractice of the attendant surgeon, petitioner received injuries which greatly added to his infirmities. Thereafter, on application made by petitioner to the respondent tribunal, the compensation to which petitioner was entitled under the provisions of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831, as variously amended) was adjusted.

By the terms of section 26 of said act, as amended by St. 1919, p. 921, § 8, and St. 1927, p. 1213, § 1, a claim for compensation from the employer has no effect upon the right of the employee to an action for damages arising out of his injury against any person other than the employer; but, where judgment is so recovered against such "third person," the employer is entitled, on application, to a first lien thereon on account of his "expenditures for compensation."

Following the adjustment of the employee's compensation by the respondent tribunal, the employee commenced an action against the surgeon for damages alleged to have been sustained by the employee by reason of the malpractice of the surgeon. Subsequently, and after a mistrial of the action, a money settlement of the controversy was agreed upon by the respective parties thereto. Later, on application presented by the insurance carrier, the respondent tribunal made an order by which the award therefore made to the employee was reduced in the amount received by him in the settlement of the action brought by the employee against the surgeon on account of his alleged unskillful practice in

treating the employee. It is with reference to such order that it is contended the respondent tribunal exceeded its jurisdiction. Before considering the question thus presented, it may be observed that from the conclusion reached herein it becomes unnecessary to definitely decide whether within the meaning of the statute here involved the surgeon was a "third person"; or whether a voluntary settlement by a "third person" in an action brought against him constitutes a "judgment."

In the application made by the employee for adjustment of his claim against his employer, the employee asked for "a total permanent disability rating." On the hearing evidence was received, not only as to the nature and effect of the original injury, but as well relating to the surgical operation which resulted in the aggravation of the injuries received at the time the accident occurred. Findings of fact upon which the award of compensation was made by the respondent tribunal, among other things, contained the statement that "said injury caused permanent disability * * *"; and it was on account of and based upon such "permanent disability" that compensation was awarded.

[1] With reference to the injury sustained by the employee, and for which he claimed damages from the surgeon, in addition to specific averments relating thereto, the complaint contained the allegation that by reason of the acts of the defendant, the plaintiff "has suffered great physical pain and mental anguish." In the settlement effected between the parties to such litigation, a release from all "claims, demands, rights and causes of action * * * as set forth in the complaint," was given by the plaintiff to the defendant; from which statement it would appear that the "physical pain and mental anguish" suffered by plaintiff on account or by reason of the alleged malpractice of the defendant on the plaintiff was included in such settlement. The question therefore arises as to whether an award of compensation by the respondent tribunal for "permanent disability" of the employee did include, or could have included, the item of "physical pain and mental suffering" theretofore endured by the employee. Although, as argued by respondents, the respondent tribunal has authority to determine the percentage of disability of an applicant for compensation, and as one of the several items which may be taken into account in reaching a conclusion thereon may include therein "pain, grief, suffering," which are present and which affect the employee's then "ability to work," nowhere in the express terms of the statute, or in the judicial decisions of this state to which our attention has been directed, may be found any indication that past "physical pain and mental anguish" endured by the employee may be compensated. In other words, so far as is discoverable,

the jurisdiction of the respondent tribunal in the premises is limited to a determination of the percentage of disability existent in the employee at the date of hearing of his application for compensation. It must be assumed that, in making its award of compensation to the employee for "permanent disability," the respondent tribunal included therein such items only as were either expressly authorized by statute or which were impliedly authorized thereby; and, consequently, that the past "physical pain and mental anguish" suffered by the employee were not included within the "permanent disability" of the employee for which the award of compensation was made.

[2, 3] Reverting to section 26 of the Workmen's Compensation, Insurance, and Safety Act, it will be noted that, when either the employee or the employer institutes an action for damages against a "third person" for or on account of his alleged negligence in connection with the injury suffered by the employee, "he shall forthwith notify the other * * * of such fact,* * *" whereupon the other may join in such action as a party plaintiff. Herein it appears that, when the employee commenced the action against the surgeon, he immediately in writing notified the employer of such fact, but that the latter took no action in the premises other than to aid, assist, and encourage the defendant therein. It is manifest that, had the employer been a party litigant, no settlement thereof could have been effected without his consent thereto, and that, in the event of a settlement, if the employer wished to protect his interests, it would become his duty to segregate the items going to make up the total thereof, so as to show at least how much thereof was allowed for "physical pain and mental suffering" and what amount, if any, was allowed for "permanent disability," as contemplated by the provisions of the Workmen's Compensation, Insurance, and Safety Act. For aught that now appears or may be ascertained the total amount received by the employee represented the damages which he suffered by reason of his past "physical pain and mental suffering." If so, as hereinbefore intimated, the respondent tribunal was without jurisdiction to deduct such amount from the award for "permanent disability" theretofore made to the employee. Nor, assuming that the award originally was composed of two or more items, would it be possible either for the respondent tribunal or for this court, either now or at any future time, to separate the total award into its several component parts. It is manifest that in the settlement the employee may have considered that the total amount, or at least some substantial portion thereof, represented his damages for past "physical pain and mental anguish." On the other hand, the defendant in the action either may have mentally divid-

ed the amount of the settlement into many different items without including therein any sum for "physical pain and mental suffering," or may have paid it with the idea that it represented some unspecified sum for each item expressly mentioned in the complaint in the action or impliedly contained therein.

It results that, in making the order here in question, the respondent tribunal acted without and in excess of its jurisdiction, for which reason the said order is annulled.

We concur: CONREY, P. J.; YORK, J.

99 Cal. App. 719

REID v. THOMAS. (Civ. 3818.)

District Court of Appeal, Third District, California. July 3, 1929.

1. Libel and slander ⇨38(3)—Charge of insanity in complaint in judicial proceeding held absolutely privileged (Civ. Code, §§ 45, 47).

Charge of insanity contained in complaint filed in a judicial proceeding in justice court was absolutely privileged under Civ. Code, §§ 45, 47.

2. Libel and slander ⇨97—Where complaint discloses that libelous matter complained of is absolutely privileged, claim of privilege need not be set up by answer or demurrer.

Where complaint affirmatively discloses that libelous matter complained of is absolutely privileged, it is unnecessary to set up claim of privilege by either answer or demurrer, since complaint fails to state a legal cause and the language complained of is not actionable.

3. Libel and slander ⇨97—Claim of absolute privilege must be raised by answer or demurrer, where complaint does not disclose privileged character thereof.

Where complaint does not show that libelous matter complained of is absolutely privileged, claim of privilege must be asserted by answer or demurrer.

4. Pleading ⇨408—Demurrer is unnecessary, where complaint absolutely fails to state cause of action, but defect may be raised at any stage and in any manner.

Where a complaint absolutely fails to state a cause of action, a demurrer is not necessary, but the defect may be raised at any stage of proceeding and in any manner which presents grounds of objection.

Appeal from Superior Court, Glenn County; Ernest Weyand, Judge.

Action by Samuel W. Reid against John Thomas. From an order and judgment of dismissal, plaintiff appeals. Affirmed.

Robert E. Jeffress and Pardini, Scampini & George, all of San Francisco, for appellant.

George R. Freeman, of Riverside, for respondent.

THOMPSON, J. This is an appeal from an order and judgment of dismissal in an action for libel.

The plaintiff filed a suit for damages against the defendant. Two causes of action were alleged. The first cause was based on a charge of libel consisting of a complaint for insanity which was sworn to and filed in the justice's court at Willows, Cal. This accusation of insanity appears in full as a part of the complaint in this action. The second cause of action consists of a charge of malicious prosecution based upon the same proceeding which is alleged in the first cause of action. No demurrer to the complaint was filed. The answer consists of a general denial, and does not affirmatively allege that the making and filing of the accusation of insanity was a privileged proceeding. But as a matter of law, it appears to be absolutely privileged. At the trial the court sustained objections to the introduction of evidence on the part of plaintiff with respect to the first cause of action, and a judgment of dismissal was subsequently entered. At the close of plaintiff's evidence, a nonsuit was also granted in the second cause of action. The plaintiff has appealed only from the order and judgment of dismissal in the first count, and asserts that the defense of privilege with relation to the publication of libelous matter is waived unless it is claimed by either a demurrer or answer to the charge.

[1] The alleged libelous matter, consisting of the charge of insanity, appears on the face of the complaint in this action. It was alleged to have been filed in a judicial proceeding in a justice's court, and was, therefore, absolutely privileged. Section 47, Civ. Code. "Libel is a false and *unprivileged* publication. * * *" Section 45, Civ. Code.

If the proceeding was privileged, it was, therefore, not libelous or actionable. Language employed in a judicial proceeding belongs to the class which is absolutely privileged, and which is, therefore, exempt from liability. Language used in judicial and legislative proceedings and in the discharge of official duties, as specified in subdivisions 1 and 2 of section 47 of the Civil Code are absolutely privileged in character. *Hale Co. v. Lea*, 191 Cal. 202, 205, 215 P. 900; *Stevens v. Snow*, 191 Cal. 58, 64, 214 P. 968; *Ball v. Rawles*, 93 Cal. 222, 236, 28 P. 937, 27 Am. St. Rep. 174. In 17 *Ruling Case Law*, 330, § 76, it is said: "An absolutely privileged communication is one in respect to which, by reason of the occasion on which it is made, no remedy can be had in a civil action. The class of absolutely privileged communications is narrow, and is practically limited to legislative and judicial proceedings and other acts

of state. Where there exists an absolute privilege, proof even of actual malice will not support an action for libel or slander, absolute privilege being in all cases a complete defense which cannot be rebutted or overcome by evidence that the publication was false and malicious."

[2-4] When a complaint affirmatively discloses the fact that the libelous matter complained of is absolutely privileged in its character, it is unnecessary to set up the claim of privilege by either answer or demurrer, for the reason that it appears that the pleading fails to state a legal cause and the language complained of is not actionable. 37 C. J. 58, § 421; 17 R. C. L. 401, § 158; 18 Standard Enc. of Proc. 928. Where, however, the privileged character of the proceeding does not appear in the complaint, it is necessary to raise the issue by answer or demurrer. Where a complaint absolutely fails to state a cause of action, a demurrer is not necessary, but the defect may be raised at any stage of the proceeding and in any manner which presents the grounds of objection. 21 Cal. Jur. 250, § 175. None of the cases relied upon by the appellant are in conflict with the foregoing declaration of law. In two of these cases it is said by the court that: "Where the complaint shows on its face that the publication was privileged, the point may be raised on general demurrer." But this may not be taken to mean that the defense is waived, unless it is raised by answer or demurrer. It means no more than the statement that, where a complaint fails to state a cause of action, that fact may be raised by a general demurrer. This does not mean it is the only way by means of which the point may be raised. Where the privileged character of the communication appears on the face of the complaint, it states no cause of action, if the privilege appears to be absolute. When no cause of action is stated, there is nothing to be waived, and no demurrer is required. A different principle is involved with respect to the statute of limitations. The limitation of time prescribed by statute within which an action may be maintained is a mere defense to the suit, or personal privilege which must be asserted, or it is deemed to have been waived. 16 Cal. Jur. 603, § 199.

In *Gosewisch v. Doran*, 161 Cal. 511, 119 P. 656, Ann. Cas. 1913D, 442, where this language with reference to a demurrer was used, the appeal was from a judgment entered upon the sustaining of a demurrer to the complaint. The absence of a demurrer or claim of an absolute privilege by means of an answer were not involved in that action. In *Stevens v. Snow*, 191 Cal. 58, 64, 214 P. 968, where similar language is used, the question of an absolute privilege was not involved. The expression of the court so far as it applies to an absolute privilege is dicta. There

is good reason for distinguishing between pleadings which are necessary to raise the issue of conditional or qualified privileges and those which are absolutely privileged. The first class may be libelous, dependent upon the motive or malice with which they are uttered. The latter are neither libelous nor actionable under any circumstances. The reason for exempting one from liability for the publication of language employed in legislative or judicial proceedings or in the discharge of official duties, although such utterances might otherwise be libelous, is founded on public policy and is deemed to be necessary for the general welfare of governmental institutions and society.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 718

**JANSEN v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**
(Civ. 6501.)

District Court of Appeal, Second District, Division 1, California. July 3, 1929.

Appeal and error ⇨571—Divorce ⇨262—Trial court could not refuse to settle transcript because defendant husband was in contempt, and mandamus would compel settlement.

After notice of appeal given by husband, appellant, from interlocutory judgment in divorce action, trial court cannot refuse to settle reporter's transcript for sole reason that appellant is guilty of contempt in refusing to comply with order directing him to pay plaintiff specified sum to enable her to defend as against such appeal, and mandamus will issue to require settlement of transcript.

Application by Joseph M. Jansen for a writ of mandamus prayed to be directed to the Superior Court in and for Los Angeles County and Douglas L. Edmonds, Judge, to require respondents to settle reporter's transcript. Writ granted.

William Bronsten and Guy B. Graham, both of Los Angeles, for petitioner.

James F. McBryde, of Glendale, and Oliver O. Clark, of Los Angeles, for respondents.

HOUSER, J. Mandamus. The question presented by this proceeding is whether, after notice of appeal given by a husband, appellant, from an interlocutory judgment in a divorce action rendered against him, the trial court may legally refuse to settle the reporter's transcript on appeal for the sole reason that the appellant is guilty of contempt of court in refusing to comply with an order of said court by which he was direct-

ed to pay to the plaintiff (respondent in the appeal) a specified sum of money to enable her to defend as against such appeal.

On the authority of the cases of *Manriquez v. Superior Court*, 199 Cal. 749, 251 P. 1118, and *Archer v. Superior Court*, 81 Cal. App. 742, 254 P. 939, the question should be answered in the negative. It follows that a peremptory writ of mandate should issue from this court directing respondents superior court and Douglas L. Edmonds, as judge thereof, to proceed in accordance with the provisions of the Code and the statutes relating to the settlement of transcripts on appeal, without reference to the fact of whether or not the appellant is in contempt of court as hereinbefore noted. So ordered.

I concur: CONREY, P. J.
YORK, J., absent.

99 Cal. App. 702

PEOPLE v. MACHADO. (Cr. 1832.)★

District Court of Appeal, Second District, Division 2, California. July 2, 1929.

Rehearing Denied July 15, 1929.

1. Physicians and surgeons ⇨2—Act punishing practice of medicine without license held not repealed by Chiropractic Act (State Medical Practice Act, § 17, as amended by St. 1915, p. 199, § 13; Chiropractic Act, §§ 7, 15, 18).

State Medical Practice Act (St. 1913, p. 722) § 17, as amended by St. 1915, p. 199, § 13, making it misdemeanor to practice medicine without license, held not in conflict with, nor repealed by, Chiropractic Act (St. 1923, p. lxxxviii) §§ 7, 15, 18, authorizing practice of chiropractic, but not authorizing practice of medicine, nor denouncing as public offense practice of medicine without license, but merely punishing practice of chiropractic without license from state board of chiropractic examiners.

2. Criminal law ⇨1169(1)—In prosecution for practicing medicine without license, error, if any, in not calling druggist to show medicine taken, was as prescribed by defendant, held not prejudicial (State Medical Practice Act, § 17, as amended by St. 1915, p. 199, § 13).

In prosecution for violating Medical Practice Act (St. 1913, p. 722) § 17, as amended by St. 1915, p. 199, § 13, by practicing medicine without license where certain bottles of medicines prescribed by defendant were received in evidence, and it appeared that defendant left pharmaceutical preparations with one of patients and prescribed their use and gave prescriptions which were filled at drug store, and used by patients, and portions of filled prescriptions appeared to be filled as prescribed by defendant, error, if any, in failing to call druggist to prove that he did not substitute another and different drug for that prescribed, was so slight as not to be prejudicial.

3. Criminal law ⇨1168(2)—District attorney's failure to elect in advance violation of Medical Practice Act state relied on for conviction held not prejudicial error, where violation first proved was deemed election (State Medical Practice Act, § 17, as amended by St. 1915, p. 199, § 13).

Where offense of practicing medicine without license in violation of State Medical Practice Act (St. 1913, p. 722) § 17, as amended by St. 1915, p. 199, § 13, was alleged to have been committed on or about certain date, and state relied on instance of practice first introduced in evidence showing medical practice, and court announced that prosecution would be bound by such evidence, defendant was not prejudiced by failure of district attorney to announce in advance on which particular violation of statute intended to be proved state would rely for conviction, especially where it did not appear from record that opening statement was made, and evidence first offered was deemed an election.

4. Criminal law ⇨678(2)—State should elect violation relied on for conviction at commencement of trial, or after opening statement.

Election by prosecution of particular violation relied on for conviction should be made at commencement of trial; but if this is not done, and district attorney makes opening statement, trial court should require election at close of such statement.

5. Physicians and surgeons ⇨6(8, 10)—Authority to practice chiropractic held no defense to prosecution for practicing medicine without license, and court properly required defendant to prove license if found practicing medicine (Medical Practice Act, § 17, as amended by St. 1915, p. 199, § 13).

Where defendant was charged with having violated Medical Practice Act (St. 1913, p. 722) § 17, as amended by St. 1915, p. 199, § 13, in that he unlawfully practiced system or mode of treating sick and had diagnosed, operated, and prescribed for diseases and other mental and physical conditions of human beings without having license to practice medicine, and there was no evidence that defendant had certificate to practice, fact that defendant may have been qualified and authorized to practice chiropractic was no defense, and hence instruction that defendant, if shown to have been practicing system of treating sick, had burden of proving possession of valid certificate to do so, was not error.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Manuel Machado was convicted of violation of the State Medical Practice Act, and he appeals. Affirmed.

Shaeffer & Weldon, of Santa Maria, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and C. C. Ward, Dist. Atty., of Santa Barbara, for the People.

CRAIG, J. The appellant, an alleged chiropractor, appeals from a judgment con-

victing him of having violated the State Medical Practice Act, and from an order denying his motion for a new trial.

He was charged with having on or about February 19, 1929, willfully and unlawfully practiced, advertised, and held himself out as practicing, a system and mode of treating the sick and afflicted, and with having unlawfully diagnosed, treated, operated for, and prescribed for the diseases, injuries, deformities, and other mental and physical conditions of human beings, without then and there having a valid, unrevoked certificate of license from the board of medical examiners so to do.

It appeared that during the month of January, 1929, the defendant examined a three year old child which was brought to his office, diagnosed its disease as pneumonia, and upon five or six consecutive days thereafter visited its home, where he prescribed and caused to be administered rhubarb and soda, a pharmaceutical preparation, and some pills. There was evidence also tending to show that he prescribed tincture of digitalis for a man on or about February 16, 1929, and other preparations for a woman and a boy about three months prior to the trial, all of whom he examined and diagnosed as cases requiring the treatments prescribed. Evidence relating to cases other than that first above mentioned was expressly admitted by the trial court for consideration by the jury solely upon the question of intent and motive, and the jury were thereafter so instructed. When upon the stand in his own behalf, the defendant identified a certificate of license issued by the board of chiropractic examiners, issued in 1928, authorizing him to practice chiropractic, and a receipt showing payment of his annual license fee in 1929, and he testified that he had been receiving patients at his office "under the chiropractic act." Objections by the district attorney to the introduction of the certificate and receipt were sustained, upon the ground that they were irrelevant, incompetent, and immaterial, and constituted no defense to a violation of the Medical Practice Act.

It is insisted on behalf of appellant that it was prejudicial error to reject this evidence, because it conveyed the impression to the jury that he was not a licensed chiropractor, and assumed that even so licensed, it was not a defense to a charge of illegally practicing a system or mode of treating the sick and afflicted as alleged in the information. By comparison of the two statutes, appellant attempts to urge as a ground for reversal that the Chiropractic Act, being later in date of enactment, repealed the penal provisions of the Medical Act, for the reason that in this respect they are conflicting. By section 17, chapter 354, of the Statutes of 1913 (p. 722), as amended (St. 1915, p. 199, § 13), it was provided by the Legislature that: "Any person who shall practice or attempt to practice, or

who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who shall diagnose, treat, operate for, or prescribe for, any disease, injury, deformity, or other mental or physical condition of any person, without having at the time of so doing a valid unrevoked certificate as provided in this act, * * * shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than six hundred dollars (\$600.00), or by imprisonment for a term of not less than sixty (60) days nor more than one hundred and eighty (180) days, or by both such fine and imprisonment."

Sections 7, 15, and 18 of the Chiropractic Act (Stats. 1923, p. lxxxviii, in effect December 21, 1922) provide:

"One form of certificate shall be issued by the board of chiropractic examiners, which said certificate shall be designated 'License to practice chiropractic,' which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, *but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica.*"

"Any person who shall practice or attempt to practice chiropractic, * * * or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than ninety days, or both."

"Nothing herein shall be construed as repealing the 'medical practice act,' of June 2, 1913, or any subsequent amendments thereof, except in so far as that act or said amendments *may conflict with the provisions of this act as applied to persons licensed under this act*, to which extent any and all acts or parts of acts in conflict herewith are hereby repealed."

[1] It is at once obvious that there is neither real nor apparent "conflict" between the penal provisions of these statutes. The Medical Practice Act authorizes a properly qualified licentiate to practice medicine, as the practice of medicine is therein defined in detail, and makes it a misdemeanor to so practice without the prescribed license of the board of medical examiners. The Chiropractic Act authorizes one licensed thereunder to practice chiropractic in accordance with certain specified standards, but does not authorize its licentiates to practice medicine, nor does it denounce as a public offense the practice of medicine without a license therefor.

The only misdemeanors of this nature, punishable under this latter act, consist of practicing chiropractic without a license from the board of chiropractic examiners, fraudulently bartering a certificate to practice, and the use by a licensed practitioner of a name, term, or initials "which would indicate that he or she was practicing a profession for which he held no license." Each statute defines offenses peculiar to its own sphere, and confines its penalties thereto. Appellant seeks to rely upon authorities holding that in the event of a conflict in the penal provisions of statutes applicable to the same offense, the more recent enactment repeals those of the statute preceding it, and from this it is argued that he should have been tried under the Chiropractic Act of 1923. However, since appellant was charged with an offense clearly violative of the Medical Practice Act of 1913, as amended, and to which the later statute obviously has no relation, to wit, practicing medicine without a license from the state board of medical examiners, there is no merit in this contention.

[2] Certain bottles of medicines alleged to have been prescribed by the defendant as above mentioned were received in evidence over the objections of his counsel, and these rulings are also assigned as prejudicial error. It is not denied that appellant prescribed certain remedies, nor that the patients who received from him such prescriptions carried or sent them to a druggist, there had them filled, and took the contents of the bottles received from the druggist for the afflictions diagnosed by the defendant. It was also testified by a qualified chemist that he examined the contents of these containers, which he found to be pharmaceutical preparations within the category of *materia medica*. It is appellant's contention, however, that there was no showing that the druggist furnished the drugs named in the prescriptions, nor that the medicines so taken by the patients, portions of which were so analyzed and produced in court, were the preparations which were actually prescribed. Briefly stated, the substance of this objection is that the druggist should have been called to prove that he did not substitute another and different drug for that prescribed. It is true, as contended, that in one instance the prescriptions were not connected with the defendant, but in the Nunez Case, for which he was prosecuted, it appears that Machado both prescribed and personally left with the mother a mixture of rhubarb, soda, glycerine, and spirits of peppermint, which, under his orders, was administered to a three year old child for a malady which he diagnosed as pneumonia. In another instance the defendant visited an aged man who then had and was taking digitalis under the directions of a physician; appellant examined him, pronounced the case doubtful, altered the dosage, but prescribed digitalis, which was continued. In another

case the defendant stated to the patient that he should apply tincture of green soap and carbolated vaseline for eczema, wrote a prescription, which was filled at a drug store and used as directed. A sample of this latter preparation, examined by the chemist, was pronounced a pharmaceutical preparation conforming to the prescription which Machado had indicated to the patient should be used, at the time of furnishing the written prescription which was exchanged with the druggist for the substance which the patient so applied and delivered to a special agent of the medical board. If there was error, it was so slight that it was not prejudicial.

[3, 4] Nor was the defendant prejudiced by the failure of the district attorney to announce in advance upon which particular violation of the statute, intended to be proved, the people would rely for a conviction. The offense was alleged to have been committed on or about February 19, 1929, and evidence was offered which tended to show that the defendant had practiced medicine illegally, both in January and February of this year. Mrs. Joe Nunez and her son were first called, and professional visits, diagnosing, and prescribing at their home were proved by them, although they were illiterate and did not remember dates, but believed these acts to have occurred in the month of January. As already observed, the people relied upon this instance, and the court announced that the prosecution would be bound thereby, and so instructed the jury. This was in compliance with previous decisions upon the subject. It is the better practice to make an election at the commencement of the trial, but if this be not done, and the district attorney makes an opening statement, the trial court should require that it be done at the close of such statement. *People v. Williams*, 133 Cal. 165, 65 P. 323; *People v. Barnett*, 15 Cal. App. 89, 113 P. 879. However, it does not appear from the record that an opening statement was made, and under the circumstances the evidence first offered was properly deemed an election. *People v. Williams*, *supra*; *People v. Harlan*, 29 Cal. App. 600, 156 P. 980.

[5] It is next contended that the trial court erred in instructing the jury that if they found from the evidence to a moral certainty and beyond a reasonable doubt that the defendant was practicing, attempting to practice, or holding himself out as practicing, a system or mode of treating the sick and afflicted, the burden lay with him to prove that he had a valid, unrevoked certificate of license so to do. It is argued that as a chiropractor he was entitled to practice a system or mode of treating the sick and afflicted. This argument entirely overlooks the fact that the jury were instructed that the defendant was charged with having violated the state Medical Practice Act, in that he had unlawfully practiced a system or mode of treating the sick and afflicted, and had diagnosed,

treated, operated, and prescribed for diseases, injuries, deformities, and other mental and physical conditions of human beings, without then and there having a valid, unrevoked certificate of license from the board of medical examiners of this state so to do. From our preceding review of the evidence it is obvious that Machado held himself out as practicing, and did practice, the system or mode of treating the sick and afflicted forbidden by the state Medical Practice Act, except as to those holding a certificate from the board of medical examiners. There is no evidence, nor is it claimed, that he had such a certificate, and the evidence of his guilt was ample. That he may have been qualified and authorized to practice some other and different system or mode of treating human beings was no defense, and we do not conceive of any legal theory upon which it can be said that the jury were confused in this regard by the instructions of the court.

No other points are advanced which require discussion, and reversible error not appearing, the judgment and order denying a new trial are affirmed.

I concur: IRA F. THOMPSON, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

Action to recover treble amount of interest paid on promissory note secured by trust deed under the provisions of a statute relating to usury by Primo Degli Esposti against Rivers Bros., Inc., and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Soren X. Christensen and J. C. Wood, both of San Francisco, for appellant.

Oscar Samuels and J. Samuels, both of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondents.

RICHARDS, J. This appeal is from a judgment of the superior court of the state of California, in and for the city and county of San Francisco, in favor of the defendants and against the plaintiff, rendered and entered after the court had sustained a general demurrer to the plaintiff's amended complaint without leave to amend. The action was commenced to recover treble the amount of certain interest paid upon a promissory note, secured by a trust deed, under the provisions of section 3 of the act relating to usury (St. 1919, p. lxxxiii). The facts upon which the plaintiff relied for his recovery as set forth in his complaint, and repeated in his amended complaint, may be briefly stated as follows: On March 9, 1926, Joseph Varsi and wife executed the note and trust deed to which the plaintiff in his complaint refers, and which called for a payment of \$20,000, with interest monthly in advance at the rate of one per cent. per month. During the month of March, 1927, the makers of the note paid to the payees thereof, who are the defendants herein, the sum of \$3,170, of which the sum of \$3,000 was to be applied upon the principal, and the sum of \$170 as advance interest upon the reduced principal for the month extending from March 9, 1927, to April 9, 1927. During the latter period Joseph Varsi and wife conveyed the property described in the trust deed to one Frederick Huelter, subject to the trust deed, for the sum of \$17,000. On April 8, 1927, Frederick Huelter paid the defendants \$170 as interest on said amount at the rate of one per cent. per month from April 9, 1927, to May 9, 1927, and thereafter made four additional monthly payments at said rate upon the note. During the month of August, 1927, Frederick Huelter conveyed the property, subject to the trust deed, to one Harry Schwartz, who, on the same day, conveyed it to the plaintiff. Thereafter the plaintiff paid the interest accruing upon the note at the same rate monthly in advance for five months; the last payment being made on January 9, 1928. The complaint further shows that on March 8, 1928, the plaintiff tendered to the defendants the sum of \$11,500, together with the interest amounting to \$170 for the month beginning February 9, 1928, and ending on March 9, 1928. At the time of

207 Cal. 570

ESPOSTI v. RIVERS BROS., Inc., et al.
(S. F. 13051.)

Supreme Court of California. July 15, 1929.

1. Usury ☞130—Grantee of property taking subject to usurious mortgage, amount of which is deducted from price, cannot complain of usury in inception of mortgage.

Grantee of property taken subject to usurious mortgage, amount of which is deducted from purchase price, cannot complain of usury in inception of mortgage.

2. Assignments ☞26—Transferee of property taken subject to usurious mortgage could not assign right to recover treble usurious interest to his transferee (Usury Act, § 3).

Transferee of property taken subject to usurious mortgage, amount of which was deducted from purchase price, had no right to recover treble amount of usurious interest paid under Usury Act, § 3, and could not assign right to recover such interest to his transferee.

3. Assignments ☞26—Right of original maker of usurious note and mortgage to recover treble interest is not assignable (Usury Act, § 3).

Right of original maker of usurious note and mortgage given under Usury Act, § 3, to recover treble amount of interest paid is not assignable.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

such tender the plaintiff advised the defendants of the assignment to him of whatever right of action existed in said Frederick Huelter for the recovery provided for in section 3 of the Usury Act. The defendants refused to accept these tenders; whereupon the plaintiff deposited the sum thus tendered to the credit of the defendants with the Bank of Italy, which immediately notified the defendants of such deposit. Thereupon the plaintiff commenced this action to recover the sum of \$5,100, being treble the amount of the alleged usurious interest paid by the plaintiff and his assignor Huelter, praying that said sum be deducted from the principal due under said indebtedness, and for general relief. The defendants presented a general demurrer to the original complaint, which the trial court sustained and also presented a general demurrer to the amended complaint, which the trial court also sustained without leave to amend. The judgment followed from which this appeal has been taken.

[1] There are two points presented by the appellant upon this appeal. The first is that, the transaction between the defendants and the original makers of the promissory note and trust deed being usurious, the plaintiff as the transferee of the property affected thereby, and which he took by the foregoing several transfers, subject to said indebtedness, is entitled to recover the trebled amount of interest paid by himself and his assignor Huelter upon said obligation. The second point urged by the appellant is that the right of action to recover and to treble the amounts of interest thus paid by his predecessor in interest Huelter was properly assignable and was duly assigned to him. In presenting the first of these propositions, the appellant relies upon the recent decisions of this court upholding the view that the transaction which is set forth in his pleadings is a usurious one, and chiefly upon our decision in the case of *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725. In so doing, however, the appellant entirely overlooks the proposition of law upon which the trial court apparently relied in its order sustaining the defendants' demurrer without leave to amend. That proposition of law, broadly stated, is that a grantee of property taken subject to a usurious loan, the amount of which is deducted from the purchase price, will not be permitted to complain of usury in the inception of the loan. The respondents, on the other hand, present an amplitude of authority upholding this proposition and showing it to be in this as well as in most other jurisdictions in this country well-settled law. The following are some of the leading cases upon which the respondents thus rely: *Matthews v. Ormerd*, 140 Cal. 578, 74 P. 136; *Trusdell v. Dowden*, 47 N. J. Eq. 396, 20 A. 972; *Terminal Bank v. Dubroff*, 66 Misc. Rep. 100, 120 N. Y. S. 609; *Brown v. Jones*, 89 Misc. Rep. 538, 152 N. Y. S. 571;

Stein v. Indianapolis Building, etc., Ass'n, 18 Ind. 237, 81 Am. Dec. 353; *Essley v. Sloan*, 116 Ill. 391, 6 N. E. 449; *Key West Wharf & Coal Co. v. Porter*, 63 Fla. 448, 58 So. 599, Ann. Cas. 1914A, 173, 188, and cases cited. The appellant has furnished us no reply to the point thus presented, nor to the foregoing list of persuasive authorities, and we are satisfied that none could be made, and hence the trial court, in reliance upon the foregoing legal principle, was justified in sustaining the defendants' demurrer without leave to amend.

[2, 3] As to the second proposition urged by the appellant to the effect that he is also suing as the assignee of Huelter for the recovery of the usurious interest which the latter had paid prior to his transfer of the property, there are two sufficient answers, the first of which is that Huelter, as a transferee of the property from the Varsis, subject to said mortgage and trust deed, was not himself entitled under the foregoing principle of law to recover any usurious interest which he may have paid, and therefore had nothing which was assignable to the plaintiff. The second answer is that the right which the original maker of a usurious note and mortgage is given under section 3 of the Usury Act to recover such interest and to treble the same is in the nature of a statutory penalty, and, under the authorities from other jurisdictions, which we hereby approve, is not assignable. In the case of *Pardoe v. Iowa State Bank*, 106 Iowa, 345, 76 N. W. 800, a statute containing the same language as that of the usury law of this state was so construed with a quite abundant reference to authorities. A similar ruling was made by the Supreme Court of Kansas upon the terms of a similar statute in the case of *Lloyd v. First Nat. Bank*, 5 Kan. App. 512, 47 P. 575. See, also, *Robinson v. St. Maries Lumber Co.*, 34 Idaho, 707, 204 P. 671; 21 R. C. L., p. 2117, § 6; *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083, Ann. Cas. 1916D, 886, 893 and notes; *Allen v. Petty*, 58 S. C. 240, 36 S. E. 586; *First State Bank, etc., v. Bank of Jefferson*, 112 Okl. 177, 240 P. 311. In opposition to these authorities the appellant presents a few cases which are inconclusive, for the reason that they relate in the main to conditions unlike those presented in the instant case; the only authority directly supporting the appellant's position being that of *Taylor v. Sturgis*, 29 Tex. Civ. App. 270, 68 S. W. 538, which is commented upon in Ann. Cas. 1916D, at page 893, as being the "Texas rule," and as being opposed to the overwhelming weight of authority from other jurisdictions. However, we are of the opinion that there is no merit in this, the appellant's second contention, for the reason first above stated.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

207 Cal. 551

HUNTLY v. UNITED STATES FIDELITY & GUARANTY CO. (S. F. 12979.)

Supreme Court of California. July 13, 1929.

Insurance ⇨665(5)—Evidence held to sustain finding death resulted from accidental bodily injury within accident policy.

In action on accident policy for death of insured, evidence held sufficient to sustain verdict of jury that death resulted "directly, and independently of all other causes, from accidental and bodily injury" and not from previous diseased condition.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Emma L. Huntly against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. W. B. Smith and Ford, Johnson & Bourquin, all of San Francisco, for appellant.

Raymond Perry, of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor for the sum of \$7,500, for which she sought recovery as the beneficiary named in an accident insurance policy issued by the defendant, United States Fidelity & Guaranty Company, to her husband, which policy was dated January 5, 1918, and provided for an indemnity in the amount sued for, payable to plaintiff in the event of the death of the insured "resulting directly, and independently of all other causes, from accidental and bodily injury." The deceased husband of the plaintiff thus insured under said policy was at and for some time prior to the time of his death an auditor in the employ of the Pacific Steamship Company, stationed at berth 160, Wilmington, Cal. On March 22, 1926, about 7:45 o'clock a. m., the deceased was found in a kneeling position with his head against a checker's desk just beside the door of berth 160 above referred to. There were no witnesses to his fall, but when he was discovered some 15 or 20 minutes later he was still living, though in a semiconscious condition, and was feebly but vainly attempting to rise. His head at the base of his forehead was resting upon the edge of the checker's bench when he was found, and he appeared to have sustained a deep wound at the point of contact where the frontal bone of the skull joins the nasal bone, and which wound had apparently been caused by his violent fall against the edge of such bench a short while before he was found. He had also an abrasion across his nose, his right knee was skinned, and there

were scratches upon the back of his right hand. Within some 30 minutes after he was discovered in his above-described condition he died. The foregoing facts, and certain others to be adverted to, were presented by the plaintiff in evidence at the trial. The defendant, in its pleadings and in the evidence adduced in support thereof at the trial, attempted to show that the decedent prior to his aforesaid injuries had been afflicted with a pronounced and well-defined condition known as "angina pectoris," and that the arteries of the deceased upon the post mortem examination showed an advanced condition of calcification known as "arteriosclerosis." The defendant also introduced certain evidence showing that the deceased, within the period of a week or so prior to his final and fatal injuries, had, upon two occasions, been found lying on the streets of Wilmington in an unconscious condition, and had been given emergency treatment for what was diagnosed at the time as apoplexy or heart trouble, and that for some period prior to these attacks he had been receiving treatment from a physician for symptoms indicating the existence of heart trouble. Predicated upon this evidence and upon what the autopsies had disclosed, the defendant presented evidence of certain expert physicians who testified that in their opinion the deceased's death had been caused by a sudden recurrence of unconsciousness resulting from his diseased condition and from the effect of which he had died, rather than from any effect produced by his facial or other injuries. At the conclusion of the evidence, the defendant moved for a nonsuit, which motion the trial court denied; whereupon defendant submitted certain instructions which practically amounted to instructions for a directed verdict, and which were based upon the ground urged upon motion for nonsuit, which was, in substance, that the uncontradicted evidence in the case disclosed that the cause of the decedent's death was that of his previous diseased condition and was not the result of such accidental bodily injuries as are covered and required to exist by the terms of the policy as a condition of recovery thereunder. The court refused these requested instructions. The jury returned a verdict in favor of the plaintiff for the amount stated in the policy, and for which sum the trial court entered judgment upon denying the defendant's motion for a new trial.

The appellant demands a reversal of the judgment upon two grounds: First, upon that presented upon motion for nonsuit and urged in the instructions which the court refused to give; second, upon the ground that the trial court erred in such refusal, and also committed error in the giving of certain instructions requested by plaintiff. We are unable to agree with the appellant's contention

that the judgment should be reversed upon the first of the foregoing grounds, since in our opinion there does exist in this record certain other substantial evidence which would suffice to sustain the verdict of the jury. It is true that the deceased husband of this plaintiff was found by the diagnoses after his death to be afflicted with the physical conditions defined as angina pectoris and arteriosclerosis. It is also true that, as a probable result of his aforesaid condition, he had, within a short while before the fall which immediately preceded his demise, the two fainting spells upon the streets of Wilmington which the evidence disclosed. But the evidence also discloses that, notwithstanding these ailments and the occurrence of these fainting spells the decedent was otherwise in a fairly rugged physical condition, that he was regularly performing his work and exhibiting no impairment of physical ability so to do, and that, even on the occasion of his fainting spells, he was, after a few hours of rest, back at his accustomed place in the office of his employer. There is also the evidence of the witness Williams, who saw him coming down the street a moment or two before his fall, and who apparently noticed nothing unusual in his physical condition. This witness further testified to the fact that he was employed by the Nelson Steamship Company in Wilmington at berth 160 on the day of the decedent's injuries and death; that immediately in front of the door which the decedent was presently to enter there was a metal plate 4 feet square and about a quarter of an inch thick, which was laid upon the platform of the dock and which the stevedores used to run their heavy trucks over. This particular plate had become warped with use, and the witness Williams, in passing, struck his foot against the warped edge thereof, and it was while he was rubbing his injured foot that he saw Huntly come around the edge of the dock and start down the platform to the place where he was to cross the same plate in order to enter the door just beside which stood the checker's bench against which he made his headlong fall and from the contact with which he received his facial injury. The plaintiff insists that it is a fairly deducible inference that her deceased husband had also tripped upon the edge of this warped metal plate and had thereby been caused to fall in the position in which he was found a few moments later. The evidence with respect to the position in which the deceased was thus found a few moments later would seem to support that inference and would seem to negative the inference which the defendant seeks to have drawn from the existence of his diseased condition, that he had fallen as the result of a sudden fainting spell, which upon this occasion proved to be fatal. The evidence which the plaintiff produced in opposition to this lat-

ter inference, in the form of expert opinion, and also in the form presented by accredited medical treatises, was to the effect that a person suddenly collapsing as the result of an attack of heart failure indicated that under such circumstances the person thus afflicted would fall and be found lying flat upon his back, as in fact the deceased upon his two former fainting spells was found to be lying, and that a person thus suddenly overcome would not be found in the position upon his hands and knees in which the deceased was when discovered, and that a person suffering a fainting spell from heart failure would not have made the forward plunge which the deceased must have made in order to strike his head against the edge of the checker's bench with sufficient force to have caused his death, and which in the opinion of the plaintiff's medical expert, Dr. Sweeney, did cause, and in fact was the sole cause of, the death of the decedent. The plaintiff further introduced certain photographs purporting to give the relative position and condition of the metal plate upon which she insisted that her husband must have tripped and fallen, and of the checker's bench against which he was obviously impacted in his fall. These tend quite strongly to support the plaintiff's theory as to the sole and immediate cause of her husband's death. In the foregoing state of the evidence we are unable to say that there was not substantial and sufficient evidence before the jury to support the plaintiff's claim as to the cause of her husband's death and to sustain the verdict of the jury based thereon. It is of some significance in this connection that the defendant presented not only a motion for nonsuit based upon the proposition which it here urges as the first ground of its appeal, but also presented to the trial court a motion for a new trial based upon the same ground, and that both of these motions the trial court, who had heard all of the evidence in the case, including the testimony of the opinion witnesses, denied. We therefore conclude that there is no merit in the appellant's first contention.

As to the appellant's second contention, to the effect that the trial court erred in refusing to give certain of its requested instructions and also committed error in the giving of certain instructions which the plaintiff requested, it will suffice to say that, as to the refused instructions, these were predicated upon the defendant's theory as to the contradicted state of the evidence, and that, since we have declined to adopt such theory, we must uphold the decision of the trial judge who, for the same reason, refused to give said instructions. With respect to the instructions which the trial court gave at the request of plaintiff, we have examined these in the light of the entire body of instructions which were given to the jury, and we

find that, as to the instructions to which appellant offers particular objection, these were, in the main, taken from cases which have received the approval of this court, and, as to the instructions in general, we have found them to be full and fair, and, taken as a whole, not subject to the appellant's criticism.

It follows from these conclusions that the judgment should be, and the same is hereby, affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.



207 Cal. 587

YUBA CITY v. CONSOLIDATED MAUSOLEUM SYNDICATE. (Sac. 4213.)

Supreme Court of California. July 16, 1929.

1. Dedication ⇨44—Finding that offer to dedicate street had not been revoked at time of city's implied acceptance was authorized, where property continued to be used in same manner.

Fact that period of 31 years elapsed after offer of dedication of property to city for street was accepted did not prevent trial court from finding, in action by city to enjoin obstruction of street, that offer to dedicate had not been withdrawn at time of city's implied acceptance thereof, where property continued to be used in the same way as when the dedication offer was made and property was conveyed with reference to location according to map.

2. Dedication ⇨38—Where offer to dedicate had not been withdrawn, no period of time after city's acceptance was necessary to constitute area public street, and prescription was not involved.

Where offer of property owners to dedicate street to city was not withdrawn at time of city's implied acceptance of offer, no period of time after acceptance was necessary to constitute the area a public street, and doctrine of prescription was not involved, though acceptance was postponed for 31 year period.

3. Dedication ⇨45—Dedication and revocation of offer to dedicate street are questions of fact.

Dedication by property owners of street to public use and revocation of offer to dedicate are questions of fact for trial court, in city's action against property owner to restrain obstruction of street.

In Bank.

Appeal from Superior Court, Sutter County; Eugene P. McDaniel, Judge.

Action by the City of Yuba City against the Consolidated Mausoleum Syndicate. Judgment for plaintiff, and defendant appeals. Affirmed.

Elliott, Atkinson & Sitton, of Sacramento, for appellant.

Arthur Coats, of Yuba City, for respondent.

PRESTON, J. Inasmuch as this appeal involves merely a question of fact upon which ample evidence exists to support the findings made by the trial court, the judgment must be and is hereby affirmed.

The action is by Yuba City, a municipality, against the above-named defendant and appellant to enjoin the obstruction of the free use as a public street of a certain strip of land 30 feet wide and 230 feet long, claimed to be a portion of what is known as Aylor street, in said town. Plaintiff had judgment as prayed. Admittedly the land lies in the projection of what is conceded to be Aylor street.

The court found that for five years last past the city had been in possession of said tract of land, had graded and graveled it, and spent public funds in the improvement thereof as a public street; that in 1926, by proceedings had under the Improvement Act of 1911 (St. 1911, p. 730), the city had constructed, as a part of its sewerage system, a sewer line along and in the same; that defendant on December 7, 1927, erected a barrier across said right of way, thus preventing its use by the traveling public; and that, unless enjoined by the court, defendant would continue to exclude the city from the use of said street and would indefinitely delay its paving and otherwise do great and irreparable damage to plaintiff. The court further found that defendant was not the owner of the area in dispute, and if it had any interest whatever in it such interest was subject and subservient to the right and easement of said city to have and use said strip for street and highway purposes.

It was stipulated that in 1892 the Sutter City Lumber & Milling Company was the owner of the south half of lot 8 of Teegarden addition to said city, and in that year subdivided a portion of said south half of said lot, which portion included the area in dispute, which was marked on the map filed by said company as a street. The greater portion of said south half of said lot, however, was not subdivided. The subdivided portion was laid out in streets and lots; lots 4, 5, 6, 7, and 8 thereof fronting upon the south line of said area here in question. On November 2, 1893, said owner conveyed the property to George W. Brown as: "Lots 4, 5, 6, 7, and 8, according to a Map entitled 'Plot of the South half of Lot Eight in the Teegarden Addition to Yuba City' filed for record November 23rd, 1892, in the office of the recorder of said Sutter County, in Book One of Maps, page 7." On May 22, 1916, said George W. Brown conveyed said property to E. B. Snook by the same description; on June 2,

1917, the estate of said E. B. Snook conveyed said property to defendant in this action, also by the same description.

It appears that from 1892 to 1923 the property was not opened up to the traveling public, but was inclosed and presumably cultivated. There is evidence that this condition existed continuously from the time the map was filed until February 23, 1923, upon which date the city accepted and approved the plat of what is known as the "Shasta Tract," which is a plat of the north half of said lot 8, located immediately north of this area claimed as a street. This disputed area was shown on said map as a street and such portions of said south half as had been subdivided were also shown on said map. After the acceptance of said map of the Shasta tract, the city graded said disputed area as a street and from time to time thereafter improved it, and the public used it without hindrance until the erection of said barrier, on December 7, 1927.

When the city, in August, 1926, initiated said proceeding under the Improvement Act of 1911, for the construction of its sewerage system, no protest was made by defendant against constructing a sewer line along and in said street. Again, when, on August 22, 1927, proceedings were instituted under the same act for the paving of said area, no protest was entered as to such improvement. In fact, nothing was done by way of protest until the erection of said barrier. The record also shows that said strip has never been given in as property for assessment purposes by any of the claimants and said area has never been assessed for taxes since the offer to dedicate made by the filing of the map in the year 1892.

[1, 2] It seems to be the contention of appellant that inasmuch as between 1892 and 1923, a period of 31 years, there was no formal acceptance or user of this area as a street, the offer to dedicate made by the filing of the map was revoked and that the evidence is insufficient to show a right by prescription to the use of said area for street purposes. But we find nothing in the record to show any change of attitude on the part of the owners of said contiguous area from the time of the filing of said map to the 7th day of December, 1927, when the barrier was erected across said street. Apparently the property was used until 1923 in the same way as when the dedication offer was made. Consequently, the court was warranted in finding, as it impliedly did, that the offer to dedicate had not been withdrawn at the time of the implied acceptance by the city. Inasmuch as the court was warranted in so finding, no period of time after acceptance was necessary to constitute the area a public street; hence the doctrine of prescription is not a material issue in the matter.

[3] Dedication and revocation of an offer to dedicate are questions of fact, and no good can be done the parties or the profession by an elaboration of a doctrine so well settled. In fact, a case similar to this was recently before the court. *San Francisco Sulphur Co. v. County of Contra Costa* (Cal. Sup.) 276 P. 570.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.

207 Cal. 624

LOCKIE v. CO-OPERATIVE LAND CO. et al.
(Sac. 4193.)

Supreme Court of California. July 18, 1929.

1. Vendor and purchaser ⇨339—Where vendor refused to convey in accordance with contract, purchaser could sue to recover payments made and for lien on property without rescission (Civ. Code, § 3050).

Where vendor refused to convey property in accordance with contract and by fraudulent representations induced purchaser to execute quitclaim deed, purchaser could maintain suit to recover purchase money paid and for special lien under Civ. Code, § 3050, without a rescission, since decree of lien was in effect a rescission or at least a termination of the contract.

2. Mortgages ⇨154(1)—Where mortgagees had actual and constructive notice of plaintiff's land contract before taking mortgage, they were not innocent incumbrancers for value without notice.

Where mortgagees had both actual and constructive notice of plaintiff's contract for purchase of land before taking mortgage, they could not be regarded as innocent incumbrancers for value without notice.

3. Vendor and purchaser ⇨341(1½)—In action by purchaser to recover purchase money paid, mortgagees were proper parties defendant and were bound by decree (Civ. Code, § 3050; Code Civ. Proc. § 379).

In action by purchaser to recover purchase money paid and for special lien under Civ. Code, § 3050, where vendor refused to convey, mortgagees, having an interest in controversy, were proper parties defendant under Code Civ. Proc. § 379, and were bound by decree.

In Bank.

Appeal from Superior Court, Madera County; S. L. Strother, Judge.

Action to recover money paid under a contract on purchase of real property by W. S. Lockie against the Co-operative Land Company and others. From a judgment for plaintiff and an order denying a motion for a new trial, defendants appeal. Affirmed.

Barcroft & Barcroft and J. J. Coghlan, all of Madera, for appellants.

Neil Cunningham, of Fresno, for respondent.

RICHARDS, J. Defendants appeal from a money judgment for \$5,074 in favor of plaintiff and respondent, which judgment also decreed that the same should be a special lien under section 3050, Civil Code, and be prior to the lien of a mortgage of the defendants and Olcese and Buchenau, upon lots 670 and 671, containing 40 acres of the Fairmead Colony No. 5 tract in Madera county, and further decreed that said property be sold to satisfy said judgment and lien. The order denying a motion for a new trial is also appealed from, the appeal being taken by the alternative method.

The amended complaint alleges the execution of a contract of sale on December 9, 1912 (recorded February 7, 1913), by the Cooperative Land & Trust Company, predecessor of defendant Co-operative Land Company, by which said company agreed to sell to plaintiff and R. E. Bradley said 40 acres for \$4,400, \$1,100 to be paid down and four promissory notes for \$825 each given for the balance of the purchase price, and upon completion of the payments, interest, and taxes, and surrender of agreement, the purchasers were to receive a good and sufficient deed of said lots 670 and 671 with certificate of title. Soon after the making of the contract Bradley assigned his interest therein to plaintiff. At the time the agreement of sale was entered into defendants Olcese and Buchenau were the owners of the property, the land company not then having obtained title. Thereafter, on January 29, 1913, the property was conveyed with other property to said land company with a blanket mortgage back through one Jordan covering the lots here involved with other property, dated August 15, 1913, and recorded on August 19, 1913, subsequent to the recordation of plaintiff's contract on February 7, 1913. Olcese having died, his executors have been substituted as defendants in his place and stead, as also have Alida Buchenau, wife of defendant Herbert Buchenau and executrix of his estate, and Herbert J. Buchenau, for said Buchenau. The mortgage incumbrance was renewed on November 7, 1921, by said land company in favor of said Olcese and Alida Buchenau, executrix, and the record shows that an action to foreclose said mortgage has been instituted and a lis pendens, which includes the property here involved, filed. The complaint alleges that the property is community property. The respondent made payments on account of principal, interest, and taxes, as found by the court, in the sum of \$5,074. On November 14, 1922, plaintiff tendered, and thereafter renewed said tender, of the sum of \$612.52, the balance due under said contract of sale, and demanded a deed and certificate of title from said land company. The land company has failed to execute and deliver any deed or certificate of title as required by its contract of sale, apparently being unable to furnish a

certificate of title free from the lien of the mortgage incumbrance. The plaintiff thereupon brought his action to recover the moneys paid to said land company under said agreement of purchase and sale, and seeks, by virtue of the provisions of section 3050, Civil Code, to have said judgment therefor declared a special lien upon the real property in question, but did not seek a rescission of said contract.

The complaint alleges that prior to final tender, and in May, 1922, said Co-operative Land Company falsely and fraudulently represented to plaintiff, through its agent and with intent to deceive and defraud plaintiff, and the trial court has found that plaintiff relied upon such false and fraudulent representation, that before said company could execute and deliver a deed of the property to respondent's wife, as respondent desired it to do, that it would be necessary for respondent and his wife to re-assign or quitclaim all right, title, and interest under the contract of December 9, 1912, and in and to said lots 670 and 671, to said land company, and that as a consideration therefor said land company would execute a certain new contract of sale covering the same property to plaintiff's wife and make the date of final payment December 9, 1922, and would upon such payment being made execute and deliver its deed and certificate of title to plaintiff's wife. The respondent and his wife were induced by such false and fraudulent representation, as found by the trial court, to execute such a quitclaim deed, and the same was recorded on June 14, 1922. Said land company has failed to execute a new agreement of sale to respondent's wife and has refused to execute and deliver a deed and certificate of title of said property, although it has been duly tendered the balance due under said contract of December 9, 1912. The trial court has found that the execution of the quitclaim deed by respondent and his wife was without any consideration whatever and induced by false and fraudulent representation. It has further found that the securing of said quitclaim deed from respondent and wife by the defendant land company was directed by the mortgagees to clear said property from the lien of respondent's contract of sale and in aid of their blanket mortgage. It is further found that it was not until August 1, 1926, that the respondent discovered that the representations inducing the making of the quitclaim deed were false and fraudulent.

Section 3050 of the Civil Code reads as follows: "One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration," and is merely declara-

tory of an equitable principle in accord with authority, equity, and justice.

Appellants do not seriously question that there may not be a difference between a rescission of a contract and an action to declare a lien under said section, and that a lien may be enforced without rescission, but argue that in this particular action all general rules of law and equity have been disregarded. Counsel argue that as the only flaw in the title of the Co-operative Land Company was the mortgage held by Olcese and Buchenau, and the contract was binding on all the defendants, that respondent has made out a perfect case for the specific enforcement of a contract by plaintiff for the sale of real property, and that therefore there was no failure of consideration; that either such a case was not made out against all the defendants or that the respondent has misapprehended his remedy and should have brought an action for specific performance and paid the balance due on the purchase price into court so as to secure specific performance.

[1-3] It is respondent's contention that relief may be granted without rescission and that it was not necessary for plaintiff to rescind or to restore or account for the prior use of the land; that the vendor having breached an executory contract the vendee may treat the vendor's breach as an abandonment and sue to recover what he had paid in an action for money had and received upon the theory that a payment of money under a contract to purchase creates a resulting trust to an equitable estate in the land to be purchased proportionate to the moneys paid and that the vendee has a purchaser's lien for the same under section 3050, Civil Code, which also extends to all moneys paid out for expenses, improvements, taxes, insurance, etc., and that such a lien may be enforced against a subsequent purchaser or mortgagee who takes with notice of the vendee's equity. *Montgomery v. Meyerstein*, 186 Cal. 459, 199 P. 800; compare *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937, 127 Am. St. Rep. 862, 15 Ann. Cas. 819; *Haile v. Smith*, 113 Cal. 656, 45 P. 872; *Benson v. Shotwell*, 87 Cal. 49, 21 P. 249, 681; *Harder v. Allred*, 61 Cal. App. 394, 214 P. 1017; *Kane v. Ott*, 73 Cal. App. 124, 238 P. 126; 39 Cyc. 2031, 2037; 25 Cal. Jur. 299, 812. *Montgomery v. Meyerstein*, supra, holds that section 3050, Civil Code, may be availed of to enforce a lien for money paid under a contract to purchase real estate where there is a failure of consideration, but that the section is not limited to failure of consideration alone. While fraud is alleged in the present case, it is only incidental to the main contract upon which the moneys were paid and for which a judgment and lien are sought and relates to the procurement of a quitclaim deed of respondent's rights under said contract. Respondent also contends correctly that the decreeing of a lien under the facts of this case is in effect

a rescission or at least a termination of the contract and sustains his argument by reference to and citation from an elaborate note found in 45 A. L. R., at pages 358 and 364. While there may be some technical legal question as to the right to an equitable lien where the contract is rescinded and possession lost, the weight of authority is that the right to an equitable lien is recognized where the vendee seeks to recover the amounts paid on the purchase price and a foreclosure of the lien thereof by reason of the failure of the vendor to make title or where the vendor's title is defective, upon the equitable principle that by the contract and payments thereunder the vendee acquired in equity a corresponding proportional interest in the land. The respondent here is not repudiating the contract of December 9, 1912. His cause of action is rested upon a right springing from said contract of which the defendant mortgagees had both actual and constructive notice at all times herein, and they cannot therefore be regarded as innocent incumbrancers for value without notice, and the lien of whose mortgage the trial court has found and decreed upon substantial evidence to be inferior to the lien of respondent. Said contract exists for the purposes of the judgment in full force and effect by reason of the decree annulling said quitclaim deed, the execution of which the trial court has found was induced by fraud and was without consideration, and said contract is terminated by the decree herein. Said mortgagees having an interest in the controversy were proper parties defendant (section 379, Code Civ. Proc.) and are bound by the decree. It is also to be noted that no defense was interposed that respondent was in default under his contract or that the same had ever been forfeited or terminated.

Appellants urge certain deficiencies of allegation in the amended complaint which would support a cause of action against defendants based upon appellants' contention that respondent's action lies in rescission and that in fact respondent has rescinded his contract, at least in part, and still inconsistently retains possession, and that therefore section 3050, Civil Code, does not apply. There seems to be no force in these contentions under the facts as developed in this case. It is further urged that certain findings are not supported by evidence and that certain other findings are contrary to the evidence and the judgment therefore void by reason thereof. The findings are sufficiently supported by evidence for the purposes of this judgment and none are contrary to the evidence and they sufficiently support the conclusions of law and the judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

PARKER et al. v. TOUT et al. (Sac. 4172.)

Supreme Court of California. July 16, 1929.

As Modified Aug. 1, 1929.

1. Mortgages ¶181—Grantee satisfying trust deed and taking renewal without knowledge of mechanic's lien intervening had priority over mechanic's lien to extent of original note.

Where grantee under trust deed satisfied trust deed of record and took renewal note secured by trust deed after mechanic's lien claimants commenced work on property, but without notice or knowledge thereof, lien under trust deed held superior to mechanic's lien to extent of amount of original note and interest thereon.

2. Mortgages ¶151(3)—Mechanic's lien intervening between satisfaction of trust deed and taking of renewal trust deed held prior as regards additional money secured.

Where grantee under trust deed satisfied trust deed of record and took renewal note secured by trust deed after mechanic's lien claimants commenced work on property, mechanic's lien held prior in right as regards additional money advanced by grantee and secured by second trust deed.

In Bank.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by Frank R. Parker and others against C. S. Tout and others. From a judgment declaring a mechanic's lien in favor of plaintiffs to be prior in right to the mortgage lien of one of defendants, defendants appeal. **Affirmed in part and reversed in part.**

McKee, Tasheira & Wahrhaftig, of Oakland, W. T. Belieu, of Willows, and W. E. Johnson, of San Francisco, for appellants.

Bond & Deirup and Jerome D. Peters, all of Chico, for respondents.

LANGDON, J. This is an appeal from a judgment declaring a mechanic's lien in favor of plaintiffs to be prior in right to the mortgage lien of the defendant bank upon real property situated in Glenn county, Cal., and owned by the defendants Tout.

The facts in the case are not disputed. The defendant bank was the owner and holder of a note for \$25,000, secured by a deed of trust upon this real property, which deed of trust was recorded June 17, 1922, and was a valid and subsisting first lien of record at the time the plaintiffs commenced the work of digging a well upon the property, which work is the basis of the mechanic's lien asserted in this action.

Shortly before May 14, 1924, Tout went to the bank and arranged to borrow some money to dig a well, intimating at the time that the well need be only about 100 feet deep. On May 14, 1924, Tout entered into a contract with plaintiffs to dig this well at an agreed price per foot. The well actually cost over \$1,700, as it became necessary to drill much

deeper than was originally planned. The work of drilling the well commenced on May 25, 1924, and was completed July 7, 1924, and the notice of lien was not filed until September 18, 1924. While the well was being drilled, on June 28, 1924, Tout and his wife gave the defendant bank a new note secured by a new deed of trust as a renewal of the old note and interest and some additional advances for taxes, pump, well, etc., the aggregate of which amounted to \$27,500. No payments had been made on the original note of \$25,000, and the additional \$2,500 represented the items above enumerated. This second deed of trust was recorded on July 2, 1924, before the recordation of the mechanic's lien, but after the work of drilling the well had been started. After the recordation of the second trust deed, on July 2, 1924, defendants W. W. Garthwaite and J. Y. Eccleston, as trustees under the first trust deed, executed and recorded a satisfaction thereof and the same was recorded in the office of the county recorder of Glenn county.

The evidence shows without conflict that before the acceptance of the renewal trust deed of June 28, 1924, and before satisfying the first trust deed of record, the bank had the records of Glenn county searched to ascertain if between the time of the execution of the first trust deed and the renewal thereof, any incumbrances or liens had been placed thereon, and, after a report on the title, the bank accepted the renewal of the first trust deed and had the same recorded, and then executed and recorded the satisfaction thereof. It was stipulated that the bank did not know of plaintiffs' and respondents' lien claim until the suit was filed, and had no constructive notice thereof until September 18, 1924, when it was filed for record.

The trial court held that, because the first trust deed had been satisfied of record, the mechanic's lien became a first lien and was prior in right to the lien of the second trust deed given in renewal of the first one, but recorded subsequent to the commencement of the drilling of the well, and consequently subsequent to the attaching of the mechanic's lien.

[1, 2] The only question involved in the appeal is whether equity will maintain and enforce the original priorities between the parties because of the fact that the plaintiffs and respondents herein had notice of the first trust deed for \$25,000 when they commenced their work and because they engaged in such work upon property subject at the time to this trust deed and the bank exercised every precaution to protect its rights and was not negligent or careless in releasing the first trust deed and had no notice or knowledge of the mechanic's lien when it satisfied its first lien and accepted a renewal note subsequent in time and right to the mechanic's lien. It would seem but just and equitable to give

priority to the lien of the defendant bank for at least the amount of the original note with interest. As to the additional money advanced by the bank, and also secured by the second trust deed, the mechanic's lien would seem to be prior in right, and this gives to the lien claimant a distinct advantage which he did not have when he commenced work upon the property, for this money went to pay taxes and to buy a pump and other equipment for the ranch, all of which increased the security of the lien claimant after the work was commenced.

Judicial authority is not lacking for such an equitable adjustment between the parties. In *Shaffer v. McCloskey*, 101 Cal. 576, 36 P. 196, the court held that a subsequent lienholder, who has not acquired his lien after a prior mortgage has been marked satisfied, and has not been led by a clear record to invest money on the land, but who took the incumbrance while the mortgage was in full legal existence, recorded, and unsatisfied, and with perfect understanding that it was a valid lien, will not be permitted in equity to take advantage of an inadvertence or mistake in the satisfaction of the mortgage.

In *Van Sandt v. Alvis*, 109 Cal. 165, 41 P. 1014, 50 Am. St. Rep. 25, a mortgagor had placed a homestead upon the mortgaged property after the execution of the mortgage. The mortgage debt became due and payable, and an application was made to the executrix of the mortgagee for an extension of time on the debt. Thereupon a new note and mortgage was executed and delivered by the mortgagor to the executrix as a renewal of the former debt. The wife did not join in the execution of the new note and mortgage. On the foreclosure proceeding it was held that, while the first mortgage had been satisfied of record and the execution of the new note and mortgage was not legally effective as against the wife, in equity the transaction would be deemed as simply changing the form of the old mortgage, which would be enforced in equity as against the wife.

To the same general effect are the cases of *Boreman v. Hatfield*, 96 Wash. 270, 164 P. 921, L. R. A. 1917E, 1052; *White v. Stevenson*, 144 Cal. 104, 77 P. 828.

Respondents seek to prevent the application of the equitable doctrine in this case because it is contended that the bank had actual notice that a well was being dug upon the property. The bank claims to have advanced money to pay the contemplated cost of the well and included this advance in the second trust deed. It had no knowledge that a lien was to be asserted or filed when it released its first trust deed. In *Capital Lumbering Co. v. Ryan et al.*, 34 Or. 73, 54 P. 1095, it was sought to foreclose a mechanic's lien which had crept in between the renewal of a recorded mortgage and the satisfaction of the

first lien. In that case the court said: "But the mere fact that a former mortgage was released, and a new one taken in place thereof, in ignorance of the existence of an intervening lien, is, in equity, deemed such a mistake of fact as will entitle the plaintiff to relief, although such lien is a matter of record."

Justice and equity and well-established precedents compel a decree that the lien of the bank under its trust deed is superior in right to the mechanic's lien to the extent of the amount of the original note and interest thereon. The mechanic's lien is prior in right to the other advances secured by the trust deed for \$27,500, which gives to the lien claimants an advantage which they had no right to expect when they commenced their work on the well, for, as we have stated, such advances were used in payment of taxes and to purchase equipment.

The judgment as to C. S. Tout and Anna J. Tout, his wife, is affirmed; and as to W. W. Garthwaite, J. Y. Eccleston, the Oakland Bank (a corporation), to stand reversed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; RICHARDS, J.

207 Cal. 574

WITHERILL v. BREHM et al. (Sac. 4180.)

Supreme Court of California. July 15, 1929.

1. Waters and water courses $\S$ 152(11)—Finding as to amount of water required for beneficial irrigation of plaintiff's land held sustained by evidence.

In action to determine water rights, trial court's allowance of 25 inches of water under a 4-inch pressure for 20 acres of plaintiff's land held not excessive under the evidence that character and formation of the land required unusual amount of water for irrigating purposes.

2. Waters and water courses $\S$ 143—Quantity of water required for irrigation is question of fact to be determined by evidence, not by rule.

The amount of water necessary for irrigation of land cannot be determined by rule, but is a question of fact to be determined by evidence in particular case, hence contention that quantity of water awarded by judgment was excessive because in excess of one miner's inch of water per acre could not be sustained.

3. Waters and water courses $\S$ 143—Appropriator need not use best methods of irrigation or take extraordinary precautions to prevent waste.

Though an appropriator can claim only amount of water necessary to properly supply his needs and can permit no water to go to waste, he is not bound to adopt best methods for utilizing the water or take extraordinary precautions to prevent waste, but as long as he makes reasonable use of water according to custom of locality other users cannot complain that his methods are wasteful.

4. Appeal and error 1011(1)—Conflicting testimony respecting carrying capacity of diversion ditch presented question for trial court to determine.

In action to determine water rights, conflicting testimony respecting carrying capacity of plaintiff's diversion ditch *held* to present question for trial court to determine.

In Bank.

Appeal from Superior Court, Siskiyou County; Claude F. Purkitt, Judge.

Action by Alice Witherill, executrix of the last will and testament of Andrew Witherill, deceased, against A. Brehm and others. From the judgment, defendants appeal. Affirmed.

J. W. McCaughey and Vincent Surr, both of San Francisco, for appellants.

B. K. Collier, Joseph P. McNamara, and Horace V. Ley, all of Yreka, for respondent.

CURTIS, J. This is the second appeal taken in this action; the opinion in the first appeal is to be found in 74 Cal. App. 286, 240 P. 529. At the first trial of this action by the judgment of the court the plaintiff was awarded a perpetual flow of 75 inches of water measured under a 4-inch pressure of the waters of Grouse creek in Siskiyou county. Upon appeal the defendants made the following claims: (1) That their riparian rights were superior to the adverse title of plaintiff; (2) that the source of water rights claimed by plaintiff are within the grant of railroad lands from the United States to the Central Pacific Railroad Company; (3) that adverse possession on the part of the plaintiff has not been established; (4) that 75 inches of water under 4-inch pressure is excessive for the necessary use of the plaintiff; (5) that costs were improperly taxed against defendants; and (6) that defendants were prejudiced by the continuation of their motion for a new trial to a time when it would be automatically denied.

The appellate court on said first appeal considered all of the foregoing claims of the defendants and determined all of them in favor of the plaintiff except No. 4, and as to said last-mentioned claim it held that the amount of water allowed the plaintiff in the judgment rendered at the first trial of this action was excessive. It accordingly made the following order: "For the reason that the judgment allows an excessive quantity of water and that it is not confined to those months during which it was actually and necessarily used for beneficial purposes, the cause must be remanded. The judgment is therefore reversed." At the second trial the issues were confined to the amount of water actually and necessarily used by the plaintiff and to the time or months of the year of said user. The trial court on the second trial fixed the

amount of water to which the plaintiff was entitled at 50 inches, measured under a 4-inch pressure, during the irrigating season commencing April 1st and ending October 15th of each year, and at 5 inches, measured under a 4-inch pressure, during the remaining portion of the year. From this judgment the defendants have appealed and in due time served and filed their opening brief. The plaintiff and respondent has made no appearance in this court, and has not filed any brief or points and authorities, nor in any other manner assisted the court in the determination of the questions raised by the appellants in their brief. This has made it necessary for this court to carefully go over and examine the entire record herein, which we have done.

The sum and substance of appellants' contention on their present appeal is that the evidence does not support the findings in regard to the amount of water actually and necessarily used by the respondent for beneficial purposes, or, in other words, the appellants contend that the amount of water allowed the respondent in the judgment rendered at the second trial of said action is excessive, and unwarranted by the evidence in the case.

The decree of the court, based upon proper and sufficient findings, is "that plaintiff is the owner of, and entitled to the prior right to divert, 50 inches of the first flow of the waters of Grouse Creek situated in Siskiyou County, California, said 50 inches to be measured under a 4" pressure at the point of diversion on said Grouse Creek." From the point of diversion mentioned in said findings the waters of said stream are conducted in an open ditch a distance of 2½ miles to respondent's land and premises through a porous formation, and the court found upon evidence unquestionably sufficient to support said finding "that approximately two-fifths of the amount of water diverted from Grouse Creek at the head of plaintiff's ditch is lost in transit by seepage and evaporation." The effect of this loss by seepage and evaporation would be that respondent would receive of the 50 inches allowed to be diverted from the stream only 30 inches for use upon her said premises. As to the 5 inches of water allowed by the judgment to plaintiff during the nonirrigating period of each year, said judgment provides that respondent is the owner and entitled "to the prior right to divert 5 inches, measured under a 4" pressure at the point of user thereof near the buildings of plaintiff on her said land during the period of each year commencing on October 15th of each year and ending on April 1st of the next succeeding year." There is no contention on appellants' part that the judgment in respect to this quantity of water allowed the respondent is erroneous or is not supported by suffi-

cient evidence. In fact, the appellants stipulated in open court that respondent should be allowed for this period of the year 5 inches of water delivered at the ranch. It appears, therefore, from the record that this amount of water was by agreement awarded to the respondent for nonirrigating purposes, such as domestic use, watering stock, and other similar purposes. This amount of water for domestic use would, of course, be required during the irrigating season as well as during the balance of the year. It should not, therefore, be included in the amount awarded for irrigation purposes. As the judgment awards the respondent what amounts to 30 inches of water delivered on the premises for all purposes during the irrigating season, to ascertain the amount awarded for irrigating purposes, this 5 inches should be deducted from the 30 inches so awarded. This would leave of the 30 inches of water which, after loss by seepage and evaporation, finally reached respondent's premises, 25 inches of water for irrigating purposes upon respondent's said lands. There is some dispute as to the extent of respondent's lands upon which the waters of said stream are and have been used for irrigating purposes. Appellants claim that these lands in no event exceed 14.30 acres. They contend, however, that the lands which are actually irrigated by said water is much less in extent than 14 acres. On the other hand, there is evidence that at least 20 acres of respondent's lands have been regularly and beneficially irrigated by the water of Grouse creek, and some witnesses place the amount of such land far in excess of the last-mentioned amount. The court found "that not more than twenty acres of plaintiff's lands are actually irrigated by the waters from Grouse Creek, but that the lands thus irrigated by plaintiff are to (so) situated, and being adjacent to the east fork of Scott river, and are so overlaid with large boulders and gravel, and overlaid with but a small coating of earth, that such land is very pervious when water is applied thereon * * * and that an unusual amount of water is required to irrigate said lands." The court further found "that allowing for seepage, such quantity of water (50 inches measured under a four-inch pressure at the point of diversion) has actually, necessarily and beneficially been applied to and used by plaintiff and her predecessors in interest for irrigation and domestic purposes on the said lands described in plaintiff's complaint, and that said quantity of water is necessary to actually and beneficially irrigate plaintiff's said lands owing to the extraordinary, pervious condition and formation of said land."

While the evidence is conflicting as to the extent of respondent's land actually irrigated by the waters of Grouse creek it is undoubtedly sufficient to show that substantially 20 acres of said land had been so irrigated, and this we understand to be the purport and

meaning of the finding of the court upon this subject.

[1] We are thus brought to the question as to whether the allowance of 25 inches of water, under a 4-inch pressure, for 20 acres of land of the kind and character of respondent's land, as found by the court, is an excessive allowance of water for said land. The evidence as to the character and formation of respondent's land and that it requires an unusual amount of water for irrigating purposes in order to successfully produce crops thereon is practically undisputed. It is not necessary to give any extended résumé of the evidence upon this issue. We will mention, however, the testimony of one of the appellants' principal witnesses, John A. Beemer, an engineer, who visited the land of plaintiff and made tests of its soil for the purpose of determining the amount of water necessary to beneficially irrigate the same. This witness, after testifying of his visit to respondent's land and of his testing the soil thereof, stated: "That I would regard as porous soil. It is soil that takes a large amount of water. It takes more water than the average. * * * I would place the duty on that land as one miner's inch per acre * * * I expect I have seen instances when more than that was used, but not beneficially." In other words, this witness testified that in his opinion respondent's land required the maximum amount of water applied to it for irrigation purposes in order to successfully produce crops thereon. On the part of respondent, a witness by the name of J. B. Parker testified that it would take from 75 to 100 inches of water to irrigate the land of respondent. This witness testified that he had known said land and the ditch conveying water thereto from Grouse creek practically as long as he could remember; that he was 71 years of age and had lived in the vicinity of the Witherill ranch during all of his life; that said ranch had been irrigated by the waters of Grouse creek since 1865; that the ditch from Grouse creek to respondent's said lands would now carry 150 inches of water. He further testified as to the character and formation of the soil upon said lands, and his testimony on that subject coincided with the evidence of Mr. Beemer above referred to. The evidence also shows that the witness had been extensively engaged in farming and in the irrigation of lands in the immediate vicinity of the Witherill ranch during the greater part of his lifetime. Undoubtedly the testimony of this witness had great weight with the trial judge, and we think it was well that it should. He was a practical farmer and irrigationist and he testified from his long experience and thorough knowledge of the lands of respondent and others in that vicinity, and of the amount of water required to properly and beneficially irrigate the same. His testimony alone is sufficient to support the finding of the court as to the amount of water necessa-

ry for the proper and beneficial irrigation of respondent's lands. While his estimate of the amount of plaintiff's land which had been irrigated from the waters of Grouse creek exceeded somewhat that given by the witnesses for the appellants, his testimony as to the amount of water per acre required by said land did not greatly differ from that of appellants' witness Beemer, which has already been referred to. On the whole, we think the finding of the court as to the amount of water required for the proper and beneficial irrigation of respondent's lands finds substantial support in the evidence.

[2, 3] Appellants' further contention that the courts have seldom, if ever, allowed more than one miner's inch of water per acre for irrigating purposes is best answered by reference to a recent case decided by this court in which a judgment allowing $2\frac{1}{2}$ miner's inches per acre was sustained. *Joerger v. Mt. Shasta Power Corp.* (Cal. Sup.) 276 P. 1017. Appellants also complain of the diversion ditch of respondent and contend that the use of the same in the manner in which the respondent conducts waters through the same is wasteful of the said waters. This question is also discussed by this court in the case just mentioned. Quoting from page 1024 of the opinion in that case, this court said: "Defendants assert that an examination of all the California cases will reveal the fact that no decree has ever been upheld awarding more than one miner's inch per acre. This may be true, and yet such circumstance is not controlling, for this court cannot fix a limit beyond which a trial court may or may not go, or say, as a matter of law, that the amount allowed is excessive, irrespective of the evidence. As above stated, the amount of water necessary for beneficial use is a question of fact in each particular case. 1 *Wiel on Water Rights*, 523. The question is not to be determined by rule, but rather by the evidence presented to the court or jury. In passing, it may be said that, in the ascertainment of this fact, long-continued use of a given quantity of water by appropriation may raise a presumption of necessary and beneficial use, for it is not reasonable to suppose that one would destroy or impair the value of his land by the use of an excessive amount. *California Pastoral Co. v. Madera Irr. Co.*, supra [167 Cal. 78, 138 P. 718]; *Campbell v. Ingram*, 37 Cal. App. 728, 174 P. 366; *Stinson Canal Co. v. Lemoore Canal & Irr. Co.*, 45 Cal. App. 242, 188 P. 77. Nor is there merit in the claim that the method employed by plaintiff in diverting the water is unauthorized. While an appropriator can claim only the amount which is necessary to properly supply his needs, and can permit no water to go to waste, he is not bound, as here claimed, to adopt the best method for utilizing the water or take extraordinary precautions to prevent waste. He is entitled to make a reasonable use of the water accord-

ing to the custom of the locality, and, as long as he does so, other persons cannot complain of his acts. The amount of water required to irrigate his lands should, therefore, be determined by reference to the system used, although it may result in some waste which might be avoided by the adoption of another or more elaborate and extensive distribution system. *Farnham on Waters*, § 675; *Wiel on Water Rights* (3d Ed.) § 481; *Barrows v. Fox*, 98 Cal. 63, 32 P. 811."

[4] Appellants have much to say in their brief regarding the carrying capacity of respondent's diversion ditch, and of certain measurements made of the water flowing in said ditch by A. F. Parrott, county surveyor of the county of Siskiyou. This witness testified that he made three measurements of said ditch on September 29, 1926. This action was tried in October of that year. These measurements, according to said witness, were made one at a point 250 feet below the headgate of said ditch which showed 21 inches of water flowing in said ditch at said point of measurement; the second, a mile and one-quarter below the point of diversion, which showed $17\frac{1}{2}$ inches of water flowing in said ditch; and the third at a point between 400 and 500 feet from the point of delivery which showed $15\frac{1}{2}$ inches of water flowing in said ditch. The witness Parrott testified that the water in the ditch at one point where he made the examination was within 2 inches of the top of the ditch, and that the carrying capacity of the ditch at that point was not over 30 miner's inches of water. The point which appellants seek to make from this testimony is that the carrying capacity of the ditch was only 30 inches. This evidence standing alone might sustain appellant's point. But there is other evidence in the record which must be considered by an appellate court in reviewing the judgment of the trial court. This evidence consists of testimony given by respondent's witnesses as to the capacity of said ditch. One of these witnesses stated that after the rendition of the first judgment in this action he put a new headgate in Grouse creek, where respondent's ditch diverts the water therefrom, and that this headgate was 15 inches wide and was so constructed as to divert 75 inches of water from said creek into said ditch—that amount having been allowed by the trial court in its first decision in this action. This same witness testifying as to the capacity of said ditch said: "That ditch carried 150 inches of water for years and years and would carry it right now if it was turned into it." He further testified: "The ditch as I know it is something like 12 inches wide and 10 or 12 inches deep. I think there are places a little narrower than that. In the narrower places it is always swifter." It was for the trial court to reconcile the conflicting testimony of the several witnesses in the case, and in doing so it expressly found that the capacity

of the ditch was sufficient to carry the amount of water allotted by the decree herein to respondent. The measurements made by Mr. Parrott, the county surveyor, were taken near the end of the irrigation season, when the ditch may have become filled with sand and gravel accumulated during the previous months. After a consideration of all the evidence in the case we are satisfied with the conclusion reached by the court in regard to the amount of water to which the respondent herein is entitled to divert from Grouse creek for use upon her said lands and premises. The judgment therefore is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

207 Cal. 529

HAYNES et al. v. MacFARLANE.
(Sac. 4186.)

Supreme Court of California. July 5, 1929.

1. Automobiles ☞107(2)—Status of freight autotruck operator as private or public carrier is primarily question of fact (Auto Stage and Truck Transportation Act, § 1(c), as amended by St. 1919, p. 458).

Whether status of freight autotruck operator is that of common carrier or private carrier is primarily question of fact in each case in determining whether carrier is transportation company within Auto Stage and Truck Transportation Act (St. 1917, p. 330), § 1(c), as amended by St. 1919, p. 458.

2. Automobiles ☞76—Autotruck operator hauling freight for hire between fixed termini over regular route could not avoid regulation by entering into contracts with shippers (Auto Stage and Truck Transportation Act, § 1(c), as amended by St. 1919, p. 458).

Autotruck operator hauling freight for hire on public highways between fixed termini and over regular route for all persons who desired his services could not avoid regulation as transportation company under Auto Stage and Truck Transportation Act (St. 1917, p. 330), § 1(c), as amended by St. 1919, p. 458, by entering into written contracts with the shippers, identical in form, which stated terms of shipment and contained statement that the carrier was a private carrier.

3. Automobiles ☞107(2)—In action for injunction, finding of Railroad Commission that defendant operating autotruck was common carrier held not subject to review (Auto Stage and Truck Transportation Act, § 1(c), as amended by St. 1919, p. 458).

Finding of Railroad Commission, as basis for "cease and desist" order, that autotruck operator was engaged in business of common carrier, was not subject to review in action by competing transportation company for injunc-

tion, under Auto Stage and Truck Transportation Act (St. 1917, p. 330), § 1(c), as amended by St. 1919, p. 458.

In Bank.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by V. L. Haynes and another against Harry C. MacFarlane. Judgment for plaintiffs, and defendant appeals. Affirmed.

Sidney J. W. Sharp, of Hanford (M. L. Short, of Hanford, of counsel), for appellant.

G. L. Aynesworth, of Fresno, for respondent.

Carl I. Wheat, Reginald L. Vaughan, and Roderick B. Cassidy, all of San Francisco, amici curiæ on behalf of the Railroad Commission.

SHENK, J. This is an appeal from a judgment enjoining the defendant from transporting property by autotruck for compensation between Fresno and Hanford, and from performing any further services as a transportation company in the carriage of property for compensation between said termini until he shall have obtained a certificate of public convenience and necessity from the Railroad Commission. The judgment also awarded the plaintiffs \$700 as damages suffered by them at the hands of the defendant.

The judgment was based on a stipulation of facts wherein, among other things, it was agreed that, if judgment should go for the plaintiffs, the damages suffered by the plaintiffs should be deemed to be \$700.

At all of the times mentioned in the controversy between the parties, the plaintiffs were and are engaged in the business of a common carrier or freight by autotruck between Fresno and Hanford, and during all of said times have held, and now possess, a certificate of public convenience and necessity issued by the Railroad Commission permitting them to operate a truck line for the transportation of freight for hire between said points. On or about July 3, 1926, the plaintiffs filed a complaint with the Railroad Commission against the defendant, alleging that he was engaged in the business of a common carrier of freight by autotruck between Fresno and Hanford without a certificate of public convenience and necessity therefor from the Railroad Commission. The commission, after notice to the defendant and a hearing, found in accordance with the allegations of the complaint, and ordered the defendant to discontinue his business so conducted, making the order effective as of April 26, 1927. Prior to the effective date of the order, the defendant arranged with his customers for the carriage of freight by written order only. On April 27, 1927, or the day after the effective date of the order of the commission, the defendant entered into seven

written contracts with his former customers for the continued carriage of such freight for hire between said points, and, unless restrained by order of court, intends to and will accept and enter into at least twenty additional contracts for the carriage of freight for hire between said points with individuals, firms, and corporations, including some who may be customers of the plaintiff, and all of whom will be wholesalers or retailers of merchandise in the cities of Fresno and Hanford. These contracts are identical in form, except as to the name of the shipper, who is the party of the second part; the defendant being the party of the first part. It is recited therein that whereas the party of the second part "is desirous that the party of the first part perform for him certain hauling of merchandise," and whereas "the party of the second part has requested that the party of the first part haul merchandise for the party of the second part to and from Hanford and Fresno and to and from other points, as and when requested by the party of the second part. * * *" It is then provided that the party of the first part agrees to haul merchandise for the party of the second part to and from any point within a radius of 50 miles of Hanford, and agrees to accept as full payment therefor the sum of \$4 per ton. The party of the second part agrees to employ the party of the first part when and as the party of the second part desires to have said party of the first part haul merchandise, and to pay therefor the price agreed upon. Each contract is to continue for a period of 6 months, terminable, however, on 30 days' notice from one party to the other. The contract contains the following paragraph: "It is distinctly understood and agreed that this contract is entered into with the party of the first part as a private contract carrier and not otherwise, and that said party of the first part reserves all of the privileges and rights of a contract carrier, and does not by virtue of this agreement, or otherwise, hold himself out as or operate as a common carrier, anything in this contract to the contrary notwithstanding."

On the stipulation of facts the trial court found the defendant to be "a transportation company" in his operations between Fresno and Hanford, and as defined in section 1 (c) of the Auto Stage and Truck Transportation Act (St. 1917, p. 330). The order of injunction was accordingly issued, but was directed only to the operations of the defendant between the fixed termini of Fresno and Hanford. The stipulation of facts is made a part of the record on this appeal. It appears therefrom that the Railroad Commission, as a basis for its "cease and desist" order effective April 26, 1927, found that the defendant was theretofore engaged in the business of a common carrier between Fresno and Hanford. Its finding in that regard was based in part on the evidence of the defendant, who

testified that he was hauling freight for hire between said points on written orders and for all who desired him to haul for them. This finding was not challenged by the defendant, except before the commission, for no application was made to this court to annul the order based thereon. On the stipulation of facts, the trial court made the same finding, that is to say, that, since the effective date of the Railroad Commission's order against him, the defendant was, and continued to operate as, a transportation company as defined by the statute, notwithstanding the fact that in so operating he was working under the written contracts above outlined. The question is therefore presented whether an autotruck operator, hauling freight on the public highways for compensation between fixed termini and over a regular route, may avoid regulation under the Auto Stage and Truck Transportation Act by entering into and operating under, numerous so-called private contracts with his customers.

It is the contention of the defendant that, by reason of his present method of operation under so-called private contracts, the Railroad Commission would be bound to find that he was a private carrier under the authority of *Frost v. Railroad Commission*, 271 U. S. 583, 46 S. Ct. 605, 70 L. Ed. 1101, 47 A. L. R. 457, and *Holmes v. Railroad Commission*, 197 Cal. 627, 242 P. 486. It is then argued that, having so found, the Railroad Commission would have no jurisdiction over his operations, and consequently the trial court would lack authority to enjoin him from so operating.

[1] It may be conceded that, if the defendant's present status is that of a private carrier, the judgment appealed from is without legal support, for the alleged violation of the statute by the defendant as a common carrier is the basis of the injunction order. Whether the status of a freight autotruck operator is public or private in character is primarily a question of fact in each case. In the *Frost Case* the Railroad Commission found the carrier to be in effect a private carrier, but nevertheless a transportation company as defined by section 1(c) of the Auto Stage and Truck Transportation Act, as amended in 1919 (St. 1919, p. 458), for the reason that the term "transportation company" as defined by the amended statute was broad enough to include a private carrier. The order of the Railroad Commission was affirmed by this court (*Frost v. Railroad Commission*, 197 Cal. 230, 240 P. 26), but the judgment was reversed by the Supreme Court of the United States on the ground that the state did not possess the power to compel a private carrier to assume against his will the duties and burdens of a common carrier, and that any attempt to exercise such a power must fall before the paramount authority of the Fourteenth Amendment to the Federal Constitution. In the *Holmes Case* the Railroad Com-

mission likewise found the carrier to be a private carrier, but nevertheless enjoined it from further operations, unless and until it should agree to assume the duties and burdens of a common carrier. Although the Holmes Case was taken to the Supreme Court of the United States, the appeal was abandoned following the decision of that court in the Frost Case. But the Holmes Case can no more be taken as authority supporting the jurisdiction of the Railroad Commission to regulate private carriers than can the Frost Case, for the reason that both cases rested upon similar states of fact and involved the same questions of law. The fundamental distinction between the Frost and the Holmes Cases and the present case is that in those cases the carrier was found to be a private carrier, while in the present case the carrier has been found, both by the Railroad Commission and by the trial court, to be a common carrier. The basis of the finding of the Railroad Commission in the Frost Case that the carrier was private was that the carrier was operating under a private contract under such circumstances as removed it from the status of a common carrier. Such was also the situation in the Holmes Case. And the finding in each case was left undisturbed. In commenting on the opinion of this court in the Frost Case with reference to carriers operating under private contracts, the Supreme Court of the United States said: "The court below seemed to think that, if the state may not subject the plaintiffs in error to the provisions of the act in respect of common carriers, it will be within the power of any carrier, by the simple device of making private contracts to an unlimited number to secure all the privileges afforded common carriers without assuming any of their duties or obligations. It is enough to say that no such case is presented here, and we are not to be understood as challenging the power of the state, or of the Railroad Commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly."

[2, 3] In the present action we have just such a case as was referred to in the foregoing statement. The fact that the defendant in his contract called himself a "private carrier" could not make him such in the light of the undisputed facts to the contrary. Here we have a carrier found on sufficient evidence by the Railroad Commission and the court to be a common carrier, posing as a private carrier, in an obviously deliberate attempt to evade public regulation. The Railroad Commission found him to be a public carrier. That finding became final long before the present action was brought, and is not subject to review in this action. The

trial court found that the status of the defendant had not been changed by the so-called "private contract" method of his operations, and the record supports the finding and conclusion based thereon. If such a studied attempt to evade the provision of the statute should prove availing, the law would become a nullity, and the primary purpose of the act to regulate autotruck transportation companies would come to naught. See *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573, 209 P. 586. It is unnecessary to comment upon the many cases cited by counsel for the parties and for *amici curiæ*. No court case has been found which upon similar facts is not in harmony with the conclusions herein expressed.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

YOUNG et al. v. PACIFIC ELECTRIC RY.
CO. et al. (L. A. 9986.)★

Supreme Court of California. June 28, 1929.

Rehearing Granted July 25, 1929.

1. Railroads ⇨350(1)—Court erred in taking railroad crossing collision case from jury, unless as matter of law no other reasonable conclusion than that defendants were entitled to judgment was legally deducible.

In action for death resulting from collision at crossing between automobile truck driven by decedent and electric car of defendant, trial court erred in taking case from jury, unless it can be said as matter of law that no other reasonable conclusion than that defendants were entitled to judgment was legally deducible from evidence, and that any other holding would be so lacking in evidentiary support that appellate court would be compelled to reverse it or trial court to set it aside.

2. Railroads ⇨350(7)—That there was positive testimony that signals were given does not conclusively establish that electric car gave required crossing signals before striking automobile.

Fact that there was positive testimony on subject as to time of giving signals of electric car's approach and as to their extent, in action for death resulting from collision at crossing of automobile and car, does not conclusively establish that required crossing signals were given, but merely creates conflict to be resolved by jury.

3. Railroads ⇨316(4)—Though no speed is negligence per se in absence of statute or ordinance, railroad cannot run trains under all conditions at any chosen speed.

While no rate of speed is negligence per se in absence of statute or ordinance, railroad com-

pany will not be permitted to run its trains under all conditions at any rate of speed it may choose.

4. Railroads ⚡316(1)—Railroad must regulate speed of trains with proper regard for safety of human life and property.

Railroad company must regulate speed of its trains with proper regard for safety of human life and property, especially when running through towns and cities.

5. Railroads ⚡316(2)—Speed allowable in thinly settled country may constitute negligence when maintained through cities or villages.

Rate of speed that may be allowable in thinly settled part of country, where but few persons will have occasion to cross tracks of electric railroad, may be so dangerous as to constitute negligence on part of railroad company when running through city or village where many persons are likely to cross track.

6. Railroads ⚡350(11)—Whether speed of electric car striking truck at city crossing was excessive held for jury.

Whether or not rate of speed of electric car striking truck of deceased at city crossing was excessive *held for jury*.

7. Railroads ⚡310, 316(3)—Railroad must take such care to prevent injury by trains to those passing over crossing as under existing circumstances would be reasonable, and if view was obstructed it was duty to moderate speed accordingly.

Obligation rested upon railroad company operating electric cars of taking such care to prevent injuries by its trains to those passing over crossing where collision with automobile occurred causing death of plaintiff's decedent as would under existing circumstances be reasonable, and, if view of its tracks was so obstructed that person lawfully using street could not before passing from place of safety to place of danger see approaching train just beyond obstruction in time to escape if it moved at high speed, it was its duty to moderate speed accordingly or make approach of train reasonably apparent by other methods to user of street.

8. Railroads ⚡350(16)—Whether driver of truck struck by electric car at crossing was contributorily negligent in failing to stop, look, and listen held for jury.

Whether decedent driving truck which was struck by electric car at crossing was guilty of negligence in failing to stop, look, and listen which contributed directly and proximately to happening of accident, *held question of fact for determination of jury*.

9. Negligence ⚡136(9)—Even where facts are undisputed, if reasonable men might draw different conclusions, question of negligence is for jury.

Even where facts are undisputed, if reasonable men might draw different conclusions upon question of negligence, question is one of fact for jury.

Curtis and Shenk, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Dorothy M. Young and others against the Pacific Electric Railway Company and another. Judgment for defendant entered on directed verdict and motion of plaintiff for new trial denied, and plaintiffs appeal. Reversed and remanded for new trial.

Ben. F. Griffith and Ralph W. Eckhart, both of Los Angeles, for appellants.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondents.

WASTE, C. J. Plaintiffs, as the heirs of Peter W. Young, brought this action to recover damages for his death, resulting from a collision at a crossing between an automobile truck, driven by him, and an electric car of the defendant Pacific Electric Railway Company, operated by the defendant motorman, Howard T. Bennett. Negligence of the defendants was charged in three particulars: In failing to give a proper crossing signal; operating the car at an excessive speed; and in failing to operate the car with due care in view of the dangerous and unguarded condition of the crossing. The case was tried with a jury. When all the evidence was in, defendants moved for a directed verdict in their favor on the following grounds: (1) That the evidence showed conclusively that there was no negligence on the part of the railway company which contributed, directly or proximately, to the happening of the accident; (2) that the evidence conclusively showed that the deceased was himself guilty of contributory negligence; and (3) that if, under the evidence, the jury returned a verdict in favor of the plaintiffs, the court would have to set it aside because of the insufficiency of the evidence to support it. The court granted the motion without indicating upon what grounds it did so. Plaintiffs' motion for a new trial was denied, and they have appealed from the judgment entered on the directed verdict.

[1] The trial court erred in taking the case from the jury, unless it can be said, as a matter of law, that no other reasonable conclusion, than that defendants were entitled to judgment, was legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal, or a trial court to set it aside. *Umsted v. Scofield Engineering Const. Co.* (Cal. Sup.) 263 P. 799; *Duggan v. Forderer*, 79 Cal. App. 339, 343, 249 P. 533. It becomes necessary, therefore, to determine whether the evidence in the case tended to establish the negligence charged by the plaintiffs to the defendants, or whether the testimony, as a whole, so conclusively supported one or more of the grounds of defendants' motion for a

directed verdict that the court would have been under compulsion to set aside a contrary finding of the jury.

The collision which occasioned Young's death occurred on December 22, 1925, in the city of Hawthorne, where Eucalyptus avenue intersects at right angles the main line track of the Pacific Electric Railway Company, running east and west. Evidence as to the condition of the crossing showed that a warehouse was located on the northwest corner. North of the warehouse, on Eucalyptus avenue, was a garage, with a house adjoining on the north. These buildings obstructed the view of persons driving in a southerly direction along Eucalyptus avenue to such an extent that they had no opportunity to observe an eastbound electric car until they were almost on, or dangerously close to, the tracks. The obstructions likewise prevented the trainmen on cars approaching the crossing from the west from seeing automobiles southbound toward the tracks. In addition to the buildings, box cars stood on the siding west of Eucalyptus avenue and north of the main track practically all the time. A power line pole west of the avenue and between the two tracks also obstructed the view from a certain angle. There was the usual standard railroad crossing sign, but no automatic signaling device nor gates, nor was a flagman stationed at the intersection to warn travelers of approaching cars. One of plaintiffs' witnesses testified that on several occasions he had discussed with the agent of the Pacific Electric Railway Company at El Segundo the dangerous nature of the crossing, and had suggested that a wigwag be installed. While the respondents assert that an examination of their exhibits will show the locality to be "a sparsely settled rural community with the standard cross arm plainly visible," nevertheless, the crossing is a well-traveled one within the city limits of Hawthorne; a witness testifying that he "would estimate, including [his] customers and others driving touring cars, inclusive of [his] own trucks, about two hundred people" daily crossed the tracks at Eucalyptus avenue.

[2] Plaintiffs' first assignment of negligence on the part of the defendants concerns the alleged failure of the motorman to blow the whistle sufficiently in advance of reaching the crossing to give proper warning. There was a substantial conflict in the testimony as to the time of giving the signals, and as to their extent. The fact that there was positive testimony on the subject does not conclusively establish that the required crossing signals were given. It creates merely a conflict of testimony to be resolved by the jury. *Thompson v. Los Angeles, etc., R. Co.*, 165 Cal. 748, 752, 134 P. 709; *Vaca v. Southern Pac. Co.* (Cal. App.) 267 P. 346. See, also, *Marchetti v. Southern Pac. Co.* (Cal. Sup.) 269 P. 529.

[3-6] With reference to the alleged excessive speed of the car, respondents contend

that, in the absence of a regulatory statute or ordinance, a railway company may ordinarily run its trains at such speed as it sees fit, and that a charge of negligence cannot be predicated on that rate of speed unless there are attendant circumstances which make such speed negligence. They also cite authorities as to the right of a railroad company to operate its trains at a high rate of speed in country districts. While it is true that no rate of speed is negligence per se in the absence of a statute or ordinance, it does not follow that a railroad company will be permitted to run its trains under all conditions at any rate of speed it may choose. It must regulate its speed with proper regard for the safety of human life and property, especially when running through towns and cities. The character of a crossing, it has been well reasoned, affects the duty of the railroad company toward travelers upon the public highway, and its trains must pass over dangerous crossings at a less rate of speed proportionate to the danger. As previously stated, the scene of the collision was not the ordinary country grade crossing, but a well-traveled, paved avenue within the city limits. It was stipulated that the distance between Hawthorne and El Segundo, the termini of the portion of the electric line involved in this case, was 4.56 miles. Estimates as to the speed of the car varied from 12 to 20 miles an hour, and there was some evidence that the train was coasting. While the defendant motorman testified that his car was traveling at about 15 miles an hour as he approached the intersection, he further stated that the running time between the two termini mentioned, with seven scheduled stops, was eleven minutes. A brief computation will demonstrate that the car would have to average a trifle less than 25 miles an hour in order to keep within the allotted running time, without making any allowance for the slackening of the car before stopping, and without any deduction for the time actually lost in taking on passengers. Eucalyptus avenue was not one of the scheduled stops, and it would be only reasonable for the jury to infer that, in order to keep within the scheduled running time, the train would travel faster where there were no regular stations than it would when nearing one where it was required to stop. "A rate of speed that may be allowable in a thinly settled part of the country, where but few persons will have occasion to cross the tracks, may be so dangerous as to constitute negligence on the part of the railroad company when driving a train through a city or village, where many persons are likely to cross the track." 2 *Thompson on Negligence*, § 1875. As the standard of duty shifts with the circumstances developed in the case, the question whether or not a rate of speed is excessive is one of fact for the jury. As this court said in *Bilton v. Southern Pac. Co.*, 148 Cal. 443, 447, 83 P. 440, 442: " * * * There can be no doubt

that the question as to whether or not a rate of speed at a crossing is so dangerous or excessive as to constitute negligence must depend upon the particular circumstances there existing, and if the circumstances are such that reasonable and impartial men may well differ as to whether the speed maintained at the particular place showed a want of reasonable care, the question as to whether the railroad company was guilty of negligence in maintaining such speed is one for the jury"—citing authorities. See, also, *Marchetti v. Southern Pac. Co.*, supra, at page 531 of 269 P.; *Tousley v. Pac. Elec. Ry. Co.*, 166 Cal. 457, 460, 137 P. 31.

[7] The third charge of negligence against the defendants relates to the failure to operate the car with due care in view of the dangerous condition of the crossing. A witness testified that there was practically a solid wall of obstruction commencing with the house north of the garage and continuing up to within 19 feet, 6 or 8 inches of the track, and that there was no opportunity at all, until one passed the latter point, to see a car coming from the west. According to the testimony of the motorman, "a box car was located on the siding just north of the track that [he] was operating on, approximately 40 feet west of Eucalyptus street." He first saw the truck as he came out from behind the box car, and about 35 feet from the crossing. There was also testimony showing that if a box car was stopped in a position to load on the platform on the south side of the Sander-son warehouse, an automobile would have to be beyond the siding tracks to see a train coming from the west. A witness was asked whether, under those conditions, in an automobile in which the driver's point of vision was 7 feet back of the front of his car (as was the case with the autotruck involved in this collision), the driver could see a train approaching from the west—west of the telephone pole—without putting himself "in a position of peril." "The Court: What do you mean by 'a position of peril'?" Counsel for plaintiffs: "By 'a position of peril' I mean a position where you would be so far on the track that if a car came down there it would strike the automobile in which you were." The witness: "It would not strike me, but it would strike the automobile, for the reason that I would have to have at least my radiator and the center of my front wheels on the track." In *Bilton v. Southern Pac. Co.*, supra, this court said (page 447 of 148 Cal. [83 P. 442]): "The obligation rested upon it [the railroad company] of taking such care to prevent injury by its trains to those passing over the crossing as would, under the existing circumstances, be reasonable, and if the view of its track was so obstructed that a person lawfully using the street could not before passing from a place of safety to a place of danger see an approaching train just

beyond the obstruction in time to escape it, if it moved at a high rate of speed, it was its duty to moderate the speed accordingly, or make the approach of the train reasonably apparent by other methods to the user of the street."

Marchetti v. Southern Pacific Co., supra, was an action for damages for death caused by a collision. The court granted defendants' motion for a nonsuit based on the contributory negligence of the deceased. There, as here, the evidence showed the crossing to be dangerous because of existing obstructions, and there was a conflict as to the sounding of proper warnings. On appeal, the respondents contended that, even though it should be held there was error on the part of the trial court in granting their motion on the ground of contributory negligence, the order should be sustained because there was no evidence of negligence on their part in the operation of their train at the time of the collision. In passing upon this contention, this court said: "It was held in *Green v. Southern Pacific Co.*, 53 Cal. App. 194, 202, 199 P. 1059, 1062: That the law imposed 'upon a railroad company the duty to use reasonable care, corresponding to the circumstances constituting the probable danger, to avoid injury to persons lawfully traveling upon the public highway crossed by the company's tracks and trains. It then becomes a question for the jury to decide whether or not it was negligence for the company to run its cars across the highway without providing a flagman or some means of warning to travelers at the place of crossing. And, where the facts in evidence prove that usually or frequently there are obstructions which interfere with the opportunity to see moving trains while travelers on the highway are approaching a much-traveled crossing, it cannot be held that as a matter of law it is not negligence to run trains there without warning signals other than those usually given by engines and cars.'"

[8] Respondents contend that the deceased, in failing to stop, look, and listen, was guilty of negligence which contributed directly and proximately to the happening of the accident; but the question of such negligence is not usually one of law for the court, but is one of fact for the jury. "The law can only define the duty of individuals under given circumstances. The existence of the circumstances is a question of fact for the jury." *Dufour v. Central Pac. R. R. Co.*, 67 Cal. 319, 323, 7 P. 769, 771. Reviewing the evidence with reference to the conduct of the deceased, it appears that the territory covered by him in his business of selling and distributing bottled water, in which he had engaged for several months, was on both sides of the railroad track, and included Eucalyptus avenue. We may assume, therefore, that he was familiar with the crossing. The statement of one of

defendants' witnesses that he had had a conversation with the deceased some six or eight weeks prior to the accident, in which he had warned him about his careless manner in crossing the tracks, and his testimony as to the rate of speed at which the deceased customarily crossed the tracks, were impeached by the testimony of other witnesses. Estimates as to the speed of the automobile truck prior to the collision varied from between 12 and 15 miles to between 20 and 30 miles. Mrs. Leek, a witness for the plaintiffs, testified that she first saw the deceased as she looked through a window about 45 feet from the point where the accident occurred. At that time the truck was going at from 12 to 15 miles an hour, and, as he approached the crossing, the driver "possibly slowed down a bit"; that as the truck passed the window he was "looking down a little bit"; that his left hand was on the steering wheel, but she was not sure as to his right hand. The section foreman for the railway company testified that at the time he was about 150 feet from the crossing that he noticed the autotruck approaching, and Young was looking down and driving with one hand; that when the deceased was within 30 or 40 feet of the crossing the witness shouted at him, whereupon he looked up, "got ahold of his wheel and steering his car—turned the car the same way the Pacific Electric car was running."

[9] Appellants contend that the jury may have inferred from the testimony of these two witnesses that the deceased had slowed down his truck, preparatory to stopping as soon as he would be in a position to look up the main track. It will be recalled that in order to do so he would have to run his machine to within a few feet of the track. Appellants urge, further, that the jury may have concluded from the testimony just referred to that the deceased looked down to put one hand on the emergency brake, to set it when he stopped, when his attention was suddenly distracted and misdirected to the east by the loud shouting of the section foreman, "so powerfully" that it could be "heard about two blocks"; that during this "second of distraction" the truck traveled forward the few feet which represented the difference between safety and danger; and that by the time the driver looked to the west and saw the oncoming car he believed he could not stop before reaching the tracks, and, releasing the partial brake he had on the truck, he swung to the left, paralleling the electric car, in an effort to avoid a collision. The machine had not reached the rails, but some portion of the overhang of the electric car and the forward part of the chassis of the truck came together. The automobile was not overturned, but the driver was killed when thrown beneath its wheels by the force of the impact. Passengers on the car, as well as the motorman, gave evidence which conflicted with that of plaintiffs' witnesses as to the speed of the truck and with reference

to the conduct of the deceased on approaching the crossing. In our opinion, it was for the jury to sift the testimony, in the light of the surroundings and the ability of the witnesses to see what occurred, and to determine which of the conflicting witnesses told the truth, and then, having ascertained the facts, it was for them to say, under proper instructions as to the law, whether the conduct of the deceased was free from negligence and accompanied with ordinary care. *Cooper v. Los Angeles Terminal R. Co.*, 137 Cal. 229, 230, 70 P. 11. The right of a defendant to have a jury instructed to return a verdict in its favor can only obtain where the evidence conclusively establishes such negligence. "When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery." *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 240, 116 P. 513, 515; *Vaca v. Southern Pac. Co.*, supra, page 349 of 267 P. Even where the facts are undisputed, if reasonable men might draw different conclusions upon the question of negligence, the question is one of fact for the jury. *Johnson v. Southern Pac. R. R. Co.*, 154 Cal. 285, 295, 97 P. 520, citing *Seller v. Market-Street Ry. Co.*, 139 Cal. 268, 72 P. 1006.

Considering the evidence in this case as a whole, we do not think it can be fairly held, as a matter of law, either that the respondents were not guilty of negligence in the operation of their train, or that the deceased was contributorily negligent. The testimony was not so clear and convincing that the court could undertake to say, as a matter of law, how the jury should find on those issues. *Davis v. Pacific Power Co.*, 107 Cal. 563, 575, 40 P. 952, 48 Am. St. Rep. 156. Appellants were therefore entitled to have the case go to the jury for a verdict on the merits.

The judgment is reversed, and the cause is remanded for a new trial.

We concur: PRESTON, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

CURTIS, J. I dissent. The uncontradicted evidence in this case in my opinion shows that the deceased was guilty of contributory negligence in driving his truck upon the tracks of the defendant railway company. Contributory negligence becomes a question of law when the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from these facts reasonable men can draw but one inference, namely, an inference pointing unerringly to or against contributory negligence upon the part of the plaintiff. 19 Cal. Jur. 735; *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P.

125; *Young v. Southern Pacific Co.*, 182 Cal. 369, 190 P. 36; *Griffin v. San Pedro, L. A. & S. L. R. R. Co.*, 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842.

The uncontradicted evidence in this case shows that the deceased deliberately drove his truck upon the railroad track without making any attempt whatever to ascertain whether there was a train approaching thereon. The fact that his view of the track was obscured by buildings or other objects situated on or along the railway right of way did not relieve him of the duty of ascertaining that the railway track was free of danger before he entered thereon. *Griffin v. San Pedro, L. A. & S. L. R. R. Co.*, supra. In that case the facts were much like those in the present action, and it was therein held by this court that the uncontradicted evidence showed that the plaintiff was as a matter of law guilty of contributory negligence. The rule enunciated in that case has been uniformly followed by this court. *Murray v. Southern Pacific Co.*, 177 Cal. 1, 169 P. 675; *Billig v. Southern Pac. Co.*, 192 Cal. 357, 219 P. 992; *Parker v. Southern Pacific Co.* (Cal. Sup.) 269 P. 622; *California Rendering Co. v. Pacific Electric Ry. Co.* (Cal. Sup.) 269 P. 922.

I concur: SHENK, J.

207 Cal. 542

LEALA v. CARROLL et al. (S. F. 12989.)

Supreme Court of California. July 9, 1929.

1. Deeds ⇨124(1)—Words in deed granting property to grantee and heirs forever are construed according to intention of entire instrument.

Words in deed granting property to grantee and to heirs forever, while conveying fee-simple estate under common-law rule, is generally construed at present time in accordance with intention expressed by entire instrument.

2. Deeds ⇨129(4)—Deed declaring grantor's intention to grant life estate to son with remainder to son's children conveyed life estate to son, though rule was otherwise at common law.

Where deed contained declaration of grantor as to meaning he placed upon words of grant after granting property to grantee and heirs forever, that it was intention of grantor to grant life estate to son, and at death, property to go to children of grantee, court will give to language of deed meaning and intent with which it was used by grantor, and hence son took but a life estate, though at common law he would have acquired a fee-simple estate.

In Bank.

Appeal from Superior Court, Alameda County; Edward W. Engs, Judge.

Action to quiet title by Joseph Silveira Leala against James Carroll and others. Judgment adverse to plaintiff, and he appeals. Affirmed.

A. A. Rogers and Geo. J. La Coste, both of Oakland, for appellant.

Myron Harris and John Jewett Earle, both of Oakland, for respondents.

LANGDON, J. Plaintiff appeals from a judgment in an action brought to quiet his title in fee simple to 6.8 acres of land in Alameda county, Cal. The trial court held that plaintiff owned a life estate in the property and that the defendants were the owners of the remainder in fee. The entire controversy centers upon the construction of a certain deed executed and delivered by Manuel Silveira Leala on March 13, 1900, in which the plaintiff herein, the son of the grantor, was the grantee of an estate, which estate is contended by plaintiff to be a fee and which estate is contended by the defendants to be but a life estate. The pertinent portions of said deed are as follows:

"This indenture, made the 13th day of March, A. D. 1900, between Manuel Silveira Leala, of the Township of Eden, County of Alameda, State of California, the party of the first part, and Joseph Silveira Leala, his son, of the same place, the party of the second part,

"Witnesseth: That the said party of the first part, for and in consideration of the love and affection which the said party of the first part has and bears unto the said party of the second part, as also for the better maintenance, support, protection and livelihood, of the said party of the second part does by these presents give, grant, alien and confirm unto the said party of the second part, and to his heirs forever, all that certain piece or parcel of land situate lying and being in the Township of Eden, County of Alameda, State of California, and bounded and particularly described as follows, to wit: (here follows the description)

"The intention of the grantor herein is a life estate to his son the said party of the second part, and at his death to become the property of the said party of the second part's children."

[1, 2] The respondents herein are children of a deceased child of the appellant and qualify as "children" under the last-quoted sentence of the deed, if it is operative. It is the contention of appellant, however, that the deed contains no operative words of grant to the grantee's children and conveyed to the grantee's children no present interest in said property. The contention is sound and in harmony with the holding of the case of *McGarrigle v. Roman Catholic Orphan Asylum*, 145 Cal. 694, 79 P. 447, 1 L. R. A. (N. S.) 315, 104 Am. St. Rep. 84, unless the words in the

deed granting the property "to the said party of the second part and to his heirs forever" be construed as meaning the party of the second part and his children forever. Such language, while conveying a fee-simple estate under the common-law rule, is generally construed now in accordance with the intention expressed by the entire instrument. *Acker v. Pridgen*, 158 N. C. 337, 74 S. E. 335, 42 L. R. A. (N. S.) 407; *Jacobs v. All Persons*, 12 Cal. App. 163, 106 P. 896. In the instant case, we have a declaration of the grantor in the instrument itself as to the meaning he placed upon his words of grant. After granting the property to the plaintiff and his heirs forever, the grantor declares that it is his intention to give by this instrument a life estate to the plaintiff with a remainder after his death to his children. Under such circumstances, this court will give to the language of the deed the meaning and intent with which it was used by the grantor.

It follows that the judgment must be affirmed. It is so ordered.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

207 Cal. 560

In the Matter of Leonard T. MAYHEW on Habeas Corpus. (Cr. 3268.)

Supreme Court of California. July 15, 1929.

In Bank.

G. E. Harpham, of Los Angeles, for petitioner.

WASTE, C. J. Petition for rehearing on application for habeas corpus is denied. See *People v. Plum* (Cal. App.) 275 P. 518; *People v. Plum* (Cal. App.) 263 P. 862, on rehearing, 265 P. 322; *People v. Manchell* (Cal. App.) 267 P. 718.

207 Cal. 534

WEINSTEIN et al. v. MOERS et al.
(L. A. 9967.)

Supreme Court of California. July 5, 1929.

1. Husband and wife $\S$ 34—Evidence supported finding that husband promised wife not to claim property received under her will; "with the right to inherit."

In heir's suit to establish and enforce trust in property claimed by surviving husband under wife's will, evidence held sufficient to support court's finding that husband promised wife not to claim any property received under her will in consideration of cash and personal property received by him under agreement made by them "in full settlement of any property rights * * * in favor of either * * * with the right to in-

herit"; latter phrase not being intended in technical sense of right to take under laws of succession only.

2. Evidence $\S$ 455—Oral evidence held admissible to explain words "with the right to inherit" in spouses' property settlement agreement.

Oral evidence that husband and wife, executing agreement "in full settlement of any property rights now or which may hereafter accrue in favor of either of the parties hereto out of said marriage relation, with the right to inherit," meant that neither should take other's property after death of either, whether under will or laws of succession, held admissible to explain words "with the right to inherit," which were fairly susceptible of different interpretations.

3. Husband and wife $\S$ 34—Evidence supported finding that wife acted in reliance on husband's promise not to claim any of her property on her death.

In heir's suit to establish trust in property claimed by defendant under his deceased wife's will, evidence held sufficient to support finding that testatrix acted in reliance on defendant's promise in property settlement agreement not to claim any of her property in event of her death.

4. Husband and wife $\S$ 35—Husband's right, under property settlement contract, to money placed in escrow by wife, held not prejudiced by judgment establishing trust in property she devised to him.

While death of wife, placing money in escrow for payment to husband pursuant to property settlement agreement, revoked escrow, husband's rights thereto under settlement contract were not prejudiced by judgment establishing trust for wife's mother as her sole heir in property claimed by husband under wife's will, though properly not adjudged in suit for such relief because of necessity of presenting claim against wife's estate.

5. Husband and wife $\S$ 35—Provision of property settlement contract for delivery of merchandise to husband did not prevent operation of judgment establishing trust in property devised to him by wife.

Provision of spouses' property settlement contract for delivery of merchandise of certain value to husband held not insuperable obstacle to operation of judgment establishing trust for wife's mother in property claimed by husband under wife's will; contract not being terminated by wife's death, and its stipulations being covenants rather than conditions precedent.

6. Trusts $\S$ 97—Husband, promising wife not to claim property received under her will, held legal title thereto in trust for her heir.

While wife's will passed legal title to property devised to husband, he acquired it subject to property settlement agreement, wherein he promised not to claim any property received under will, and in subordination to equities of wife's mother, as her sole heir, for whom he held property in trust because of constructive fraud in refusing to abide by contract; neither statute of wills, statute of frauds, nor require-

ment that express trusts be in writing being applicable.

In Bank.

Appeal from Superior Court, Los Angeles County; P. E. Keeler, Judge.

Action by Clara Weinstein and husband against Albert A. Moers, individually and as executor of the estate of Theresa W. Moers, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Roger Marchetti, of Los Angeles (Dix W. Noel, of New York City, of counsel), for appellant.

John A. Powell, and O'Melveny, Millikin, Tuller & Myers and Macnell, all of Los Angeles, for respondents.

SHENK, J. This is an appeal from a judgment in favor of the plaintiff Clara Weinstein in an action to establish and enforce a trust.

Prior to August 13, 1924, the defendant Albert A. Moers and Theresa W. Moers, husband and wife, conducted an art and antique store on West Seventh street in the city of Los Angeles under the name of "Moers, Inc." During the existence of the marriage relation, and on or about August 4, 1921, they executed mutually reciprocal wills, pursuant to agreement, by which each devised and bequeathed to the other all of the property belonging to them at the time of their respective deaths. Domestic difficulties arose, and in August, 1922, the wife commenced an action for divorce against the husband, which action was subsequently dismissed. On May 23, 1924, the husband instituted an action for divorce against the wife, and the cause was set down to be heard on August 7, 1924. Immediately prior to the hearing of the cause, the parties thereto executed an agreement of property settlement, by the terms of which all rights of the parties as to their separate and community properties were provided for and settled. Among other things, it was provided therein that merchandise and personal property in the store to the value of \$5,000 was to be delivered to the husband, together with \$14,500 in cash. It was further agreed "that any and all property, whether real, personal or mixed, standing in the name of either party, shall be and it is hereby specified as the separate property of the party in whose name said property stands and each party hereto waives any right, title, claim or interest in or to any property now standing in the name of the other, or which may be hereafter acquired by the other." It was further agreed "that said payment and agreement is hereby accepted by the parties hereto in full settlement of any property rights now or which may hereafter accrue in favor of either of the parties hereto out of said marriage relation, with the right to inherit, whether said claim is based upon the community rights

now existing or which may hereafter be created." After the execution of the property settlement agreement, and on the same day, an interlocutory decree of divorce was granted to the husband. Thereafter an escrow was opened in a local bank for the purpose of carrying out certain of the terms of the agreement. The wife thereupon paid into the escrow the sum of \$14,500 for the benefit of the husband. On August 13, 1924, just a week before the date set for the closing of the escrow, Theresa W. Moers died as the result of a gunshot wound inflicted upon her the night before. See *People v. Selby*, 198 Cal. 426, 245 P. 426.

After the institution of the divorce proceedings, and prior to the execution of the property settlement agreement, the husband revoked the will made by him in favor of his wife. After the death of the wife, the reciprocal will made by her in favor of her husband was found among her effects. The surviving husband filed this will for probate. It was admitted to probate, and he was appointed executor thereof. The original and the supplemental inventory and appraisement filed April 18 and October 21, 1925, respectively, showed the value of the decedent's estate to be in excess of \$100,000. This action was commenced on March 30, 1925.

The plaintiff Clara Weinstein is the wife of her coplaintiff, and is the surviving mother and sole heir at law of Theresa W. Moers, deceased. The defendant is sued in his individual capacity and as executor of the will of his deceased wife. It is alleged in the complaint, and found by the court to be true, that it was understood and agreed by each of the parties to the property settlement agreement that, by the settlement consummated therein, "the rights given and acquired by each person thereunder should constitute all of the rights of any kind which either person shall ever have or acquire in or to the separate property of the other or in the community property of said marriage, either by virtue of the marriage relation then existing between them, or by inheritance, the one from the other, or as a legatee or devisee under any will theretofore executed by either of said persons; that said Theresa W. Moers refused to sign and execute said agreement except upon the condition and understanding that it should terminate and destroy any and every right or claim which her then husband, Albert A. Moers, might then have or might thereafter assert by virtue of the marriage relation existing between them, or as an heir of said Theresa W. Moers, or under the terms of the will theretofore executed by said Theresa W. Moers; that said Theresa W. Moers believed and understood that it was not necessary for her to revoke her then existing will in order that said Albert A. Moers should not, in the event of her death, receive any of her property through or under the terms of said

will; that in addition said Theresa W. Moers was induced to and did refrain from revoking her said will by representations made by said Albert A. Moers that he did not and would not thereafter claim any right or interest in or to any of said property except such property as was by the express terms of said agreement set over and apart to him; that the condition and understanding upon which said agreement was executed by said Theresa W. Moers was well and fully known by defendant Albert A. Moers and was assented and agreed to by him, and that he executed said agreement on his part with full knowledge thereof; that the life of said Theresa W. Moers was taken by one Norman Selby within a few days after the execution of the said agreement and before the will hereinbefore referred to as executed by her was legally revoked by her; that defendant Albert A. Moers has propounded said will for probate and claims to be the sole owner of all of the property owned by said Theresa W. Moers at the time of her death and entitled to receive distribution thereof under the terms of said will; that said claim is in violation of the terms of said agreement in this paragraph set forth, and of the understanding and agreement of the parties thereto, and its assertion constitutes a fraud upon the plaintiffs as heirs at law of said Theresa W. Moers; that any legal title acquired by said defendant Albert A. Moers under the last will and testament of said Theresa W. Moers is held by him in trust for these plaintiffs." The court concluded that the plaintiff Clara Weinstein is entitled to all of the property belonging to the decedent at the time of her death, less costs of administration of and claims against the estate, and that the defendant holds all of the property received or to be received by him from the estate of the decedent as trustee for the plaintiff Clara Weinstein. Judgment was entered accordingly.

[1, 2] In support of the appeal, an attack is made upon the sufficiency of the evidence to support the finding above quoted to the effect that the defendant promised and agreed that he would not make any claim to any property of the decedent which he might receive under her will. It appeared in evidence in support of the finding that, after the draft of the property settlement had been prepared, and pending its execution, a conference was held at which the parties thereto and their respective counsel were present. During this conference, the decedent desired and insisted that the agreement should be a complete and final settlement of the property rights of the parties, and that neither should receive any property from the other, and that she intended, as soon as the property settlement agreement was carried out, to make a will in favor of her mother. She was assured that under the agreement neither would receive the property of the other after death, but that to make it plain a clause would be

inserted in the agreement to that effect. Whereupon the words "with the right to inherit" were interlined in the paragraph where the same appears in the above-quoted portion of the agreement and in the handwriting of counsel for the defendant. When this interlineation had been made, the instrument was signed. Over the objection of the defendant, evidence was offered and received as to what the parties intended by the use of the words so interlined. The defendant contended then, and now insists, that the words so used are plain and unambiguous, admit of no oral explanation, and, when read in their obvious meaning, provide that the parties should not take one from the other under the laws of succession. The plaintiffs contend that what the parties meant was that neither should take the property of the other after the death of either, and that the words are of sufficient uncertainty as to their meaning to admit of oral evidence in explanation thereof.

That the parties intended that neither should receive any of the property of the other upon the death of either is satisfactorily established in support of the finding. True, the oral evidence as to what took place at the conference held on the day the agreement was signed was conflicting. But the assumption that the evidence was sufficient to support a contrary finding does not aid the defendant under well-recognized rules on appeal. We are of the opinion that, when the acts and circumstances of the parties at and before the signing of the instrument and the conduct of the defendant in destroying his will are taken into consideration, the words employed in the interlineation were intended, not in their technical sense, but in the sense in which the court found them to be used. Aside from the oral evidence, the words used and the circumstances of the parties speak eloquently in favor of the court's finding. The form of the expression interlined, taken in connection with the context, is fairly susceptible of different interpretations. When the words are given the meaning ascribed to them by the trial court, the question of the claimed inadmissibility of the oral evidence would seem to be removed from debate. Any other conclusion would tend to nullify the obvious intention of the parties under the contract. See *Balfour v. Fresno Canal & Irrigation Co.*, 109 Cal. 221, 41 P. 876.

[3] It is also contended by the defendant that the evidence is insufficient to support the finding that the decedent acted in reliance upon the defendant's promise not to take any of her property in the event of her death. It is sufficient on this point to say that it satisfactorily appears from the evidence that, if the decedent had not so understood their property settlement agreement, she would not have signed the same, and immediately would have revoked her will. See *De Laurencel v. De Boom*, 48 Cal. 581.

[4, 5] Again, it is argued that the evidence

is insufficient to support the finding that the promise of the defendant not to take by will was not dependent upon complete performance of the contract by the decedent. With reference to the payment of \$14,500 in cash, it appears that this amount of money was placed in the escrow to be paid to the defendant Moers upon the conclusion of the escrow on August 20th. Upon the death of Mrs. Moers on the 13th, the escrow was revoked, and the money was not paid to the defendant as therein provided. But the rights of the defendant to this money under the contract of settlement are in nowise prejudiced by the judgment herein. On the contrary, his right to the payment of this sum is recognized but properly not adjudged, because of the necessary formality of the presentation of a claim against the estate, which is more than sufficient to satisfy all of his (the defendant's) demands under the property settlement agreement. Nor are we able to find any insuperable obstacle to the operation of the judgment herein by reason of the provision of the contract for the segregation of \$5,000 of the merchandise of the parties. Certain it is that the contract was not terminated by the death of one of the parties, and its stipulations should be deemed as covenants rather than as conditions precedent, especially when the latter would result in what the court found to be inequitable consequences in favor of the defendant. *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 166 P. 325; *Lucy v. Davis*, 163 Cal. 611, 614, 126 P. 490.

[6] Since no error in the admission of evidence appears, and the findings are supported by the evidence, the judgment should stand as the appropriate action of the court in an equity proceeding. Neither the statute of wills, the statute of frauds, nor the requirement that express trusts be in writing are applicable. The will was operative to pass the legal title, but, when the defendant gathered unto himself the legal title, he acquired it subject to the operation of the property settlement agreement and in subordination to the equities of the plaintiff Clara Weinstein. The refusal of the defendant to abide by his contract amounted to a constructive fraud on the heir of the defendant, who would have taken the legal, as well as the equitable, title, if the agreement had not been repudiated. Trusts of the character here involved are impressed in favor of one who would otherwise take and against the one who has refused to perform his promise, on the ground of the imputed fraud of the latter and his attempted holding of the estate against conscience. *Smith v. Lombard*, 201 Cal. 518, 258 P. 55; *Brazil v. Silva*, 181 Cal. 490, 185 P. 174; *Estate of Everts*, 163 Cal. 449, 125 P. 1058; *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430; *Kimball v. Tripp*, 136 Cal. 631, 69 P. 428; *Prior v. Andrews*, 83 Cal. App. 782, 257

P. 560; *Sanguinetti v. Rossen*, 12 Cal. App. 623, 107 P. 560; *Powell v. Yearance*, 73 N. J. Eq. 117, 67 A. 892; *Gammel v. Fletcher*, 76 Kan. 577, 92 P. 713, 93 P. 339.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

207 Cal. 473

WHITMORE et ux. v. BROWN, City Tax Collector. (S. F. 13440.)

Supreme Court of California. June 29, 1929.

1. Mandamus ⇨118—Where taxpayers tendered sufficient amount to pay tax legally due, mandamus was proper in proceeding to compel issuance of receipt in full.

Where taxpayers tendered sufficient amount to pay tax legally due, mandamus was proper proceeding to compel tax collector to issue official receipt in full.

2. Schools and school districts ⇨12—School system may be made municipal affair by city when acting in promotion of legislative school plans and purposes of state (Const. art. 9, § 6, as amended in 1920).

Although school system is of general concern and not strictly speaking a municipal affair, under Const. art. 9, § 6, as amended in 1920, it may be made a municipal affair by city when acting in promotion and not in derogation of legislative school plans and purposes of state.

3. Municipal corporations ⇨58—Charters promulgated under Constitution as freeholders' charters have all dignity of statutes.

Charters promulgated under Constitution as freeholders' charters have all dignity of statutes.

4. Schools and school districts ⇨103(1)—As to "district" taxes for school purposes, system provided by Constitution and statutes is exclusive (Const. art. 9, § 6, as amended in 1920).

As to "district" taxes for school purposes, system provided by Const. art. 9, § 6, as amended in 1920, providing that public school system shall include such schools as may be established by Legislature or by municipal or district authority, and general statutes, is exclusive, though the word "district" does not include a municipality merely because municipality and district occupy the same territory.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, District.]

5. Schools and school districts ⇨99—City operating under freeholders' charter may aid public school system in its midst by taxation of property therein located, where warrant so to do is found in charter or other provision of law (Const. art. 9, § 6).

Const. art. 9, § 6, and statutory provisions in aid of it, do not forbid city operating under

freeholders' charter from aiding public school system in its midst by taxation of property therein located, where warrant so to do is found in charter or other provision of law.

6. Municipal corporations ⇨956(1)—Rule of strict construction applies when determining whether city has power to tax.

Rule of strict construction applies in determining whether city has power to tax, and such power, when exercised under delegated authority by municipal corporation, is subject to rigid scrutiny to determine whether it actually exists and whether it has been exercised under limitations imposed.

7. Statutes ⇨245—Tax laws are strictly construed in favor of taxpayer.

Tax laws are strictly construed in favor of taxpayer and against the state.

8. Municipal corporations ⇨57, 59—Municipal corporations have only powers expressly conferred and those necessarily incident to powers expressly granted or essential to declared objects.

Municipal corporations have only powers expressly conferred and such as are necessarily incident to those expressly granted or essential to declared objects and purposes of corporation.

9. Municipal corporations ⇨58—Language defining powers of municipal corporations and grants thereto must be strictly construed, and any doubts must be resolved against corporation.

Language defining powers of municipal corporations and grants thereto must be strictly construed, and any fair, reasonable doubts concerning existence of power must be resolved against corporation.

10. Schools and school districts ⇨108(2)—City tax for school building purposes held unwarranted, under charter requiring board of education to submit to council estimate of amounts required from city for adequate "support" of schools; "maintenance" (Pol. Code, §§ 1755, 1830, 1838, 1839, 1840).

Item of \$3 tax by city on each \$100 of assessed valuation for school building purposes held unwarranted, under charter providing that board of education shall submit in writing to council estimate of amounts required from city for adequate support of public schools for ensuing year, since purchasing lots, building buildings, making permanent improvements, and such like outlay, are not included under head of "maintenance" or "support," under Pol. Code, §§ 1755, 1830, 1838, 1840, and taxation for building purposes comes under different limit from taxation for support or maintenance, under sections 1755, 1838, 1839.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Maintenance; Support.]

In Bank.

Original proceeding by Charles S. Whitmore, Jr., and wife against Freda M. Brown, as Tax Collector of the City of Albany, for a writ of mandate to be directed to respondent

to compel her to issue a receipt in full for taxes. Writ issued.

C. N. Levers and Clark, Nicols & Eltse, of Berkeley (amici curiæ in *Nunn v. Brown*), for petitioners.

Lovett K. Fraser, of San Francisco, for respondent.

Earl Warren, Dist. Atty., Frank M. Ogden, Asst. Dist. Atty., and Agnes R. Polsdorfer and James H. Oakley, Deputy Dist. Attys., all of Oakland, as amici curiæ.

Preston Higgins, City Atty., and Homer Buckley, Deputy City Atty., both of Oakland, William J. Locke, City Atty., of Alameda, Earl J. Sinclair, City Atty., of Berkeley, amici curiæ for cities of Oakland, Alameda, and Berkeley.

PRESTON, J. Original proceeding in mandate. The question recurs upon a general demurrer to the petition.

Petitioners are property owners in the city of Albany, a city operating under a freeholders' charter adopted on the 17th day of January, 1927. Respondent is the tax collector of said city. The territory comprising the city constitutes an elementary school district, and at the same time also constitutes a high school district, each of which said districts are duly organized as such as provided by law.

The question presented by this proceeding is the validity of the tax levy made by the trustees of said city for the fiscal year 1928-29, in so far as it comprises a levy of \$3.35 per \$100 of assessed valuation as and for a "fund for the maintenance, acquisition and improvement of schools in the City of Albany within the boundaries of the City of Albany as they now are, said money so raised must be expended within the boundaries of said City of Albany."

The charter of said city provides for a board of education, which, among other duties, shall annually "submit in writing to the Council a careful estimate of the whole amount of money to be received from the State and County for the support of the public schools in the City, together with a careful estimate of the amounts, specifying in detail the objects thereof, required from the City for the adequate support of the public schools for the ensuing year." The charter further provides: "The City Council shall include in and apportion from the annual tax levy the sum of not less than thirty-five cents on each one hundred dollars of assessed valuation to be paid into the school fund of the City." Subdivision (g), § 38, St. 1927, p. 2326.

Acting under this authority the board of education, on August 17, 1928, submitted a report to the board of trustees to the effect that the Albany high school district was in need of a junior senior high school to care for the educational needs of the children of

the city and district; that no funds with which to purchase secondary school sites or to construct and equip secondary school buildings were available; that less than a year previously a bond issue had been defeated by a narrow margin, and the board of trustees were therefore urgently requested to levy a tax of \$3 on each \$100 of assessed valuation in the city of Albany, as provided by the charter of the city, the moneys thus raised to be used for the following purposes: Purchasing high school lots; building or purchasing or making alterations and additions to and insuring high school buildings and supplying them with furniture and necessary apparatus and improving high school grounds. Acting in part at least upon this recommendation, the city council, on the 17th day of September, 1928, fixed a total tax rate of \$4.59 on each \$100 of assessed valuation, setting forth an estimated expenditure for the maintenance, acquisition, and improvement of schools in the city of Albany, without any words to designate whether high schools or elementary schools, or both, were intended to be covered thereby, nor the amount to be used for maintenance for the ensuing year, of \$186,157.93, apportioning to that purpose \$3.35 of the rate fixed.

Petitioners, who owned real and personal property within the city, were assessed at the sum of \$1,850, on which the tax levy for said year at said rate was \$84.92, 50 per cent. of which would be declared delinquent upon the first Monday in December, 1928, with the remainder delinquent the last Monday in April, 1929. Petitioners paid the first installment of said taxes, and thereafter tendered to respondent the sum of \$14 in payment of the remainder claimed to be due as and for said taxes; said sum being estimated upon a school tax rate of 36 cents, and a total rate of \$1.60, instead of a school tax rate of \$3.35 and a total tax rate of \$4.59 as fixed by the city council.

[1] There is no question made as to the sufficiency of the tender if it should ultimately be held that the school tax levy was illegal. Respondent refused to comply with the demand that it accept said sum or to issue a receipt in full to petitioners and this proceeding followed. If these petitioners in fact tendered a sufficient amount to pay the tax legally due, this proceeding is a proper one to compel the issuance of an official receipt in full. *Spring Valley Water Co. v. Planer* (Cal. App.) 263 P. 323.

We face at the outset a challenge to the power of a city operating under a freeholders' charter to levy to any extent a tax for school purposes. We are cited to the holding that the school system of the state is of general and state-wide concern and not a mere "municipal affair," as that term in the Constitution (article 9, § 6) is defined, and, in support of this announcement freely made by the courts, we are referred to such cases as the follow-

ing: *Hancock v. Board of Education*, 140 Cal. 554, 74 P. 44; *Kennedy v. Miller*, 97 Cal. 429, 32 P. 558; *Los Angeles City School Dist. v. Longden*, 148 Cal. 380, 383, 83 P. 246; *Board of Education v. Davidson*, 190 Cal. 162, 210 P. 961; *Esberg v. Badaracco*, 202 Cal. 110, 259 P. 730.

We are then cited to the provisions of article 9, § 6, of the Constitution as amended in 1920, wherein a state high school fund for the support of day and evening secondary and technical schools is provided; where a county elementary school tax by the board of supervisors of each county is required; where the levy of a county high school tax by the board of supervisors is also required; and where also is found the following:

"The public school system shall include day and evening elementary schools, and such day and evening secondary schools, technical schools, kindergarten schools and normal schools or teachers' colleges, as may be established by the legislature, or by municipal or district authority. * * *

"The legislature shall provide for the levying of school district taxes by the board of supervisors of each county, and city and county, for the support of public elementary schools, secondary schools, technical schools, and kindergarten schools, or for any other public school purpose authorized by the legislature."

It is then stated that the "mode" prescribed is the "measure of power" when a provision of the Constitution is to be construed (*People v. Gunn*, 85 Cal. 238, 248, 24 P. 718), and from this line of reasoning the conclusion is adduced that only the board of supervisors of the county wherein the school district is located may levy a school tax, and action of this kind by a municipality is forbidden. This deduction is then fortified, it is said, by reference to the provisions of the Political Code, §§ 1612a, 1755, 1830-1837, inclusive, 1838, 1840, and perhaps other sections, all dealing with the subject of taxation for school purposes and providing that the levy of such taxes must be made by the board of supervisors. In this connection we are also cited to the case of *Chico H. S. Board v. Supervisors*, 118 Cal. 121, 50 P. 275, where it was held that city trustees, and not the board of supervisors, must levy school taxes in cities of the first to fifth classes, inclusive, organized and operated under the general Municipal Act of 1883 (St. 1883, p. 93); it being argued that the converse of the proposition here urged is there decided.

Again, it is asserted that, unless municipalities can tax for other than municipal purposes, the levy here made must be in excess of the powers of the city. Lastly, it is contended that in the cases of *Esberg v. Badaracco*, supra, and *McDonald v. Richards*, 79 Cal. App. 1, 248 P. 1049, we have in effect held that the board of supervisors is the only body authorized to levy a district school tax.

At this juncture, however, we are met with the fact that in cities of the first to fifth classes, inclusive, organized under the general law, a school department is specially created with power in the city trustees to levy and collect within specified limits, a tax for school purposes. This method in such city has been held to be exclusive. *Chico H. S. Board v. Supervisors*, supra.

In this connection also we must pause to note distinct evidences of the trend of our judicial decisions towards sustaining the power of cities, which desire to supplement the efforts of the state, counties, and districts, to support, maintain, and strengthen the public school system functioning within their borders. This is in line with the policy announced in our Constitution as follows: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." Const. § 1, art. 9.

For example, in the cases of *Wetmore v. City of Oakland*, 99 Cal. 146, 33 P. 769, and *Law v. San Francisco*, 144 Cal. 384, 77 P. 1014, we find the power in municipalities to vote a bond issue for school purposes to be specifically upheld. Again in *Los Angeles City School Dist. v. Longden*, supra, this power is reannounced, and, in explanation of the principle upon which the holding is based, it is said: "It thus may be taken as decided and settled that a city, as such, may bond itself for public school purposes, and that this power extends to all cases where the object is in furtherance, and not in derogation of, or in conflict with, the general school system established by the state. * * * What, therefore, the *Wetmore* case and the *Law* case decided was that the erection of schoolhouses within the corporate limits of a municipality was justly to be regarded as a municipal affair, and that the city, therefore, as such, could create a bonded indebtedness for such and like purposes, even though power to do the same thing was, under the general school system of the state, vested in a school district, which, while occupying the same territory as that of the city, was still in point of law a distinct corporate entity. It follows, therefore, that the declaration of this court that the issuing of bonds for the building of schoolhouses by a city is a municipal affair constitutes in no sense a negation of the fact that another corporate entity—the school district—may, under the general school system of the state, do the same thing for the same purpose."

[2] In short, the holding is that, notwithstanding the fact that the school system is of general concern and not strictly speaking a municipal affair, nevertheless it may be made such an affair by the city when acting in promotion and not in derogation of the leg-

islative school plans and purposes of the state. For in said case of *Los Angeles City School Dist. v. Longden*, supra, it is further said: "Moreover, it should be finally emphasized that the power of a municipality in this regard can only run current with, and never counter to, the general laws of the state touching the common-school system. To such general laws, if conflict arises, all municipal charters must be subservient."

We have also the case of *Malaley v. City of Marysville*, 37 Cal. App. 638, 174 P. 367, wherein the city charter of Marysville provided that the county superintendent should be ex officio superintendent of its city schools and for such services should receive a salary of \$50 per month. It was, however, provided by section 1617 of the Political Code that the powers and duties of the board of education included the employment and fixing of compensation of the city superintendent of schools; therefore the contention was made that the board of education, and not the city, should compensate the county superintendent for his work. The court quoted at great length from *Los Angeles City School Dist. v. Longden*, supra, and sustained the claim against the city for the salary of the county superintendent so fixed, using in part the following language: "The above excerpts are thus brought into this opinion, not because we feel prepared to hold that a superintendent of city public schools, or the matter of the appointment or employment of one, is a municipal affair, but because the principle thereby enunciated and approved and as applied to the situation considered in that case supports the proposition for which the respondent contends here, viz.: That, notwithstanding that they are different and separate or distinct corporate entities, a municipality and a school district, the territorial boundaries of which are the same as those of the city, may, if the legislature elects to give them the right to do so, exercise precisely the same identical power with respect to matters connected with and calculated to further the interests of the public school system, in so far as such city and school districts are concerned, and that therefore, merely because the Political Code, in its provisions establishing a system of common schools, confers upon the board of education of the city of Marysville power to employ a superintendent of city public schools, non constat that the provision of the charter of the city of Marysville has become a dead letter; that on the contrary, the provision being one whose object is and has always been in furtherance and not in derogation of the general school system, cannot be held to be inconsistent or in conflict, but perfectly consistent therewith."

Indeed, in the case of *Esberg v. Badaracco*, supra, we find the following language: "While statutes providing a general system of laws concerning the creation and conduct of common schools prevail over conflicting

charter provisions, the charters may provide for matters not enumerated in the general laws and not in conflict therewith, including matters in furtherance of the purpose of the general laws of the state.' (18 Cal. Jur. 814 and cases cited.)"

[3] Again, in Political Code, § 1608, re-enacted in 1927 (St. 1927, p. 133), we find the powers conferred upon boards of school trustees and city boards of education to include the power to pay into the county treasury to be placed to the credit of the proper fund of their districts, all moneys received by and apportioned to them "from taxes levied and collected under the authority of city councils for school purposes." This section apparently recognizes the power of city councils to levy taxes for school purposes under certain circumstances. And lastly, in said section 6, art. 9, of the Constitution above referred to, we find a clear intimation that schools may be established "by the legislature, or by municipal or district authority." We should also contemplate the fact that charters promulgated under the Constitution as freeholders' charters have all the dignity of ordinary statutes. *Taylor v. Cole*, 201 Cal. 327, 257 P. 40; *Stern v. City Council of Berkeley*, 25 Cal. App. 685, 145 P. 167.

[4, 5] In view of the foregoing principles thus briefly reviewed, we can reach no other conclusion than this: That, as to "district" taxes for school purposes, the system provided by the Constitution and general statutes is exclusive; that, as to district taxes it was the intent of the framers of the amendment to provide a restricted and specific method for the raising of funds for school purposes, requiring action first by the governing body of the district and the county superintendent of schools, completed by the action of the board of supervisors in levying a tax for such district. But the word "district" so used cannot be held to include a municipality merely because the municipality and the district may occupy the same territory. Nor can we find in the above-quoted provision of the Constitution, or in the several statutory provisions in aid of it, anything which forbids a city, and particularly a city operating under a freeholders' charter, to aid the public school system in its midst by taxation of property therein located, where warrant so to do is found in the charter or other provision of the law. It would be an unnecessary crippling of our public school system, unwarranted by any rule of statutory or constitutional interpretation, to so hold.

Neither the case of *Esberg v. Badaracco*, supra, nor the case of *McDonald v. Richards*, supra, considered the question we have here before us. In the former case there was a conflict between the city charter and the state law as to which body had the ultimate right to fix the amount of money to be raised by taxation for school purposes, and it was

held that this power was lodged in the board of education and not in the supervisors. In the latter case, the question for consideration was the validity of the provision of the Political Code (section 1612a), which authorizes the county auditor to levy the tax in the event of the failure of the board of supervisors to do so. We do not regard any statements made in either of said cases as foreclosing or curtailing to any extent whatever a free inquiry into and ruling upon the subject we have before us.

[6, 7] The provisions of the city charter of Albany above quoted are now to be considered. The rule of construction here applicable has been cast in different language by the courts, all, however, to the effect that taxation by a municipality affects arbitrarily private property and at the same time is the exercise of a delegated power, and that in both elements the rule applicable is that of strict construction. "The power to tax when exercised under delegated authority by a municipal corporation is always subject to rigid scrutiny, first to determine whether it actually exists, and, second, to determine whether it has been exercised under the limitations imposed. * * * Since tax proceedings are in invitum, tax laws are strictly construed in favor of the taxpayer and against the state, whether property is to be seized or the tax enforced by suit. Strict construction in such cases is reasonable, because presumptively the legislature has given in plain terms all the power intended to be exercised. A statute will not be held to have imposed a tax unless it is clear and explicit. * * * A tax statute is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it." 24 Cal. Jur. pp. 27, 28.

[8, 9] As said in *City and County of San Francisco v. Boyle*, 195 Cal. 426, 433, 434, 233 P. 965, 968: " * * * The elementary rule still obtains that 'municipal corporations have only the powers expressly conferred and such as are necessarily incident to those expressly granted, or essential to the declared objects and purposes of the corporation.' " And in *Uhl v. Badaracco*, 199 Cal. 270, 282, 248 P. 917, 921: "Language defining the powers of municipal corporations and grants thereto are to be strictly construed, and any fair reasonable doubt concerning the existence of a power is to be resolved against the corporation. Then again, as tax proceedings are in invitum, laws pertaining thereto are to be strictly construed in favor of the taxpayer and against the taxing power. [Citing cases.]" See, also, *San Christina, etc., Co. v. City and County of San Francisco*, 167 Cal. 762, 771, 141 P. 384, 52 L. R. A. (N. S.) 676; *Estate of Potter*, 188 Cal. 55, 64, 65, 204 P. 826.

The charter allows the levy of the tax for the "support" of public schools "for the ensu-

ing year." The words "support" and "maintenance" are convertible terms in the scheme of the Political Code respecting public schools. For example, referring to high schools "maintaining the high school" is provided for in section 1756, and in sections 1760 and 1761 the word "support" is found used to convey the same meaning. Again, in section 1840 we have the word "maintenance" used in the same connection. We also find the significant fact that purchasing lots, building buildings, making permanent improvements and such like outlay is not included under the head of "maintenance" or "support." See Pol. Code, §§ 1755, 1830, 1838, and 1840.

It is also to be noted that taxation for building purposes comes under a different limit from taxation for support or maintenance. See Pol. Code, §§ 1755, 1838, 1839. Lastly, in said section 1830, we find the two subjects, maintenance and building purposes, carefully distinguished and provision for the calling of an election to vote a tax for the one or the other.

The estimate prepared by the board of education in the case before us called for taxation at the rate of \$3 for the following purposes: "For purchasing high school lots; for building or purchasing one or more high school buildings; for making alterations and additions to high school buildings; for insuring high school buildings; for supplying high school buildings with furniture and necessary apparatus; and for improving high school grounds."

The budget and levy was made for the following purposes: "Fund for the maintenance, acquisition and improvement of schools in the City of Albany within the boundaries of the City of Albany as they now are, said money so raised must be expended within the boundaries of the City of Albany."

[10] Giving, as we must and do, the word "support" the meaning found in the Code, we arrive at the conclusion that the item of \$3 for school building purposes is unwarranted by the charter, and for that reason is an illegal and void element in said tax levy, and that the tax rate should be reduced by this amount.

The conclusions which we have thus arrived at are not intended, however, to be given such a narrowness of application as to wholly forbid the application of school moneys derived from taxation to such uses as that of making those ordinary repairs in existing school structures as are required for their adequate use during the current year, or as are by such use made necessary for like uses in the succeeding year; nor to the emergency provision of such structures, temporary in character, as the immediate needs of the department require during any particular period. But the erection of such permanent buildings as are contemplated by this

tax cannot be brought by any rational interpretation within the otherwise limited meaning of the word "support."

Let the peremptory writ issue.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

207 Cal. 544

Ex parte LOVALL. (Cr. 3232.)

Supreme Court of California. July 9, 1929.

1. Criminal law $\S$ 90(1)—Under Stockton charter provision creating police court and limiting its jurisdiction to matters arising within city, police court did not have jurisdiction possessed by justice's court (Const. art. 11, § 8½).

Under charter provision of city of Stockton creating police court and providing that such court should have exclusive jurisdiction of all misdemeanors punishable by fine or imprisonment or by both fine and imprisonment committed within corporate limits of city and providing that court should have exclusive jurisdiction of certain actions, police court was not vested with jurisdiction possessed by justice's court, since police court's powers were expressly restricted and limited to matters arising within city, and it was not municipal court provided for by Const. art. 11, § 8½.

2. Criminal law $\S$ 84(4)—Constitution does not prevent establishment of police court with jurisdiction limited solely to proceedings arising under municipal ordinance of city (Const. art. 11, § 8½, as amended in 1914).

Const. art. 11, § 8½, as amended in 1914, does not prevent establishment of police court with jurisdiction limited solely to such proceedings, civil and criminal, as might arise under municipal ordinances of city in which such police court may be situated.

3. Criminal law $\S$ 90(6)—Stockton charter creating police court and limiting its power to matters arising within city does not abolish justice's court in city (Const. art. 11, § 8½, as amended in 1914; Code Civ. Proc. § 103).

Charter provision of city of Stockton creating police court and limiting its jurisdiction to matters arising within city does not abolish justice's court in such city or affect its jurisdiction, since Const. art. 11, § 8½, as amended in 1914, providing that in event municipal court is established by city charter there shall be no other inferior court in such city, has no application to such city nor to justice's court provided for such city by Code Civ. Proc. § 103.

In Bank.

Application for writ of habeas corpus to secure the release of Shadow Lovall from custody. Writ discharged, and petitioner remanded.

Sydney C. Bennett, of Stockton, for petitioner.

Brobeck, Phleger & Harrison and Maurice E. Harrison, all of San Francisco, and Nutter, Hancock & Rutherford, A. P. Hayne, Guard C. Darrah, Dist. Atty., and Tom H. Louttit, Asst. Dist. Atty., all of Stockton, for respondent sheriff.

CURTIS, J. Petitioner is confined in the county jail of the county of San Joaquin under and by virtue of a commitment issued out of the justice's court of the city of Stockton, in said county. The return to the writ of habeas corpus issued herein shows that petitioner was convicted of a misdemeanor and adjudged to pay a fine of \$500, and in default of the payment of such fine that he be imprisoned in the county jail of said county. No question is made as to the regularity of any of the proceedings in the action which resulted in the judgment against petitioner. The sole point made by petitioner for his release from said imprisonment is that there is no such court as the justice's court of the city of Stockton, and for that reason the commitment purporting to have been issued by the justice of the peace of said court is void, and furnishes no legal warrant for his imprisonment. In support of his contention petitioner relies upon the recent case of *Robertson v. Langford* (Cal. App.) 273 P. 150. In that case it was held that the police court of the city of San Jose, created under the charter of said city, possessed all of the powers of a municipal court, and was therefore in fact a municipal court, in the sense in which the term municipal court was used in section 8½ of article 11 of the Constitution of this state. This section of the Constitution provides that upon the creation of a municipal court by a city under the terms of said section of the Constitution "there shall be no other court inferior to the superior court." Accordingly it was held in the case involving the validity of the city justice's court of the city of San Jose that by the adoption of the charter creating a police court having all the powers and jurisdiction possessed by a municipal court, the justice's court in said city had been abolished.

The provision of the charter of the city of San Jose, prescribing the jurisdiction of the police court of said city, which was held in *Robertson v. Langford*, supra, to be a municipal court, was as follows: "Said police court and police judge shall have all the powers, authority and jurisdiction, both civil and criminal, that are now or may hereafter be conferred by law upon justices of the peace in California, and in addition thereto, said police court and police judge shall have exclusive jurisdiction of all proceedings for the violation of any ordinance of the city of San Jose."

The provisions of the charter of the city of Stockton creating a police court for said city and prescribing its jurisdiction are found in article 21 of said charter. Section 1 of this

article provides for the creation of a police court in said city of Stockton. Section 3 of said article was amended in 1927 (St. 1927, p. 2151), the original charter having been adopted in 1923 (St. 1923, p. 1371), and in its amended form, in so far as it may be necessary for the purposes of this proceeding, reads as follows: "Said police court shall have exclusive jurisdiction of all misdemeanors punishable by fine or by imprisonment or by both such fine and imprisonment committed within the corporate limits of the city. It shall also have exclusive jurisdiction of all actions for the recovery of any fines, penalties or forfeitures prescribed for the breach of any ordinance of the city, of all actions founded upon any obligation or liability created by any ordinance, and of all prosecutions for any violation of any ordinance. Said police court shall have jurisdiction in all civil cases, concurrently with the justices' courts of all actions and proceedings arising within the corporate limits of the city and which might be tried in such justices' court." The amendment of 1927 does not affect materially any question arising in this proceeding.

[1] It will readily be seen by a comparison of the respective charter provisions of these two cities, vesting jurisdiction in the police courts created by their charters, that there is a marked difference in the jurisdiction conferred upon the police court of the city of San Jose and that conferred upon the police court of the city of Stockton. By the charter of the city of San Jose it is expressly provided that the police court of that city shall have "all powers, authority and jurisdiction, both civil and criminal, that are now or may hereafter be conferred by law upon justices of the peace," while in the charter of the city of Stockton the jurisdiction of the police court of that city is definitely and expressly limited and fixed in both civil and criminal proceedings to matters arising within the corporate limits of the city of Stockton. The difference in the jurisdiction of these two courts is just the difference between the jurisdiction of an ordinary justice's court, and an inferior, or police court, limited in its authority and powers to matters arising within the corporate limits of the municipality wherein it is situated. The criminal jurisdiction of justices' courts over certain public offenses such as petit larceny, assault and battery, breaches of the peace, and other misdemeanors, extends to all such offenses committed within the county in which said courts are established. Pen. Code, § 1425. In civil matters the justices' courts have jurisdiction of many actions arising without the city or township within which they are situated. These are enumerated in section 832 of the Code of Civil Procedure and need not be mentioned in detail. The basis of the decision in *Robertson v. Langford*, supra, was that by

various acts of the Legislature the justices' courts have had conferred upon them jurisdiction covering all matters not vested in courts of record, and that by the charter of the city of San Jose the police court of said city was vested with like jurisdiction. Therefore the court in that case held that said police court was in fact a municipal court, and under the constitutional provision above referred to, the creation and establishment of such a court in the city of San Jose abolishes all courts in said city inferior to the superior court. In the present proceeding, however, we have an entirely different state of facts. The police court of the city of Stockton has not been vested with the jurisdiction possessed by a justice's court, in that its powers are expressly restricted and limited to matters arising within the city. It could not, therefore, under the theory under which the case of *Robertson v. Langford* was decided, be held to be in any sense such a municipal court as is provided for by section 8½ of article 11 of the Constitution.

There are cases, both in this state and in other jurisdictions, which, in effect, hold that a police court or a recorder's court is a municipal court. *Uridias v. Morrill*, 22 Cal. 474; *Mathie v. McIntosh*, 40 Wis. 120; *In re Baxter*, 3 Cal. App. 716, 86 P. 998. Generally speaking, this may be true, but we think when we come to examine section 8½ of article 11 of the Constitution of this state, by the terms of which cities of the state are given the power to establish either a police or a municipal court, that these cases are not applicable. Prior to 1914, by this section of the Constitution, cities were given power in their charters to establish police courts only. By the amendment thereto, adopted in 1914, the power of cities in respect to the establishment of inferior courts was enlarged, and they were given authority to establish municipal courts as well as police courts. That portion of said section with which we are now concerned, after its amendment in 1914, and now, reads as follows:

"Sec. 8½. It shall be competent, in all charters framed under the authority given by section eight of this article, to provide, in addition to those provisions allowable by this Constitution, and by the laws of the state as follows:

"1. For the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attachés; and for the establishment, constitution, regulation, government and jurisdiction of municipal courts and judges thereof, with such civil, criminal and magisterial jurisdiction as by law may be conferred upon inferior courts and judges thereof; and for the manner in

which, the times at which and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attachés; provided, such municipal courts shall never be deprived of the jurisdiction given inferior courts created by general law.

"In any city or any city and county, when such municipal court has been established, there shall be no other court inferior to the superior court; and pending actions, trials, and all pending business of inferior courts within the territory of such city or city and county, upon the establishment of any such municipal court, shall be and become pending in such municipal court, and all records of such inferior courts shall thereupon be and become the records of such municipal court."

[2] It will thus be seen that this section of the Constitution, after its amendment in 1914, expressly provides for the establishment of both a police court and a municipal court. It is inconceivable that the framers of the amendment of 1914, whereby municipal courts were for the first time expressly provided for, intended that the court for which they were then providing was nothing more nor less than a police court. If a police court is the same thing as a municipal court, then the amendment of 1914 to said section 8½ was entirely unnecessary. We think the conclusion is inevitable that by the adoption of the amendment of 1914 it was the intention to provide for the establishment of two distinct classes of courts in the cities of the state, one a police court and the other a municipal court.

It is further apparent from the provisions of said section that the municipal court therein mentioned must be vested "with such civil, criminal and magisterial jurisdiction as by law may be conferred upon inferior courts and judges thereof," and that "such municipal courts shall never be deprived of the jurisdiction given inferior courts created by general law." No such requirement as the above is made concerning police courts. There is nothing in this section of the Constitution, nor in any other provision of the law, to our knowledge, which would prevent the establishment of a police court with jurisdiction limited solely to such proceedings, civil and criminal, as might arise under municipal ordinances of the city in which said police court may be situated. For these reasons, as well as others that might be mentioned, we conclude that the authorities above cited have no application to the police and municipal courts provided for in said section 8½ of article 11 of the Constitution. It is also perfectly clear from the terms of said section that the police court established by the charter of the city of Stockton is not a municipal court as that court is provided for in said section. We have above referred to the limited scope of

its jurisdiction. It is not vested "with such civil, criminal and magisterial jurisdiction as by law may be conferred upon inferior courts." On the other hand, it is deprived of much of the jurisdiction given inferior courts created by general law, as we have shown in the first part of this opinion. It cannot in any sense be considered or held to be a municipal court.

[3] The provisions of section 8½ of article 11 of the Constitution declaring, in the event a municipal court is established in any city by its charter, that there shall be no other inferior court in said city has therefore no application to the city of Stockton nor to the justice's court provided for such city by section 103 of the Code of Civil Procedure. The justice's court in said city has not been abolished, or in any manner affected by the adoption by said city of its charter, nor by the amendment thereof enacted in 1927. It follows therefore that the commitment issued out of said court under which petitioner is now held as a prisoner in the county jail of the county of San Joaquin is legal and valid and that petitioner is not unlawfully restrained of his liberty. This conclusion renders it unnecessary for us to consider other arguments made by the respondent in answer to petitioner's contention that the justice's court of said city has no legal existence. The writ is discharged.

The petitioner is remanded to the custody of the sheriff of said county of San Joaquin.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

100 Cal. App. 797

George E. FRIOUX, Petitioner, v. Fred H. JOHNSON, as Auditor of County of San Joaquin, State of California, Respondent. (Civ. 3795).

District Court of Appeal, Third District, California. July 16, 1929.

Application for writ of mandate prayed to be directed to respondent as Auditor of San Joaquin County requiring him to audit salary warrant of petitioner. Writ granted.

Superseding 276 P. 128, and following In re Lovall (Sup.) 279 P. 452.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for petitioner.

Guard C. Darrah, Dist. Atty., and Tom H. Louttit, Asst. Dist. Atty., both of Stockton, for respondent.

PER CURIAM. Upon the authority of the case of Ex parte Lovall on habeas corpus, 279 P. 452, recently decided by the Supreme

Court, distinguishing the questions involved in the above-entitled case from that of Robertson v. Langford (Cal. App.) 273 P. 150, it is hereby ordered that the writ prayed for be, and the same is hereby, granted.

100 Cal. App. 1

REGALIA v. MARIANI. ★

MARIANI v. REGALIA.

(Civ. 6422.)

District Court of Appeal, First District, Division 1, California. July 13, 1929.

Hearing Denied by Supreme Court Sept. 3, 1929.

1. Landlord and tenant ⇨22(2)—Agreement to execute lease of restaurant sold, containing no date when lease was to begin, held not construable as lease.

Written agreement for sale of restaurant business and for lease of premises, reciting receipt of deposit on purchase price of restaurant, that sale was to be consummated by certain date but that vendor could rescind by refunding deposit, and that certain rental was to be paid on first of each month, with option on part of vendee to renew lease, but not providing date for commencement, held not construable as lease in present but was agreement to execute lease in future.

2. Sales ⇨126(1)—Lapse of month between restaurant vendor's refusal to execute lease as agreed and vendee's election to rescind held not unreasonable.

Lapse of about one month between refusal of vendor of restaurant business to execute lease of building as agreed in written agreement for sale of business and vendee's election to rescind agreement held not an unreasonable time.

3. Evidence ⇨397(1)—Excluding testimony which could only tend to vary terms of unambiguous written agreement held not error.

Where testimony excluded could only tend to vary terms of written agreement for sale of restaurant and to execute lease, terms of which were in no way uncertain, there was no error in not permitting cross-examination thereon.

Appeals from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Consolidated actions by Fillipio Regalia against Tony Mariani, and by Tony Mariani against Fillipio Regalia. Judgment adverse to Tony Mariani, and he appeals. Affirmed.

Joseph J. McShane and J. W. Flynn, both of San Francisco (David K. Watkins, of San Francisco, of counsel), for appellant.

Lelia R. Leep and Sumner Hurd, both of San Francisco, for respondent.

PER CURIAM. The above two actions, wherein Fillipio Regalia is plaintiff and respondent and Tony Mariani is defendant and appellant in one, and in the other Tony Mari-

ani is plaintiff and appellant and Fillipio Regalia is defendant and respondent, were consolidated in the lower court and tried together and a single judgment entered; the court adjudging that Fillipio Regalia have and recover from Tony Mariani the sum of \$1,500, together with interest and costs, and that a contract entered into between the parties be rescinded, canceled, and delivered up to Fillipio Regalia, and that Tony Mariani have and recover from Fillipio Regalia \$300 as rent for the use of certain premises. The appellant has appealed from that part of the judgment wherein the court adjudged that Fillipio Regalia have rescission of the agreement of purchase and sale, the return to him of \$1,500, that Tony Mariani has not sustained damages, and that Fillipio Regalia is entitled to costs.

Respondent Regalia brought an action against appellant Mariani asking for the rescission of an agreement of purchase and sale of a certain restaurant business and the personal property used as equipment therein and the return of \$1,500, the purchase price paid. Some three months after this action was filed, appellant Mariani commenced an action against respondent Regalia in unlawful detainer, claiming respondent was in default in the payment of rent.

Respondent paid to appellant, who was the owner of the restaurant in question and the building in which it was being conducted, located at 2042-2044 Seventeenth street in the city of San Francisco, the sum of \$1,500 as the consideration of the purchase price of the restaurant business, the personal property used in and about such premises and business, and an agreement to lease to him the premises. Prior to filing the action for rescission, respondent duly served a notice of election to rescind the agreement, concerning the validity of which no point is made.

The agreement, which was signed by respondent and appellant, is as follows: "May 28, 1927. Received of Fillipio Regalia the sum of one hundred (\$100.00) dollars as deposit on purchase of restaurant located at No. 2042 and 2044 Seventeenth Street, total purchase price fifteen hundred (\$1500.00) dollars. Vendor is Mr. Tony Mariani. It is understood sale is to be consummated by June 4, 1927, but vendor, Tony Mariani, may rescind this contract on or before that date by refunding the said deposit of one hundred (\$100.00) dollars. Rent of seventy-five (\$75.00) dollars per month is to be paid on the first of each and every month and if not said contract is to be considered terminated and said purchase price of fifteen (\$1500.00) hundred dollars is to be retained by vendor, Tony Mariani, and said vendee Fillipio Regalia is to remove from said premises. Sale includes all furniture, fixtures, dishes, cooking utensils, etc. A lease of three (3) years at seventy-five (\$75.00) dollars per month is to be entered into by said vendor and said vendee with option on part of

said vendee to renew said lease for an additional two years. If said vendor refuses to sell by said June 4, 1927, he may not sell to any other party, except he give to said vendee an additional two hundred (\$200.00) dollars. Vendor may retain said restaurant for himself, however."

At the time of the execution of the receipt or agreement respondent paid to appellant \$100 as evidence of good faith, and upon taking possession on June 4, 1927—appellant not having elected to rescind as permitted by the agreement—paid to appellant the further sum of \$1,400, the balance of the purchase price.

According to the terms of the agreement, a lease for a term of three years at \$75 per month rent was to be given by appellant to respondent, with the option on the part of respondent to have the lease renewed for an additional term of two years. On June 4, 1927, respondent was tendered an unsigned lease restricting the use of the premises to residential purposes, thereby denying respondent the right to conduct in the premises the restaurant business he had purchased from appellant and for which he desired the premises without securing the written consent of appellant, and which omitted the option of an additional two-years' term, and demand was made upon respondent for the additional sum of \$100 as a condition precedent to the signing of the lease by appellant, as security for the preservation of the property. A subsequent lease was prepared from data furnished by respondent's attorney. This appellant refused to sign, according to the testimony of respondent's attorney, stating that "he owned the property and wouldn't sign a lease except on his old terms and he would not sign a lease at all unless the \$300 was put up on deposit." The witness also testified: "Mr. McShane (appellant's counsel) told me before that that there would have to be a deposit for this lease."

The following points are urged by appellant: (1) That the evidence does not sustain the findings; (2) the findings do not support nor justify the judgment; (3) the judgment is against law; (4) errors of the court in the admission and rejection of evidence.

The first three assignments may be considered together. The court found all the allegations of respondent's complaint to be true; that respondent and appellant entered into an agreement on May 28, 1927, whereby respondent agreed to purchase from appellant certain personal property located at 2042-2044 Seventeenth street in the city and county of San Francisco for the purpose of conducting a restaurant, and as a material part of the purchase and sale, appellant agreed to deliver to respondent a written lease of the premises for a period of three years, with the privilege of renewal thereof for a further length of time, at a monthly rental of \$75 a month; that the purchase price of such restaurant business, including furniture, fixtures, dishes, cooking

utensils, etc., and leasehold interest in the premises, was the sum of \$1,500, all of which sum was fully paid; that appellant delivered to respondent the restaurant business, furniture, fixtures, cooking utensils, dishes, etc., but that appellant failed and refused to deliver to respondent a lease of said premises as agreed, although repeated demands were made on appellant therefor by respondent; that such lease is of great value to respondent as security for his future right to occupy the premises for the purposes for which they were intended; that respondent has fully performed all the covenants and conditions of the agreement on his part and that although formal demand and notice of election to rescind the contract by reason of the failure of the consideration to respondent has been made, as also demand for the return of the \$1,500 paid, appellant has failed and refused to pay respondent the sum of \$1,500 or any part thereof; that respondent is entitled to and has duly shown cause why the agreement of September 28, 1927, should be and the same is rescinded. The conclusions of law follow these findings, which find support in the evidence, and adjudge that respondent is entitled to a rescission of the agreement of purchase and sale and that respondent is entitled to the return of the \$1,500 paid by him on account of the agreement.

[1] The main point urged by appellant is that if the agreement to give the lease is a valid one, the agreement is equivalent to a lease where the tenant goes into possession thereunder with the consent of the lessor, even though a formal lease was promised and refused, and has cited authority in support of his position, holding: "The entry under the written contract for a lease for a stated term and at a stated rent, and the payment and receipt of the rent, constituted a valid lease between the parties for the term, and at the rental specified." *Cheney v. Newberry*, 67 Cal. 125, 7 P. 444. We do not question this principle, but merely its application to the question here presented. While it is true that respondent paid the purchase price and went into possession under the agreement, certain other essentials are necessary to make an agreement to lease equivalent to a written lease. In *Levin v. Saroff*, 54 Cal. App. 285, 201 P. 961, 963, cited by appellant, while the court does say, "The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract which was already expressed in writing," and that "to create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed term; and, third, a definite and agreed price of rental, and the time and manner of payment," the court also says, "Whether an instrument is a lease in present or an agreement to execute a lease in

future is largely a question of the intention of the parties." In the present case the agreement is primarily a receipt for \$100 paid on purchase price of the restaurant equipment, which sale was to be consummated on June 4th. Should the vendor not go on with the sale by June 4th, he was to return to the prospective vendee the \$100; the receipt or agreement providing: "If said vendor refuses to sell by said June 4, 1927, he may not sell to any other party, except he give to said vendee an additional two hundred (\$200.00) dollars."

The agreement in the *Levin Case* was a formal agreement setting forth all of the terms and conditions which were to go into the lease, and all of such terms and conditions were intended by the parties to be incorporated in the lease, while here it is evident that the clause in the receipt that "a lease of three (3) years at seventy-five (\$75.00) dollars per month is to be entered into by said vendor and said vendee with the option on the part of said vendee to renew said lease for an additional two years" was intended to be an agreement to make a lease in the future and was not intended as a lease. That being so, the receipt or agreement should not be construed as a lease, as "an agreement to execute a lease in future is largely a question of the intention of the parties." *Levin v. Saroff*, supra. Furthermore, the receipt or agreement does not meet the requirements stated in *Levin v. Saroff*, supra, in that there is no date agreed upon when the three-year term is to begin. It is true the sale of the personal property was to take place by June 4th, in the event appellant should not conclude that he did not care to go on with the transaction, in which event the initial payment was to be returned, but there is no stipulation at what date the three-year lease was to begin.

There is no foundation for appellant's contention that both parties construed the agreement to be that appellant should pay the \$300 demanded as security. Respondent merely said that he would think it over and never so agreed, and the oral contract, if made, was never executed. A contract in writing may only be altered by another contract in writing or by an executed oral agreement. Civ. Code, § 1698.

[2] There is no merit in the contention that respondent did not rescind promptly. The matter of executing the lease was under discussion between counsel for the respective parties, and two leases were drawn up which appellant refused to sign, and finally, according to the testimony of respondent's counsel, either in the latter part of August or the first part of September appellant finally refused to sign the lease except on the old terms and then not until the \$300 was put up or deposited, and on September 28th the notice of election to rescind was served on appellant, and on September 30th the action was filed. It ap-

pears that about one month's time elapsed between appellant's refusal and respondent's election to rescind. This was not an unreasonable time.

[3] This disposes of the questions presented by appellant's first three assignments. As to the fourth—"errors of the court in the admission and rejection of evidence"—under which appellant contends that it was error not to permit appellant to cross-examine respondent's counsel as to the understanding of giving security, it may be said that such testimony was properly excluded, as such examination could only elicit testimony tending to vary the terms of the written instrument, the terms of which were in no way uncertain.

The judgment is affirmed.

100 Cal. App. 28

BOOTH v. BOOTH. (Civ. 6662.)

District Court of Appeal, First District, Division 2, California. July 16, 1929.

1. Divorce ⇨204—Judgment for permanent maintenance held permissible, though there were no findings entitling wife to divorce (Civ. Code, § 136).

Under Civ. Code, § 136, judgment for permanent maintenance held permissible, though there was no finding that wife suffered grievous bodily injury or grievous mental suffering, and thus judgment of divorce could not have been sustained.

2. Divorce ⇨237—Court properly exercised discretionary power to require husband to provide permanent maintenance for wife in view of circumstances showing unhappy marital relation of parties (Civ. Code, § 136).

Where evidence showed that husband refused to provide wife with reasonable and suitable home and that he would not resume relation of husband and wife, and other circumstances showing unpleasant and unhappy marital relation of parties, court was warranted in exercising its discretionary power under Civ. Code, § 136, to require husband to provide for wife a permanent maintenance.

3. Divorce ⇨240(5)—Where husband earned \$300 per month and wife was unable to work, award of \$125 monthly for separate maintenance held not excessive.

Where husband was earning \$300 per month and wife was ill and under constant care of physician and was unable to do any work, allowance of \$125 per month to wife for separate maintenance held not excessive.

4. Divorce ⇨245(1)—Court awarding permanent separate maintenance to wife retains jurisdiction to alter or revoke order for maintenance when circumstances require (Civ. Code, § 136, and § 137 as amended by St. 1927, p. 441).

Under Civ. Code, § 136, and section 137 as amended by St. 1927, p. 441, court awarding per-

manent separate maintenance to wife retains jurisdiction to vary, alter, or revoke order for maintenance when upon proper showing it deems exigencies of case or circumstances of parties require it.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action for divorce by Charles Stuart Booth against Lola Warrington Booth. From a judgment denying a divorce and awarding separate maintenance, plaintiff appeals. Affirmed.

Leon J. Dugan, Soren X. Christensen, and J. C. Wood, all of San Francisco, for appellant.

William E. Harvent, of Oakland, for respondent.

BURROUGHS, Justice pro tem. Plaintiff Charles Stuart Booth, and defendant, Lola Warrington Booth, are husband and wife. Plaintiff commenced this action for divorce. The defendant asked for separate maintenance. The court denied the divorce and granted the defendant separate maintenance in the sum of \$125 per month. The plaintiff appeals from the judgment. He does not complain of the judgment in so far as it denies him a divorce, but only that portion thereof granting the defendant separate maintenance.

[1] The record discloses the following facts: The complaint alleges a cause of action on the ground of extreme cruelty. The answer denies the allegations of cruelty, and by a cross-complaint the defendant also alleges extreme cruelty and asks for separate maintenance only. The answer to the cross-complaint denies the alleged cruelty, and on the issues thus framed the cause was tried by the court, findings of facts and conclusions of law made and filed, and the judgment complained of was entered. The evidence discloses that the parties are living separate and apart, and the conclusion is amply justified from both the evidence and the findings that such separation was without the fault of the defendant. Upon sufficient evidence the court found that many of the acts of cruelty set forth in the cross-complaint were true, and although there is evidence in the record that said acts caused respondent a great deal of worry and were responsible for her nervous condition and broken health, there is no finding of fact that such acts of cruelty occasioned the cross-complainant either grievous bodily injury or grievous mental suffering. It is claimed by appellant that in the absence of such a finding the record is insufficient to sustain a judgment for divorce and that permanent maintenance can only be granted in those cases where the wife is entitled to a divorce, or where the facts show willful desertion or willful failure to provide for the wife under section 137 of the Civil Code as amended by

St. 1927, p. 441. In support of this claim he cites section 137, Civil Code, as amended, which, so far as material to this decision, is as follows: "When the husband or wife willfully deserts the wife or husband, as the case may be, or when the husband or wife has any cause of action for divorce as provided in section 92 of this code, he or she may, without applying for divorce, maintain in the superior court an action against her or him for permanent support and maintenance of himself or herself or of himself and children, or of herself and children. When the husband willfully fails to provide for the wife, she may, without applying for divorce, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children." It is argued by appellant that as respondent's cause of action is not based upon willful desertion or willful failure to provide, as authorized by the section of the code last cited, she must allege and prove and the court must find in her favor a complete cause of action for divorce as provided in section 92 of the Civil Code. It may be conceded that the cross-complaint is not predicated upon willful desertion or willful failure to provide under section 137 of the Civil Code as amended, but that a cause of action on the ground of extreme cruelty under subdivision 2, section 92, of the Civil Code is therein stated, and the court having failed to find that the acts of cruelty which were found to be true inflicted either grievous physical injury or grievous mental suffering upon respondent, the findings are insufficient to sustain a judgment of divorce. *Nelson v. Nelson*, 18 Cal. App. 602, 123 P. 1099; *Smith v. Smith*, 124 Cal. 651, 57 P. 573; *Franklin v. Franklin*, 140 Cal. 607, 74 P. 155. But appellant has failed to give any consideration to section 136, Civil Code, which provides: "Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and children of the marriage, or any of them." Construing the last-cited section, the court in *Hagle v. Hagle*, 68 Cal. 588, 9 P. 842, held that even though the husband has not been guilty of anything amounting to legal cruelty, which was the ground for divorce in that action, his conduct was such that it was impossible for the parties to live happily together and the court was justified in granting the wife separate maintenance. In *Broad v. Broad*, 35 Cal. App. 646, 170 P. 658, each of the parties sought a divorce from the other on the ground of extreme cruelty, but a divorce was denied either party and separate maintenance granted the wife. The sole question there presented was whether the court, where it was found that the wife was not entitled to a divorce, and was living apart from her husband, could make an award of separate maintenance under section 136, Civil Code. The court there said: "In this state section 137, of the Civil

Code gives to the wife the right to maintenance where she has a cause for divorce but waives it; and section 136—which has stood alone since its passage—when construed in relation to section 137 and other cognate sections, seems clearly to contemplate relief in cases where the wife may not be entitled to a decree of divorce. To give the section the construction contended for by the appellant would be to treat it as a useless enactment, adding nothing to the body of our law. Such an interpretation will not be given to an enactment of the legislature if it can be reasonably avoided." *Jacobs v. Jacobs*, 68 Cal. App. 725, 230 P. 209, 210, is a case similar to *Broad v. Broad*, supra, and it is there said: "We have not been cited to any case in this state holding that the trial court is without jurisdiction to award alimony to an unoffending wife where she has been unable to establish grounds for divorce." Although in the case at bar, in the absence of a finding that the cross-complainant suffered either grievous bodily injury or grievous mental suffering, a judgment of divorce could not be sustained, yet under the foregoing authorities, a judgment for permanent maintenance is permissible.

[2] The appellant also claims that the evidence is insufficient to sustain the finding of extreme cruelty or the judgment based thereon because the acts alleged and proven are trivial in their character and were not such as would destroy the object of matrimony. Upon sufficient evidence the court found that in the month of May, 1924, the respondent asked appellant to provide them a reasonable and suitable home, but that he refused and ever since said time has refused to do so, and he also told her "that she could stay put, that he liked the simple life," and "to forget about ever going back with him to live as husband and wife." At another time he told her "that he did not want to resume the relation of husband and wife and that he had thought the matter over and had decided that they should live apart." In January, 1925, the parties met in San Francisco, and plaintiff told his wife that he did not have any intention of living with her again as man and wife and to just forget it. The court also found on sufficient evidence that in November, 1924, appellant left respondent in Oakland, under pretext of going on a trip to Los Angeles, and the respondent afterwards learned that he had gone to San Francisco and remained there for two days on a wild party. There are other circumstances of a similar character shown by the evidence and found by the court to be true, but the foregoing illustrates the attitude of appellant toward respondent, and the unpleasant and unhappy marital relation of the parties. Under such circumstances the court was warranted in exercising its discretionary power under the provisions of section 136 of the Civil Code and to require

the husband to provide for his wife a permanent maintenance.

[3, 4] There is one other claim advanced by appellant that requires consideration. He claims that the award of \$125 per month is excessive. The evidence shows that the appellant is earning \$300 per month. Also that the respondent is ill and under the constant care of a physician and because of her ailment, valvular disease of the heart, she is unable to do any work whatever. Further her necessary expenditures for medicine and medical aid amount to from \$12.50 to \$30 per month and her board and laundry cost \$50 per month. Add to these items the cost of clothing and necessary incidental expenses, we cannot say that the sum allowed is excessive. Furthermore, we are of the opinion that construing section 136 and section 137 (as amended) of the Civil Code together, the court retains its jurisdiction to vary, alter, or revoke such order for maintenance when, upon a proper showing, it deems the exigencies of the case, or the circumstances of the parties, require it.

The judgment is affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

100 Cal. App. 7

FEAGINS v. BURTON. (Civ. 5350.)

District Court of Appeal, Second District, Division 2, California. July 13, 1929.

1. Exchange of property ⇨ 13(1)—Where defendant agreed to allow \$500 credit on automobile plaintiff might select, but refused to deliver automobile selected, plaintiff could sue on indebtedness.

Where defendant, in exchange transaction, allowed plaintiff credit of \$500 on any used automobile plaintiff might select from defendant's stock within six months, and plaintiff selected an automobile, but defendant offered to deliver automobile only if plaintiff paid \$40 because of difference on trade, and thus failed to carry out his obligation under contract, plaintiff was under no obligation to make another choice, but could sue on money obligation.

2. Exchange of property ⇨ 13(1)—Defendant's conditional offer to deliver automobile plaintiff selected was refusal to perform, authorizing immediate suit without waiting for expiration of contract (Civ. Code, § 1494).

Where defendant in exchange transaction agreed to allow plaintiff \$500 credit on any used automobile plaintiff might select from defendant's stock within six months, and plaintiff selected automobile, but defendant refused to deliver it, unless plaintiff paid \$40 because of another transaction, defendant's conditional offer was a refusal to perform, under Civ. Code, § 1494, providing that offer of performance must be free from conditions justifying an immediate

suit by plaintiff without waiting for the expiration of the six-month period.

Appeal from Superior Court, San Bernardino County; Benjamin Warmer, Judge.

Action by N. B. Feagins against H. N. Burton. From a judgment for plaintiff, defendant appeals. Affirmed.

Pollock & Mitchell, of Ontario, for appellant.

Arthur O. Dillon and E. H. Jolliffe, both of Ontario, for respondent.

IRA F. THOMPSON, J. On July 30, 1924, appellant and respondent entered into a written agreement whereby respondent, who owned an equity in a certain ranch in Riverside county, Cal., agreed to deed his equity therein, together with certain personal property located on the ranch, to appellant, who in turn agreed to deliver to respondent a certain Willys-Knight automobile, and also to deliver to respondent an agreement of credit, allowing him a credit of \$500 on any used car respondent might desire to choose from appellant's stock of used cars within six months from the date of the contract. The evidence established the following facts: That respondent performed every act required of him to be performed under the terms of the contract, and that appellant delivered to respondent the Willys-Knight automobile, but failed to deliver the credit memorandum above referred to. These further facts were brought out by the evidence: That during the six-month period respondent made several trips to appellant's showroom, and looked at the cars there on display; that on different occasions he selected two Ford automobiles from among appellant's stock, but did not purchase them, because appellant informed him they had already been sold; that on another occasion, some time in January, 1925, respondent selected a Gardner automobile from appellant's stock; that appellant told him the price of this car was \$345, but that respondent would have to pay him an additional \$40 to make up for a horse that appellant claimed had not been delivered to him under the terms of the contract; that respondent refused to pay the \$40, and appellant refused to deliver the automobile to respondent. The evidence further showed that during the six-month period appellant paid certain creditors of respondent sums of money amounting to \$117.29, and that the parties agreed that this sum should be deducted from the \$500 credit owing to respondent, which left a balance of \$382.71. On January 26, 1925, respondent brought suit for the sum of \$382.71, or, in lieu thereof, an automobile whose market value was reasonably worth the sum of \$382.71. The court rendered judgment for this sum, together with

interest and costs, from which judgment appellant takes this appeal.

[1] Appellant contends that "In the case at bar there was no promise to pay any sum of money; there was no promise to pay any sum of money in merchandise," and on this basis he contends the judgment for the direct payment of money was erroneous. This case presents the question: Did the contract involved here create such an indebtedness owing from appellant to respondent that upon appellant's failure to pay in specific property, respondent was entitled to sue on a money obligation?

Looking at the contract in its entirety (which contract appellant admitted he composed), it discloses the fact that respondent's consideration for deeding the ranch to appellant was the Willys-Knight automobile, and an additional \$500 as a credit to respondent on another automobile that respondent "may desire to choose from Mr. Burton's stock within the next six months." The facts above recited show that in at least three instances respondent picked out automobiles from appellant's stock which were satisfactory to respondent, and that his failure to purchase them was through no fault of his. Under the terms of the contract, appellant's obligation to sell respondent any automobile he might desire to choose was unconditional, and, when appellant sought to add to the price of the Gardner automobile, or in effect charge respondent more for the car than he would have charged another customer, he failed to carry out his obligation under the contract, and respondent was under no obligation to make another choice, but could sue on the indebtedness, which he subsequently did.

The case of *Irvine v. Postal Tel. Cable Co.*, 37 Cal. App. 61, 173 P. 487, answers the above question. The facts were as follows: Under a contract with defendant, plaintiff granted a right of way over his land for the erection of poles, etc., to be used in the telegraph company's business, the consideration to be certain telegraph privileges amounting to \$1,500. Plaintiff performed all of the obligations on his part to be performed, but defendant granted him telegraph privileges only in the sum of \$500.26. The defendant contended that, inasmuch as the federal and state law enacted since the execution of the contract prohibited it from issuing franks for any consideration, and that no consideration other than franks could be required of defendant under the terms of the contract, therefore it was relieved of further performance. The court said: "This position is untenable under the construction of the contract compelled by the weight of authority, namely, that by its terms the contract in question is in effect in the alternative * * * the contract provides that the consideration for the rights granted by said agreement is 'telegraph privileges * * * to the amount of \$1,500,

which said amount shall be taken in the use of telegraph privileges at the usual and ordinary rates.' Upon the failure of the obligor to deliver telegraph franks when needed and requested the contract, in our opinion, became one to pay the sum of money designated as the consideration for the privileges granted by the contract"—citing *Marshall v. Ferguson*, 23 Cal. 69; *Beckwith v. Sheldon*, 168 Cal. 742, 145 P. 97, Ann. Cas. 1916A, 963. See, also, *Gillin v. Hopkins*, 28 Cal. App. 579, 153 P. 724; and *Beal v. United Properties Co.*, 46 Cal. App. 287, 189 P. 346.

[2] Appellant also contends that the action was brought prematurely, in view of the fact that the complaint was filed on January 26, 1925, and six months from the date of the contract did not expire until January 30, 1925. The evidence established the fact that the conversation between the parties with regard to the Gardner automobile occurred in January, 1925, but the exact day of the month is not made apparent by the record. The date is immaterial, however, if there was a refusal on the part of appellant to deliver "any automobile plaintiff might desire to choose from appellant's stock," during the six months. California Jurisprudence, vol. 6, § 242, in its chapter on Contracts, states the rule as follows: "A person is forbidden, it is true, to make his offer dependent upon any conditions which the other party is not bound, on his part, to perform, and it has been declared, if one who is bound to a contract annexes an unwarranted condition to his offer of performance, this is, in effect, a refusal to perform"—citing *Woody v. Bennett*, 88 Cal. 241, 26 P. 117. Section 1494 of the Civil Code is as follows: "An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform." The case of *Woody v. Bennett*, supra, involved the sale of a horse with right of exchange, in the event the horse was not able to overcome a certain physical defect which defendants guaranteed could be overcome with proper applications. Plaintiffs found the defect to be hereditary, and demanded the exchange, but defendants refused to exchange the horse, unless plaintiffs agreed to pay for a certain other horse which defendants claimed they had previously agreed to purchase. (The plaintiffs had not in fact agreed to make this latter purchase.) The court held that the conditional offer of defendants was equivalent to a refusal to exchange, and justified plaintiffs in suing. The respondent's testimony with regard to the Gardner car was that he "picked out" a Gardner car which he saw sitting out in the yard; that Mr. Burton offered it to him for \$345 and asked him for \$40 because of some difference on the ranch trade about a horse, that he wouldn't pay the \$40 and that he did not get the car. On cross-examination the appellant testified: "I was trying to have Mr. Feagins settle for the horse which I have not

yet found; he was to put up forty dollars (\$40.00) to be delivered to me if the horse wasn't found." Under the authorities above cited, it is clear that appellant's conditional offer was a refusal to perform.

The other contentions are in fact covered by the discussion heretofore, and need not be discussed further in view of the conclusion reached.

Judgment affirmed.

I concur: CRAIG, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

99 Cal. App. 341

SWITHENBANK v. WOOD et al. (Civ. 3741.)

District Court of Appeal, Third District, California. July 5, 1929.

Landlord and tenant §90(1)—Tenant holding over after lease expired and landlord's refusal to renew or accept rent did not "hold by landlord's permission," creating presumption of acquiescence in renewal of lease (Code Civ. Proc. § 1161, subd. 2).

Where landlord had expressly refused to renew lease or to accept rent tendered at expiration of term thereof to be applied on new term, tenant was not as a matter of law holding over "by permission of landlord" within Code Civ. Proc. § 1161, subd. 2, so as to create presumption of acquiescence in renewal of lease arising from possession of tenant and receipt of rent by landlord after expiration of lease.

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 278 P. 496.

H. C. Nelson, of Eureka, for appellants.

A. G. Bradford, of Eureka, for respondent.

PER CURIAM. Appellants have filed a petition for a rehearing. Referring to the finding quoted in the opinion, to the effect that as a part of the transaction relating to the exchange of bills of sale by the parties the "plaintiff stated to said defendant Wood that said sheep would not be segregated or separated until a sale or partition of said ranch," petitioners say: "In view of the foregoing finding it is evident that the refusal on the part of plaintiff to execute a new lease upon or just prior to the expiration of the old lease did not take the case out of the requirements laid down in subdivision 2, section 1161, of the Code of Civil Procedure." The finding referred to is of a mere evidentiary fact, not responsive to any issue in the case. It does not appear that the defendants con-

sented to or that the parties agreed upon such postponement of the segregation and separation of the sheep until a sale or partition of the ranch. It was within the exclusive province of the trial court to determine whether such evidentiary fact, together with the presumption relied upon by the defendants, or the evidence to the contrary, was of the greater weight.

Petitioners contend that the evidence is insufficient to overcome such presumption. In a case originating prior to the enactment of section 1945 of the Civil Code, relating to the presumption arising from the possession of the tenant and the receipt of rent by the lessor after the expiration of the term of a lease, the parties to a lease for years had a conversation about the future occupation of the premises, after the end of the term, but no other lease was executed. The tenant continued in possession, paying the same rent as before. He testified that he "refused to make a new lease." The court instructed the jury that, if they found the facts as stated herein, the lessee became a tenant from year to year. In reversing the judgment the Supreme Court said: "We think that the conversation of the parties, had after the expiration of the lease for years, and their disagreement as to the term during which the defendant was thereafter to remain, should have gone to the jury for the purpose of ascertaining how or for what term the tenant was thereafter to hold. * * * If, as here, the evidence offered on the part of the defendant went to show that he had expressly refused to accept a term of one year, that fact would tend to overthrow and destroy the mere presumption drawn from the subsequent payment of rent—that he was to continue to hold thereafter for the space of one year." *Skaggs v. Elkus*, 45 Cal. 154, 160; *Underhill on Landlord and Tenant*, § 98; 35 C. J. 1031.

In construing a statute relating to leases of agricultural lands, similar to the provisions of section 1161 upon which appellants rely, it is said: "The meaning of that article is simply this: That, if both parties to the lease remain silent and inactive for the space of one month after the expiration of the lease, they shall both be presumed to have acquiesced in, and tacitly consented to, a renewal of the lease for another year. It has no application whatever when either party has clearly announced his intention not to renew the lease on the same terms or for a full year, for the purpose of the law is not to force a contract upon parties unwilling to contract, but merely to establish a rule of evidence, or presumption, as to their intention in the premises." *Ashton Realty Co. v. Prowell*, 165 La. 328, 115 So. 579, 581.

After a landlord has expressly refused to

renew a lease and has refused to accept rent tendered at the expiration of the term thereof to be applied on a new term, it certainly cannot be held, as a matter of law, that the tenant is thereafter, in the language of section 1161, "holding by permission of the landlord."

Rehearing denied.

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BERGHAUSER v. GOLDEN STATE ORCHARDS (Moore, Intervener). ★
(Civ. 3743.)

District Court of Appeal, Third District, California. July 11, 1929.

Hearing Granted by Supreme Court Sept. 3, 1929.

1. Appeal and error ⇨907(3)—Where appeal is presented on judgment roll alone, finding of trial court must be taken as supported.

Finding of trial court must be taken as supported, where case is presented on appeal on judgment roll alone.

2. Parties ⇨40(5)—In action on notes wherein plaintiff attached moneys and credits due defendant in hands of third person, one claiming such credits under assignment from defendant could intervene (Code Civ. Proc. § 387).

In action on notes in which plaintiff sought to attach moneys and credits due defendant in possession of third party, one claiming such moneys and credits under assignment from defendant had right to intervene to assert claim to property attached under Code Civ. Proc. § 387, though claimant had no interest in notes sued on.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by J. H. Berghauser against the Golden State Orchards, in which a writ of attachment was issued, and Caroline Moore intervened. From a judgment for intervenor, plaintiff appeals. Affirmed.

W. F. Williamson, of San Francisco, and R. M. Rankin, of Williams, for appellant.

Ware & Ware, of Chica, for respondent.

PLUMMER, J. [1] This action was brought by the plaintiff to recover judgment against the defendant, Golden State Orchards, a corporation, upon two promissory notes. Upon the filing of the complaint a writ of attachment was issued, by virtue of which the sheriff of the city and county of San Francisco was commanded to attach all moneys and credits due to the defendant, owing from and in the possession of the California Packing Corporation. The defendant Golden State Orchards, a corporation, had sold and delivered to the California Packing Corporation a large quantity of dried prunes, etc., and at the time of the levy of the at-

tachment the California Packing Corporation had not paid the amount of the purchase price of said dried fruit. The record further shows that, after the sale of said prunes and other fruits by the defendant to the California Packing Corporation, and before the beginning of this action and the service of the writ of attachment herein referred to, the defendant had sold and transferred to the intervenor its claim against the California Packing Corporation for the moneys due and unpaid on account of the purchase price of said fruit. After the beginning of the action by the plaintiff and the issuance and service of the writ of attachment as just stated, the intervenor, Caroline Moore, sought and obtained from the court permission to intervene and set up her claim and right to the money and credits in the possession of the said California Packing Corporation. The court found in favor of the intervenor to the extent of her claim, to wit, that said intervenor was the owner of all and singular the amount of money owing by the said California Packing Corporation on account of its purchase of dried fruits from the defendant Golden State Orchards Corporation, and that the intervenor was entitled to have paid to her the whole amount of said moneys. The plaintiff demurred to the complaint in intervention, and, upon his demurrer being overruled, filed an answer to the complaint in intervention, and raised the question that the assignment had been made to hinder, delay, and defraud creditors. The court found against this contention, and, as the cause is here upon the judgment roll alone, the finding must be taken as supported.

[2] Upon this appeal, the appellant contends that, under the provisions of section 387 of the Code of Civil Procedure, Caroline Moore had no legal right to intervene, and that the court erred in permitting her so to do. In support of this contention, a number of cases bearing upon the right of intervention are cited to the point that the intervenor must have some interest in that which is involved in the litigation, and, as the suit is upon two promissory notes, the promissory notes only are involved in this action. We do not need to review the cases cited, for the simple reason that they are not really in point in this controversy. The question presented for us to decide upon this appeal may be stated as follows: Has the claimant to property which has been attached in an action between other parties to recover upon an indebtedness in which such claimant has no interest a right to intervene in defense of his own claim of ownership to the property attached? Or, to state the question as presented by the record in this case—the plaintiff has sued upon two promissory notes executed by the defendant, and has attached moneys and credits in the possession of a

third person, claimed by the intervener. Under such circumstances, is intervention permissible, and can the alleged owner of such credits be permitted to come in and set up such ownership? That a claimant to property attached under such circumstances has a right to intervention is no longer an open question in this state. *Carter v. Garetson*, 56 Cal. App. 241, 204 P. 1090; *Bonfiglio v. Bonfiglio*, 203 Cal. 409, 264 P. 747; *Dennis v. Kolm*, 131 Cal. 91, 63 P. 141. It would serve no useful purpose to incumber the record with a review of the cases just cited. We may, however, state that the question raised upon this appeal as to whether an intervention lies under the circumstances involved herein is fully covered and completely answered in the case of *Carter v. Garetson*, supra. The opinion in that case cites a number of authorities from other states supporting the same rule. The cases just cited being conclusive of the question raised upon this appeal, it follows that the judgment of the trial court should be, and the same is hereby, affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

99 Cal. App. 723

ZIMMERMAN v. CONTINENTAL LIFE INS. CO. (Civ. 6626.) ★

District Court of Appeal, First District, Division 1, California. July 5, 1929.

Rehearing Denied Aug. 3, 1929. Hearing Denied by Supreme Court Aug. 29, 1929.

1. Pleading ⇨403(3)—Insurer's allegations that neither plaintiff nor insured had performed conditions of accident policy cured defect in complaint not alleging performance of conditions.

In action on accident insurance policy, defect in complaint not alleging in one of counts that insured and plaintiff had each performed all conditions of policy, held cured, where insurer by its answer alleged that neither plaintiff nor insured had performed terms and conditions of policy, and thus treated issue as properly made.

2. Insurance ⇨466—When two causes join in causing injury, one of which is insured against, insured is covered by policy.

When two causes join in causing an injury, one of which is insured against under accident policy, insured is covered by policy.

3. Insurance ⇨452—"Travel and pedestrian policy," insuring against death or disability sustained by being struck by vehicle propelled by electricity, covered death of motorcyclist struck by electric train.

Policy, having caption describing it as "travel and pedestrian accident policy," insuring against death or disability sustained by insured by being struck or knocked down or run over while in or on public highway by any vehicle propelled by electricity, held to cover death

of motorcyclist struck by train operated by electricity.

4. Insurance ⇨303—Failure of insured to perform agreement to continue as regular reader of newspaper during life of accident policy would not avoid policy (Civ. Code, §§ 2608, 2611).

Where accident policy was issued in consideration of registration fee and premium and insured's agreement to continue as regular reader of newspaper named during life of policy, insured's failure to perform agreement to continue as regular reader of such newspaper would not avoid policy under Civ. Code, §§ 2608, 2611, since promise related to future, and was not material to risk.

5. Insurance ⇨307—Insured's performance of agreement to continue as regular reader of newspaper during life of accident policy was not condition to recovery.

Insured's performance of agreement to continue as regular reader of newspaper named during life of accident policy was not condition to recovery on policy.

6. Trial ⇨397(1)—Where only evidentiary facts were set forth in stipulation, defendant was entitled to finding on issue.

In action on accident policy, where issue was whether insured was injured by being struck by railroad car, and only evidentiary facts from which inference might be drawn were set forth in stipulation, defendant was entitled to finding on issue.

7. Appeal and error ⇨1122(2)—Where evidentiary facts from which inference might be drawn were set forth in stipulation, and trial court did not make finding, appellate court could make finding (Const. art. 6, § 4¾; Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

In action on accident insurance policy, in which issue was whether insured was injured by being struck by railroad car, and such fact was not covered by stipulation, but only evidentiary facts from which inference might be drawn were set forth therein, and court did not make finding, appellate court could make finding on issue under Const. art. 6, § 4¾, and Code Civ. Proc. § 956a, as added by St. 1927, p. 583.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action upon a policy of accident insurance by Genevieve Zimmerman, as administratrix of the estate of Albert T. Meyer, deceased, against the Continental Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Peter tum Suden and Richard tum Suden, both of San Francisco, for appellant.

Wilbur S. Pierce, of Richmond, and Jesse G. Benson, of Oakland, for respondent.

PER CURIAM. An action to recover upon a policy of insurance against accidents issued to Albert T. Meyer in his lifetime; the in-

demnity for loss of life being made payable to his estate.

The parties filed an agreed statement of the facts, together with photographs showing physical conditions at the scene of the accident. It appears that the insured on January 29, 1927, in the daytime, and immediately before receiving the physical injuries which caused his death, was operating a motorcycle at a speed of 25 miles per hour in an easterly direction along Twenty-Eighth street in the city of Oakland. This street crosses Poplar street upon which the Key System Transit Company maintains a double-track railroad, over which trains are operated by electricity. Cross-arm warning signals were maintained at the crossing. In approaching Poplar street from the east along Twenty-Eighth street, the view to the north is obstructed until a point about 30 feet east of the tracks is reached. The motorcycle was about this distance from the track when a train from the north reached, and was moving across, the intersection. The motorcycle collided with the side of one of the cars of the train, causing the injuries from which the insured died.

The clause of the policy under which the plaintiff sought to recover insured against death or disability sustained by the insured "by being struck or knocked down or run over while in or on a public highway by * * * any vehicle * * * propelled by * * * electricity (excluding injuries sustained while on a railroad right of way in violation of statute or any regulation of the railroad company)."

The trial court entered judgment for the plaintiff.

The insurer, which has appealed, contends that the complaint failed to state a cause of action; that the evidence fails to show that the insured was struck or knocked down by the car while he was upon a public highway, and that he was in fact upon the railroad right of way in violation of statute; that the clause quoted insured pedestrians only; that the accident was an excepted peril; and, lastly, that the judgment was not supported by findings of fact.

The complaint as filed contained two counts—one, the second, based upon the clause quoted above, and the other, the first, upon a clause of the policy insuring against death or disability caused by the wrecking or disablement of any private automobile, motor-driven car, or horse-drawn vehicle, or by being accidentally thrown from such automobile, car, or vehicle. To the second count a general demurrer was overruled, but to the first it was sustained without leave to amend. The latter count contained the general allegation that the insured and the plaintiff had each performed all the conditions of the policy; no such allegation, however, being set forth in the remaining count.

Appellant urges that, by reason of this omission, the complaint was insufficient.

[1] While allegations of the performance of conditions precedent are essential to the statement of a cause of action upon a policy of insurance (*Allen v. Home Ins. Co.*, 133 Cal. 29, 65 P. 138; *Arnold v. American Ins. Co.*, 148 Cal. 660, 84 P. 182, 25 L. R. A. (N. S.) 6), here appellant by its answer alleged that neither the plaintiff nor the insured had performed the terms and conditions of the policy, thus treating the issue as properly made, and curing the defect (*Hoover v. Lester*, 16 Cal. App. 151, 116 P. 382; *Lugiani v. Landau, etc., Co.*, 38 Cal. App. 146, 175 P. 648; *Bledsoe v. Stuckey*, 47 Cal. App. 95, 190 P. 217).

[2] According to the stipulation, the impact was sufficient to break through one of the doors which opened in the side of the car. From this it is contended that the insured was not struck by the car, but that his injuries were wholly due to the velocity of the motorcycle when the collision occurred.

It has been held that, when two causes join in causing an injury, one of which is insured against, the insured is covered by the policy (*Continental Life Ins. Co. v. Wilson*, 36 Ga. App. 540, 137 S. E. 403; *Wright v. Ætna, etc., Ins. Co. [C. C. A.] 10 F.[2d] 281*, 46 A. L. R. 225); and, while from the nature of the accident and other circumstances shown different conclusions might be drawn, the inference which appears to have been drawn by the trial court that the insured was struck by the car is not unreasonable, and is supported by the evidence.

Nor do we find merit in the further claim that the insured was struck while upon the right of way of the railroad company. It is true, as contended by appellant, that he appears to have approached the crossing at an unlawful rate of speed, but the physical facts show that the collision did not occur upon the right of way, but upon the public highway.

[3] It is also claimed that the quoted clause in the policy covers pedestrians only and not injuries received while operating a motorcycle. This construction is based largely upon the fact that in the caption the policy is described as a "Travel and Pedestrian Accident Policy." While the caption may be considered in determining the interpretation to be given a policy (*Taylor v. Northwestern, etc., Co.*, 34 Cal. App. 471, 167 P. 899; *Moore v. Fidelity, etc., Co.*, of New York, 203 Cal. 465, 265 P. 207, 56 A. L. R. 860), the language here supports a broader construction than that sought to be given it by appellant, and the injuries in the present case were, we think, clearly covered by its provisions.

[4, 5] This conclusion also disposes of the contention that the accident under the terms of the policy was an excepted peril. The policy was issued "in consideration of a regis-

tration fee of twenty-five cents (\$0.25) and of the premium of one dollar (\$1.00) paid by the insured, and his agreement to continue as a regular reader of the Oakland Tribune during the life of this policy. * * * It is urged that, plaintiff having failed to prove performance by the insured of the promise to continue as a regular reader of the newspaper, no recovery could be had on the policy. The promise, however, related to the future, and was not material to the risk, and, no declaration to that effect being contained therein, a failure to perform would not avoid the policy, nor was such performance a condition to recovery. Civ. Code, §§ 2608, 2611.

[6, 7] The trial court made no findings of fact, but concluded from the statement of facts filed that plaintiff was entitled to judgment, which was entered accordingly. That this may be done where the ultimate facts are agreed upon is well settled (*Gregory v. Gregory*, 102 Cal. 50, 36 P. 364; *Muller v. Rowell*, 110 Cal. 318, 42 P. 804); but here the issue was whether the insured was injured by being struck by the car. This fact was not covered by the stipulation; only the evidentiary facts from which the inference might be drawn being set forth therein. Appellant was therefore entitled to a finding on the issue. *Crisman v. Lanterman*, 149 Cal. 647, 87 P. 89, 117 Am. St. Rep. 167. However, an appellate court is authorized to make findings in certain cases (Const. art. 6, § 4½; Code Civ. Proc. § 956a, as added by St. 1927, p. 583; *Kirk v. Culley*, 202 Cal. 501, 261 P. 994), and the present is one wherein the power may be properly exercised. It was manifestly the conclusion of the trial court that the insured was struck by the car, and the circumstances shown reasonably support such a finding. We therefore find, in accordance with the allegations of the complaint, "that on January 29, 1927, the insured was killed by being struck by a vehicle propelled by electricity."

The judgment is affirmed.

99 Cal. App. 788

Ex parte LEET. (Cr. 1540.)

District Court of Appeal, First District, Division 1, California. July 12, 1929.

Divorce 269 (11)—Order committing husband for contempt for failure to pay alimony held unauthorized, where husband's uncontradicted testimony showed inability to comply with order.

Where property settlement carried into interlocutory divorce decree merely required that husband use his best efforts to acquire the amount fixed in decree as alimony, and husband alone testified at hearing on order to show cause why he should not be punished for contempt

for noncompliance with the order, and his testimony was to the effect that he had no property and was out of employment and had not received funds which he expected from his mother, order committing husband for contempt for failure to pay alimony was unauthorized because unsupported by evidence.

Application by William A. Leet for habeas corpus, to be directed to the Sheriff of the City and County of San Francisco, to review an order committing petitioner to jail for contempt. Writ granted, and petitioner discharged.

Clarence A. Linn, of San Francisco, for petitioner.

Hugh K. McKevitt and Halloway Jones, both of San Francisco, for respondent.

TYLER, P. J. Habeas corpus to review an order of the superior court of the city and county of San Francisco committing petitioner to jail for contempt of court in failing to comply with the terms and provisions of an order of said court requiring him to pay to his ex-wife the sum of \$2,800, the amount due under a property settlement had between the parties.

The record shows that one Doris Leet and petitioner were husband and wife; that on the 23d day of December, 1927, Doris Leet obtained an interlocutory decree of divorce from petitioner; that prior to the granting of this decree the parties entered into a written agreement, by the terms of which they settled and adjusted all their property rights growing out of or connected with their marital relation. Under the agreement, petitioner agreed to pay his wife certain sums from time to time for her support and maintenance. The substance of this agreement was incorporated in the interlocutory decree. The petitioner failed to comply with the terms of the decree in this particular, and he was ordered to show cause why he should not be punished for contempt by reason thereof. He was the only witness upon the hearing. He testified that he had no funds of any kind and owned no real estate, stocks, bonds, securities, or other personal property of any kind or character, nor was any property held in trust for him. He further testified that at the time he signed the property settlement agreement he thought his mother would provide the funds with which to pay the same, but she had refused to do so. He also testified that his employer had failed in business, and he had in consequence lost his position and had been out of employment for a period of over six months. At the conclusion of his testimony the court adjudged petitioner guilty of contempt and signed an order committing him to the county jail until he complied with the terms of the interlocutory decree requiring him to pay the sum of \$2,800.

It is here claimed that as the evidence shows without conflict that petitioner did not have the ability to comply with the terms of the interlocutory decree, the order adjudging him in contempt of court is without evidence to support it. We see no escape from this contention. As above stated, the only testimony taken upon the proceeding was that of petitioner. This testimony was either true or false. As was said in *Myers v. Superior Court*, 46 Cal. App. 206, 189 P. 109, if true, the evidence shows that petitioner was without means to comply with the order; if false, then there is no evidence before the court upon the subject. In either event, the order of the court was made without authority of law. See *Merriitt v. Superior Court* (Cal. App.) 269 P. 547; *In re Harris*, 81 Cal. App. 498, 253 P. 953; *Ex parte Todd*, 119 Cal. 57, 50 P. 1071.

We are cited to *In re McCarty*, 154 Cal. 534, 98 P. 540, and *In re Rasmussen*, 56 Cal. App. 368, 205 P. 72, to the effect that on the hearing of a contempt proceeding growing out of the husband's failure to pay alimony, it is not necessary for the wife to prove anything more than the making of the order and the disobedience of it by her husband in refusing to pay the amount which the court found he had the ability to pay when it made the order; that she makes a *prima facie* case at the hearing by producing the original order and by proof of the refusal of her husband to make payments according to its terms. In both these cases, however, it was recited in the original order directing the payment of alimony that defendant had the ability to pay. Here there is no such finding. Under the property settlement, which was carried into the interlocutory decree, the husband merely agreed to use his best efforts to acquire the amount fixed in the decree.

There being no evidence in the record to support any finding upon which to predicate an order of contempt, it follows that the writ should be granted and the petitioner discharged from custody. It is so ordered.

We concur: KNIGHT, J.; CASHIN, J.

99 Cal. App. 695

MADDUX v. MORA et al. (Civ. 5374.) ★

District Court of Appeal, Second District, Division 2, California. July 2, 1929.

Rehearing Denied July 31, 1929.

1. Sales $\S$ 479(7)—Evidence, in action by conditional seller, held to support findings that seller took automobile to make necessary repairs and did not resell.

In action to recover balance due on automobile sold under conditional sales contract, together with cost of necessary repairs made, evidence held sufficient to support findings that sell-

er took possession of automobile to make necessary repairs in accordance with terms of contract and did not resell automobile.

2. Sales $\S$ 479(7)—Conditional seller, suing to recover balance due and value of necessary repairs for automobile, need not allege buyer knew seller took automobile to make necessary repairs.

Where, under conditional sales contract, seller was permitted to retake automobile to make necessary repairs, seller, in action to recover balance due on purchase price and value of repairs made, was not required to allege that purchaser had knowledge of purpose of seller in taking automobile; the only ultimate fact required to be alleged being seller's purpose.

3. Sales $\S$ 479(11)—Conditional seller, taking possession of automobile to make necessary repairs, was not precluded from electing to repossess property or sue for price.

Where conditional sales contract expressly gave seller right to retake property for purpose of making necessary repairs, seller, retaking automobile for such purposes, was not precluded from subsequently making election between right to repossess property and terminate contract or sue for balance of purchase price.

4. New trial $\S$ 102(1)—New trial for newly discovered evidence was properly refused, where reasonable diligence in procuring witnesses was not shown (Code Civ. Proc. $\S$ 656, subd. 4).

Where there was no showing that buyer, sued for balance of purchase price, together with value of necessary repairs made to automobile sold, used reasonable or any diligence in attempting to produce all evidence, or that witnesses could not, with some diligence, have been discovered, motion for new trial was properly overruled under Code Civ. Proc. $\S$ 656, subd. 4, authorizing new trial for newly discovered evidence; such motion being regarded with distrust and disfavor, and such proffered evidence looked on with suspicion after defeat.

5. Appeal and error $\S$ 981—New trial $\S$ 99—Motion for new trial for newly-discovered evidence is discretionary, and denial of motion will not be disturbed, unless discretion is abused.

Motions for new trial on ground of newly discovered evidence are largely within discretion of trial court, and, except in cases of plain abuse of discretion, an order denying motion will not be disturbed.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

On rehearing. Superseding former opinion. For former opinion, see 278 P. 468.

J. L. Granttham and Frank C. Scherrer, both of Riverside, for appellant.

Best & Best, of Riverside, for respondent.

CRAIG, J. The respondent began the above-entitled suit in Perris township, Riverside county, to recover \$160.50, which, by amendments to the complaint, was later increased to \$237.50, together with \$100 attorney's

fees, interest and costs, for breach of a contract. Judgment was rendered in favor of the plaintiff, and an appeal was taken to the superior court of Riverside county, wherein judgment was again rendered in favor of the plaintiff, after a trial de novo. From the latter judgment, the defendant Mora appealed to this court.

The facts necessary to a consideration of the points presented are as follows: Maddux agreed to sell an automobile to the defendants under the terms of a conditional sale contract. Payments were made until October, 1921, when there was a balance on the purchase price of \$162.50 then due. In September, 1922, the car being out of repair, the vendor took possession of it, and put it in good condition again, at an expense of \$75. The purchaser failed to pay either the balance of the original purchase price or the expense of repairs, and on January 12, 1924, this suit was commenced.

It appears that one Haas was the agent who arranged the sale of the machine, and it is contended by the appellant that, after default had been made, and the car had been repossessed by Maddux, Haas arranged to and did sell it to one Taylor. The court did not so find, and one of the grounds urged for reversal is that, in failing to so find, material evidence was disregarded.

[1] The principal attack upon the judgment is that the evidence is insufficient to support certain findings which the court made, and which are numbered IV, IX, and X. They are as follows:

IV. "That on or about the month of March, 1922, plaintiff found the said personal property abandoned in the yard of one Ira L. Haas at Perris, California; that at the time of such finding the tires on the said machine had deteriorated to such an extent that they were no longer of any value; that the said personal property had lain out in the weather for months without any protection and that the same was not in good order and repairs as when originally sold to the defendants herein; that plaintiff thereupon took possession of the said personal property for the purpose of putting the same in as good order as when sold in accordance with the terms of the said agreement and that thereafter plaintiff repaired same and placed the automobile in as good repair and condition as when originally sold at an expense of \$75.00; that the plaintiff made the repairs on the said car on or about the 1st day of November, 1922, and that the amount of the said repairs nor any portion thereof has ever been repaid by either of the said defendants or by anyone acting in their behalf."

IX. "That the said plaintiff M. C. Maddux did not at any time either by himself or by or through any of his agents take the said automobile so purchased under the contract aforesaid from either of the said defendants for any other purpose except for placing the

same in as good condition and repair as when originally sold by the said plaintiff; that the said plaintiff neither by himself nor through any of his agents has at any time sold the said automobile to James Taylor or to anyone else and that the said plaintiff now has the said automobile in his possession."

From these No. X logically finds the amount owing to the plaintiff on account of principal, interest, and for repairs.

The rule that an appellate court will not reverse a judgment where there is any substantial evidence to support it is recognized by appellant. We find that there is such evidence here. It appears without conflict that one Haas "found" the buyers, told Mr. Maddux, and he sent salesmen to close the "deals," and in this instance he "found" the defendants; that, after the sale had been made to the Moras, he attended to the collections. He testified that he "never took the car back for Mr. Maddux"; that he "never sold the car to James Taylor. Taylor asked me how much was due on the car and I told him I did not know, I would have to take that up with Mr. Maddux. I might have told Vincinti Mora if James Taylor bought the car I would get his contract and return it to him. I meant if James Taylor bought the car I would get Mora's contract and give it back to him." Taylor testified that he agreed with Haas to buy the car if Mr. Maddux did not charge him over \$125. At the time of making this arrangement with Haas, Taylor deposited \$30 with him, and received this back when he returned the car, which he did when it appeared that Maddux would not sell it for \$125, but required \$185. According to Haas, Taylor had the car three or four days. Vincinti Mora brought Taylor to him. Taylor left the car with Haas, and Maddux eventually got it.

We find no testimony that Maddux ever authorized Taylor to take the car from appellant at the time it was left with Haas upon the first occasion, nor to sell the car to Taylor except under the terms of a proposed contract, which Taylor did not accept, and which Maddux prepared and placed in the hands of Haas after Taylor had taken the car and left a \$30 deposit with Haas. As above stated, Taylor would not accept the car on the terms offered by Maddux. However, had he done so, it was apparently the understanding with Haas that Maddux would relieve the Moras from their liability as vendees, but this never happened. Maddux testified also that he did not sell the car to Taylor; that he took it only for the purpose of repairing it; that the Moras could have had it at any time it was in his possession had they come for it. Surely it cannot be said that there is no substantial evidence to support these findings.

There is a considerable amount of testimony in conflict with that above delineated and which upholds the statement of facts as asserted by appellant, but the trial court ap-

parently disbelieved it, as it had a right to do.

[2] There is no merit in the contention that the complaint does not state a cause of action. Argument as to its contents prior to amendment, and which was eliminated by amendment, is beside the subject. In this behalf, the only consideration is the allegations of the complaint as amended, and upon which the case was tried. We are cited to no authority in support of appellant's claim that, in order to state a cause of action, it must appear that the vendee had knowledge of the purpose of the vendor in taking the personal property, where, as in this case, the vendor was permitted by the contract to retake the car for either of two purposes, namely, to make necessary repairs, or because of the default of the vendee, and to terminate the contract. The ultimate fact required to be alleged is the vendor's purpose. This the complaint alleges to have been for the making of needed repairs. It is not important that amendments to the complaint were filed instead of an amended complaint. The amendments here in question clearly show the alterations and additions to the complaint, and no exception was taken to this form of amendment.

[3] Appellant contends that in case of default by the vendee a vendor through a conditional sales contract must elect between two remedies; that is, he may repossess the property and terminate the contract, or he may sue for the balance of the purchase price, but that he cannot do both. Granting this to be the general rule as to his final remedy, it does not prevent the vendor under a contract which expressly gives him that right from retaking the property for the purpose of making needed repairs. The repossessing under these circumstances for such purposes cannot preclude the vendor from later making his election between the two remedies mentioned, and this clearly was done in the instant case.

[4, 5] The appellant filed affidavits wherein it was averred that one Joe Chavez, if permitted to testify, would swear that the automobile had not been repaired by Maddux, and that the affiant purchased it as junk, thereafter returning it to the plaintiff for

\$50 when the latter recovered judgment against the Moras and desired to make delivery; that Maddux had offered it for sale to others at a nominal price, and had stated that he had not expected until after the trial in the justice's court to collect further payments from the Moras. Counter affidavits were filed by the plaintiff, denying the foregoing allegations, in detail. The affidavit of appellant recites that he had not previously known of the witnesses therein named, nor of the facts to which they would testify, but accidentally discovered them during a casual conversation with an acquaintance after the trial. A motion for new trial, based thereon, was denied, and this is assigned as ground for reversal; it being urged that the trial court thus abused its judicial discretion. Subdivision 4, section 656, of the Code of Civil Procedure, provides that a new trial may be granted for "newly discovered evidence, material for the party making the application, which he *could not, with reasonable diligence*, have discovered and produced at the trial." There was no showing that appellant used reasonable or any diligence in attempting to produce at the trial all of his evidence, nor that these witnesses could not, with some diligence, have been discovered. A motion for new trial upon the ground of newly discovered evidence is regarded by the court with distrust and disfavor, and such proffered evidence is looked upon with suspicion after defeat. *Estate of Cover*, 188 Cal. 133, 204 P. 583; *People v. Rushing*, 130 Cal. 449, 62 P. 743, 80 Am. St. Rep. 141; *Tibbet v. Sue*, 125 Cal. 544, 58 P. 160. Such motions are largely within the discretion of the trial court, and except in cases of plain abuse of such discretion, an order denying the motion will not be disturbed. *Waer v. Waer*, 189 Cal. 178, 207 P. 891. We are not convinced that such an abuse has been shown in this instance.

The judgment is affirmed.

I concur: IRA F. THOMPSON, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this opinion.

99 Cal. App. 747

MATTEI v. HECKE, State Director of Agriculture, et al. (Civ. 6760.)

District Court of Appeal, First District, Division 1, California. July 9, 1929.

- 1. Constitutional law** ⇨83(1)—**Citizen's liberty and manner of conducting business cannot be curtailed, unless necessary to preserve public health, safety, or morals.**

Liberty of citizen and his manner of conducting his business or marketing his products may not be curtailed or interfered with, except where it is necessary under the police power for protection or preservation of public health, safety, or morals.

- 2. Constitutional law** ⇨81—**To justify state in interposing authority, interests of public generally must require interference.**

In order to justify state in interposing its authority, interests of public generally must require interference, and interposing of authority must be reasonably necessary for accomplishment of purpose.

- 3. Constitutional law** ⇨68(1)—**Whether regulation of lawful business is valid exercise of police power is judicial question.**

Where police power is exerted to regulate lawful business, it is always judicial question whether regulation is valid exercise of police power.

- 4. Statutes** ⇨47—**That Legislature was well-meaning in passage of legislation is no test of validity (California Fruit, Nut, and Vegetable Standardization Act of 1927, § 22).**

That Legislature was well-meaning in its passage of California Fruit, Nut, and Vegetable Standardization Act of 1927, § 22 (St. 1927, p. 1845), providing that containers for grapes other than those packed in sawdust, cork, etc., and in certain standard containers established by act, shall, if used, be conspicuously marked, in letters not less than one-half inch in height, "Irregular Container," is no criterion or test of validity of act.

- 5. Weights and measures** ⇨2—**Act requiring that other than certain containers established by act for grapes be marked "Irregular Container," held invalid exercise of police power (California Fruit, Nut and Vegetable Standardization Act of 1927, § 22).**

California Fruit, Nut and Vegetable Standardization Act of 1927, § 22 (St. 1927, p. 1845), providing that containers for grapes, other than those packed in sawdust, cork, etc., and in certain standard containers established by act, shall, if used, be conspicuously marked, in letters not less than one-half inch in height, "Irregular Container," held invalid exercise of police power, in attempting unduly to regulate marketing of grapes.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by A. Mattei against C. H. Hecke, as Director of Agriculture of the State of California, and another. From an order

granting a temporary injunction, defendants appeal. Affirmed.

U. S. Webb, Atty. Gen., Thomas H. Christiansen, Deputy Atty. Gen., Glenn M. Devore, Dist. Atty., and Arthur C. Shepard, Deputy Dist. Atty., both of Fresno, for appellants.

Lewis H. Smith, of Los Angeles, and Archie A. Smith, of Fresno, for respondent.

PER CURIAM. This appeal involves the constitutionality of that portion of section 22 of "the California Fruit, Nut, and Vegetable Standardization Act of 1927" which provides that grapes in containers other than those packed in sawdust, cork, etc., and in certain standard containers established by such act, shall, if used, be conspicuously marked, in letters not less than one-half inch in height, "Irregular Container."

The respondent, A. Mattei, is a grape grower and shipper in Fresno county. At the time grapes were ready to ship during the fall of 1927 he had on hand certain lug boxes of dimensions different from those authorized to be used under the California Fruit, Nut, and Vegetable Standardization Act of 1927 (St. 1927, p. 1845), which he proposed to use for the shipment of some of his grapes, without putting on the boxes the words "irregular container," as required by section 22 of the act. He was warned by the department of agriculture of the state of California and by the horticultural commissioner of the county of Fresno that the use of such containers without the addition of the words "irregular container," as provided by the act, was in violation of law, and that legal proceedings would be instituted against him, if he persisted in using the boxes as he proposed to do and was then in fact doing. Thereupon respondent filed a complaint for an injunction in the superior court of Fresno county against the director of agriculture of the state of California and the horticultural commissioner of Fresno county, whereby he sought to enjoin them from prosecuting him or causing him to be arrested, or preventing him from moving his grapes, or shipping them, or from condemning them, or from in any manner preventing him from packing or shipping his grapes in the containers that he proposed to use and was actually using—that is, containers differing from the standard crates and lugs provided for by the act and not having the words "irregular container" marked thereon.

The complaint is predicated on the premise that the proviso in section 22 of the act, requiring that containers of other sizes than those prescribed in the act which are permitted to be used, if used, must be conspicuously marked with the words "irregular container" in letters of a certain size, is unconstitutional. At the time of filing the complaint, the respondent, Mattei, obtained a

temporary restraining order, which also ordered that appellants Hecke and Roullard show cause, at a time and place fixed by the order, why a preliminary injunction should not be granted as prayed for in plaintiff's complaint, pending the final determination of the action. On September 3, 1927, the order to show cause came on for hearing. This hearing was upon the complaint and the demurrer and answer of the defendants thereto. It was stipulated by the parties that for the purpose of the hearing the allegations of plaintiff's complaint were admitted, except the allegations that the act requiring grapes to be packed in the lugs or containers of the measurements required and the words "irregular container" so affixed to lugs containing grapes would mislead the trade, and cause the purchaser to believe that the contents of the lugs were of inferior quality. On December 1, 1927, the court made its order granting the temporary injunction, and from this order the appeal is taken.

Unquestionably an act such as we have here, restricting the personal liberty of a citizen, is invalid unless such restriction is necessary for the protection of the public safety, public health, or public morals. As is said in *Ex parte Dickey*, 144 Cal. 234, 236, 77 P. 924, 925 (66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428): "It appears, therefore, that the due exercise of the police power is limited to the preservation of the public health, safety, and morals, and that legislation which transcends these objects, whatever other justification it may claim for its existence, cannot be upheld as a legitimate police regulation." It will, we think, be conceded that such restrictions cannot be upheld, unless in their application they actually effect the object sought to be obtained.

Appellants state in their brief that the prevention of fraud and deception in the packing, marking, shipping, and sale of fruits, nuts, and vegetables is the basic reason for the act. The only provision relative to the packing and shipment of grapes contained in the act that would tend to prevent fraud and deception is the provision in section 22 that the net weight and name of the variety shall be marked in plain sight on the outside of each container, and with this provision of the act, it is conceded, respondent has and intends to comply. The other provisions of the act give the approximate size of the standard baskets and the dimensions, depth inside, width inside, and length outside, of the standard crate and standard lug box.

It becomes apparent on reading the statute that there is no cubic content provided for any of the respective containers in which grapes are to be packed. For the so-called standard basket referred to in subdivision 1, section 11, of the act, only *approximate* dimensions are given, and no cubic content is prescribed, and for the other eight varieties

of crates or lugs in which shipment may be made there are provided *inside* dimensions in depth and width, but only *outside* dimensions in length. Hence a variation in the thickness of the ends of any of the respective containers enumerated creates a variation in the cubic content of such respective containers. In addition, as suggested by counsel for respondent, a perforated, corrugated cardboard ventilator, many of which are now in use, taking up a space of one or more inches on the ends, sides, or bottom of the container, if used, would materially affect the cubic content remaining for the product to be packed, and this is not attempted to be regulated or prohibited in any manner. The depth and width of the respective containers being prescribed by only inside dimensions, and the length by only outside dimensions, there is no uniformity prescribed for either inside or outside size of the containers. There is no uniformity prescribed by the portions of the act as to the size or cubic content of the container, nor as to volume or weight of the product to be sold therein.

Aside from all other considerations there is no measure attempted to be prescribed by which grapes may be sold and nothing—except the notice of net weight, which is not here complained of—which visualizes or presents to the purchaser the quantity of grapes he is purchasing. The seller may select any one of four crates and any one of four lug boxes, the crates themselves varying in inside depth from 4 inches to 4¾ inches, and the lug boxes varying in inside depth from 4¾ inches to 5¾ inches. There is nowhere any provision or attempted provision as to the weight or volume of grapes to be packed or shipped in any of the respective containers. The net weight and name of the variety required to be stamped on all the containers used is the only portion of the act which in any manner attempts to provide for the purchaser a statement or representation as to the quantity of grapes offered to him, and with this provision respondent has complied.

[1] The liberty of the citizen and his manner of conducting his business or marketing his products may not be curtailed or interfered with, except where it is necessary under the police power for the protection or preservation of the public health, safety, or morals. "A statute prohibiting, regulating, or interfering with private business can be upheld only under the police power, and that the police power can be rightfully exercised only when the statute in question is for the protection of the public safety, the public health, or the public morals." *Ex parte Drexel*, 147 Cal. 763, 82 P. 429, 430, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878. "It is, of course, elementary, that the enjoyment of one's property cannot be interfered with or limited arbitrarily." *In re Kelso*, 147 Cal. 609, 82 P. 241, 242, 2 L. R. A. (N. S.) 796, 109

Am. St. Rep. 178. See, also, *Pacific Palisades Assn. v. City of Huntington Beach*, 196 Cal. 211, 216, 237 P. 538, 40 A. L. R. 782; *People v. Holder*, 53 Cal. App. 45, 199 P. 832; *Binford v. Boyd*, 178 Cal. 458, 174 P. 56. As was said by Mr. Justice Field in *Slaughterhouse Cases*, 16 Wall. 86, 21 L. Ed. 394, 418: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

[2, 3] In *City of Buffalo v. Collins Baking Co.*, 39 App. Div. 432, 57 N. Y. S. 348, which is analogous on principle to the question here presented, the court held void an ordinance providing that all bread sold or offered for sale in the city of Buffalo, wherever baked, should be made into loaves weighing not less than 1½ pounds each, the court stating that no good to the public is apparent; that bread of the same composition weighing one pound is equally as wholesome as a loaf one-half pound heavier; that the ordinance was an interference with a lawful trade or avocation; that "under the pretense of prescribing a police regulation, the state cannot be permitted to encroach upon any of the just rights of the citizen, which the constitution intended to secure against abridgment." In *Frost v. City of Los Angeles*, 181 Cal. 22, 28, 183 P. 342, 345 (6 A. L. R. 468), the court uses this language: "The Legislature is possessed of the entire police power of the state, except as its power is limited by the provisions of the Constitution. But it cannot, under the guise of the police power, unreasonably interfere with a lawful and useful occupation or business which is not inherently, or because of the manner in which it is carried on, injurious to persons, or property, or to the public health, convenience, comfort, safety, or morals. *Ex parte Whitwell*, 98 Cal. 73, 81, 32 P. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; *Ex parte Sing Lee*, 96 Cal. 354, 31 P. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218; *Los Angeles v. Hollywood Cem. Ass'n*, 124 Cal. 349, 57 P. 153, 71 Am. St. Rep. 75; *Ex parte McCapes*, 157 Cal. 29, 106 P. 229; *In re Dart*, 172 Cal. 59, 155 P. 63, L. R. A. 1916D, 905, Ann. Cas. 1917D, 1122." In *Ex parte Hayden*, 147 Cal. 649, 650, 82 P. 315, 316 (1 L. R. A. [N. S.] 184, 109 Am. St. Rep. 183) the court says: "The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health, or the public morals [citing authorities]. But the Legislature, under the guise of police regulations, cannot enact laws which do not pertain to one or the other of these objects, and which impose onerous and unnecessary burdens upon business and property."

In order to justify the state in interposing its authority the interests of the public generally must require such interference and

such interposing of authority must be reasonably necessary for the accomplishment of the purpose, and where the police power is exerted to regulate a lawful business it is always a judicial question whether the regulation is a valid exercise of such power. In *re Smith*, 143 Cal. 368, 77 P. 180. "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." In *re Dees*, 46 Cal. App. 656, 660, 189 P. 1050, 1052.

We have read the cases cited by appellants, and find they concern ordinances establishing net weights at which commodities may be sold, or that net weights are required to be contained on the labels or packages, with the exception of *In re Fujii*, 189 Cal. 55, 207 P. 537, in which case petitioner was arrested for selling strawberries in containers holding one-half dry pint in violation of a statute providing that standard baskets for strawberries should be the dry pint. In that case the court took cognizance of the fact that strawberries are much larger than other varieties of berries, and that they are less uniform as to size and form and cannot therefore be placed as compactly in containers as other types of berries. The most pertinent basis for the decision in the *Fujii Case*, however, was that the evidence introduced disclosed that the common practice in the sale of strawberries was to offer them for sale in trays holding either six pint baskets or six one-half pint baskets; the six baskets in either event filling the tray. Where one-half pint baskets were used, the surface area of strawberries exposed to the purchaser was the same as where full pint baskets were used. Therefore the court held that an opportunity for deception existed which the provisions of the act in question obviated.

[4] Appellants in their brief state: "It must be assumed that the legislative body satisfied itself that deception was being practiced upon the public directly or indirectly concerning containers in which grapes were packed and shipped, and that the public was entitled to be protected in the matter to the end that a purchaser might rest assured, without investigation, when he bought a lug of grapes that he was getting a certain amount." We fail to see how marking the container in letters not less than one-half inch in height "irregular container" would assure the purchaser that he was getting a certain quantity of grapes, nor in what manner it would operate in the preservation of the public health, safety, morals, or welfare. That the Legislature was well-meaning in its passage of this legislation is no criterion or test of its validity. As was said in *Ex parte Jentzsch*, 112 Cal. 468, 473, 44 P. 803, 804 (32

L. R. A. 664): "So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic; for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the Legislature to encroach upon the rights of citizens with experimental laws none the less dangerous because well meant."

[5] In our opinion the trial court was correct in its holding, and the order appealed from is accordingly affirmed.

99 Cal. App. 767

ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited, v. DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY OF STATE et al. (Civ. 6687.)★

District Court of Appeal, Second District, Division 1, California. July 10, 1929.

Rehearing Denied Aug. 5, 1929. Hearing Denied by Supreme Court Sept. 3, 1929.

1. Master and servant 405(2)—Evidence, in proceeding for compensation, held to warrant finding that ostensible employer was actual employer.

In proceeding under Workmen's Compensation Act, where employee hired by garage owner did not know that ostensible garage owner was only acting as agent for undisclosed principal, evidence held sufficient to warrant finding that garage owner was actual employer.

2. Master and servant 3361—Employer, though representing undisclosed principal, was responsible as actual employer to employee hired by him.

Where ostensible employer was in fact representing undisclosed principal in operation of garage, he was nevertheless, as to employee hired by him, occupying relation of actual employer and responsible as such.

Certiorari to Division of Industrial Accidents and Safety.

Proceeding under the Workmen's Compensation Act by Benjamin H. Caverly, employee, against Arthur White and another, employers, and the Zurich General Accident & Liability Insurance Company, insurer. To review an award of the Division of Industrial Accidents and Safety against the insurer and another the insurer alone applies for certiorari. Denied.

J. L. Kearney, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CONREY, P. J. Benjamin H. Caverly filed with respondent Division of Industrial Accidents and Safety an application for an award of compensation for injuries arising out of and occurring in the course of his employ-

ment. He named as defendants Arthur White, West Coast Mortgage & Investment Company, and Zurich General Accident & Liability Insurance Company, Limited. In making its award the division found that the injury was received while Caverly was employed as a mechanic by "Arthur White, doing business as White Garage," as his ostensible employer and as agent for West Coast Mortgage & Investment Company, a corporation, an undisclosed principal; that at that time the Zurich Company was the insurance carrier for "Arthur White, doing business as White Garage." The division made its award against the insurance carrier and the West Coast Mortgage & Investment Company, and discharged "Arthur White, doing business as White Garage," from liability. The Zurich Company petitions for the writ of review.

Petitioner had issued a policy of insurance to "Arthur White, doing business as the White Garage." Petitioner contends that the division exceeded its jurisdiction, in this, that there is no evidence to sustain the finding that Arthur White was Caverly's employer; and further contends that the evidence without conflict shows that the real employer was the West Coast Mortgage & Investment Company, which company, as the findings declare, was uninsured. We have examined the evidence set out on page 3 of the petition, which petitioner states is practically all of the evidence bearing upon the stated question. We have further examined the answer to the petition, which more fully sets forth the evidence relating to that question. Caverly stated that at the time of his employment he talked to one McIntyre, who was then manager of the White Garage, and also to Mr. White. In substance his statement is that he was given the job at 75 cents an hour for his work, and that there were no other terms. Mr. White testified that his business was that of manager of the West Coast Mortgage & Investment Company; that his arrangement with Caverly was that Caverly was to run the shop on the basis of 50 per cent. of his labor. He testified that he was not an owner of the garage and had nothing to do with it, and that it was always owned by the corporation, of which corporation he was the president and manager. The real contention of White before the division, as may be seen from his testimony, was that Caverly was an independent contractor and was not an employee of either the investment company or the White Garage. Over the door of the shop there was a sign reading: "White Garage." White testified that there was nothing there that would lead any one to believe that the West Coast Mortgage & Investment Company was identified with the concern, or that he himself was so identified. In other words, the fact seems to be that when Caverly was employed, and during the period of his em-

★Rehearing denied. Hearing denied by Supreme Court.

ployment, the place was operated simply as "White Garage," and that Mr. White as the person in charge of the premises was the ostensible owner, and, acting under that appearance and under those circumstances, employed Caverly to work in the shop.

[1, 2] We think that the evidence is sufficient to warrant the finding of the division that White was the actual employer. If in fact in his operation of the business he was representing an undisclosed principal, nevertheless he was, as to Caverly, occupying the actual relation of employer and could be held responsible as such employer. *Geary St., P. & O. R. Co. v. Rolph*, 189 Cal. 59, 64, 207 P. 539. It follows that Caverly was protected by the insurance policy issued to White for the purposes of that business.

The petition for writ of review is denied.

We concur: HOUSER, J.; HOLLZER, Justice pro tem

HOFFMAN v. SOUTHERN PAC. CO. et al.* (Civ. 3815.)

District Court of Appeal, Third District, California. July 3, 1929.

Rehearing Granted Aug. 2, 1929.

1. Railroads ⇨327(7)—Vehicle driver need not actually stop under any or all circumstances before crossing railroad track.

Law does not require driver of vehicle to actually stop under any or all circumstances before crossing railway track.

2. Railroads ⇨333(1)—Test of contributory negligence of one attempting to cross railroad track before approaching train is whether reasonably prudent person would have undertaken attempt.

Test as to existence of contributory negligence on part of one who attempts to cross railroad track ahead of an approaching train is question as to whether, under circumstances, reasonably prudent person would have undertaken to cross track.

3. Railroads ⇨350(13)—When circumstances allow different conclusions to reasonably be drawn as to prudence of person attempting to cross railroad track, contributory negligence is for jury.

When circumstances of particular case are of nature that different conclusions may reasonably be drawn as to prudence of person in attempting to cross railroad track, question of contributory negligence becomes one for determination of jury.

4. Railroads ⇨328(8)—When dense fog obscures view, greater caution should be observed in crossing railroad track.

When dense fog obscures one's view, greater caution should be observed in crossing rail-

road track than might suffice at time when the atmosphere is clear.

5. Railroads ⇨350(26)—Contributory negligence of automobile driver in failing to stop machine or engine before crossing railroad track in fog held for jury.

Where on morning that train and automobile collided at crossing dense fog prevailed and train was late, and driver of automobile had knowledge of customary time that train approached crossing, contributory negligence of plaintiff in failing to stop automobile before attempting to cross track held for jury.

6. Railroads ⇨328(2)—That stopping automobile before reaching crossing would have prevented collision with train was not conclusive of driver's negligence.

If automobile had been stopped just before reaching crossing so that collision would not have occurred with train, that in itself was not conclusive of negligence of automobile driver.

7. Railroads ⇨348(4)—Evidence sustained implied finding that train did not signal before it collided with plaintiff's automobile at crossing.

In action to recover for injuries sustained when plaintiff's automobile was struck by train at crossing, evidence held sufficient to support implied finding of failure to blow whistle or ring bell of train before accident.

8. Pleading ⇨250—Permitting amendment of complaint to include demand for damages for necessary medical aid held not error, where original complaint alleged severe, permanent injuries (Civ. Code, § 3283).

Where, during process of trial in action for injuries sustained when train collided with plaintiff's automobile, plaintiff was permitted to amend complaint to include demand for damages in sum of \$1,500 for medical aid in performance of necessary surgical operation resulting from injuries sustained, there was no abuse of discretion, under Civ. Code, § 3283, authorizing recovery of reasonably certain future damages, where original complaint alleged that plaintiff was severely and permanently injured.

9. Damages ⇨188(3)—Evidence supported judgment as to injuries sustained in collision and necessary future expense for operation.

In action for injuries resulting from collision of plaintiff's automobile with train at crossing, evidence held to support judgment with respect to permanent injuries and necessary future expense of \$1,500 which would be reasonably certain to accrue for operation as result of accident.

10. Appeal and error ⇨1048(3)—Permitting physician to testify that plaintiff's condition resulted from accident held not erroneous, though hypothetical question did not fully state facts involved previously testified to by another witness.

Permitting physician to testify in response to hypothetical question that plaintiff's present condition and injuries resulted from accident, though hypothetical question did not fully state facts involved upon which opinion was necessarily based, held not erroneous, where all of re-

maining necessary facts had been previously testified to by witness who treated plaintiff for injuries.

11. Courts ⇨117—Court minutes control controversy regarding demand for jury on certain date.

Court minutes must control where there is controversy regarding demand for jury on certain date.

12. Jury ⇨25(9)—Jury having been properly demanded for first trial, demand was not required to be renewed at subsequent trial.

Where proper demand for jury was made for first trial of case in action for injuries, it was not necessary to repeat demand for jury at time case was finally set for trial, since original demand was continuing in effect; Code Civ. Proc. § 631, being unavailing, since providing that constitutional right to trial by jury is waived by failing to announce that jury is required at time cause is first set upon trial calendar.

13. Jury ⇨79(1)—It is preferable to order trial jury drawn from regular panel.

It is custom and preferable practice to order trial jury to be drawn from regular panel.

14. Appeal and error ⇨922—In absence of formal showing that special venire was not necessarily drawn, it must be assumed court correctly denied defendants' motion for jury from regular panel (Code Civ. Proc. §§ 214, 226).

In absence of formal showing that special venire was not necessarily drawn pursuant to specific authorization of Code Civ. Proc. § 226, it must be assumed that there was no abuse of discretion on part of court in ordering special venire instead of jury from regular panel pursuant to section 214, and that denial of defendants' motion for a jury drawn from the general panel was not prejudicial or erroneous.

15. Jury ⇨149—Refusing during trial to discharge juror shown to be aunt of clerk employed in office of plaintiff's counsel held not error, where no prejudice was shown.

Where, after jury had been impaneled and during process of trial, defendants moved court to discharge juror because she was aunt of clerk employed in office of one of attorneys for plaintiff, and juror was qualified on voir dire, there was no abuse of discretion in refusing to discharge her, where no prejudice was shown on part of juror.

16. Jury ⇨132—It cannot be presumed that juror is biased because niece is employed in office of plaintiff's counsel.

It cannot be presumed as matter of law that juror is biased and prejudiced in favor of plaintiff merely because her niece is employed in office of litigant's counsel.

17. Appeal and error ⇨216(2)—Defendants failing to request instruction to disregard alleged misconduct of plaintiff's counsel cannot complain on appeal.

Where defendants in action for injuries failed to request court to instruct jury to disregard expositions of counsel for plaintiff consisting of interruptions on cross-examination

and court instructed that judgment must be rendered solely on the evidence at trial, defendants may not complain on appeal.

18. Appeal and error ⇨1050(1)—Permitting witness to say that, if headlight of locomotive striking automobile had cast rays along track in front of automobile, witness could have seen it, held not prejudicial.

In action for injuries sustained in collision of plaintiff's automobile with train, permitting witness to say that, if headlight of engine had cast rays of light along track in front of automobile, he could have seen it, though possibly stating a conclusion, held not prejudicial.

19. Damages ⇨168(2)—Evidence showing nature of soil at crossing where train struck plaintiff's automobile held admissible, since gravel and dirt found in wounds tended to show seriousness of injuries.

There was no error in permitting plaintiff, in action for injuries sustained when automobile collided with defendants' train at crossing, to show nature of soil at crossing, since gravel and dirt found in wounds of plaintiff tended to show seriousness of his injuries.

20. Damages ⇨172(1)—Nature of employment of plaintiff and cost of hiring man to take place as well digger during incapacitation from injuries held admissible as tending to establish measure of damages.

Showing nature of employment of plaintiff, in action for injuries sustained when his automobile collided with train, and cost of hiring man to take place as well digger while plaintiff was incapacitated from injuries, was admissible as tending to establish measure of damages for injuries sustained.

21. Appeal and error ⇨1050(1)—Where plaintiff sustained fractured skull from injury, evidence of subsequent injury from blow on head, though incompetent, was not prejudicial.

Evidence of subsequent injury from blow on head to plaintiff in action for injuries sustained when automobile collided with train was not competent, unless it may have tended to show he was more susceptible to injury on account of sensitive condition of his head owing to fracture of skull from collision, but was not prejudicial.

22. Appeal and error ⇨1050(1)—Permitting witness to describe position and condition of automobile in ditch at railroad crossing 24 hours after collision with train held not prejudicial error.

In action to recover for injuries sustained when plaintiff's automobile collided with train, there was no prejudicial error in permitting witness to describe position and condition of automobile as it lay in ditch at crossing 24 hours after accident, where machine was completely demolished by collision, though it should have been shown that no substantial change occurred in meantime.

23. Evidence ⇨116—That automobile after collision with train was in second gearing tended to corroborate driver's statement that he shifted to that gearing before collision.

Fact that automobile as found in ditch 24 hours after collision with train at crossing was

in second gearing was admissible as tending to corroborate plaintiff's statement, in action for injuries, that he shifted to that gearing immediately before collision.

24. Railroads ⚙️316(1)—Due caution as to speed of train must be determined from surrounding facts.

Due caution with respect to speed of a train must be determined from all surrounding facts, circumstances, and conditions.

25. Railroads ⚙️350(11)—When there are substantial circumstances supporting charge of excessive speed of train, question is for jury.

When there are substantial circumstances supporting charge of excessive speed of train amounting to lack of due care, it becomes question for jury to determine.

26. Railroads ⚙️316(4)—In absence of contrary statute or ordinance, speed of train is not negligence per se.

While railroad trains must be run with reasonable care commensurate with surrounding circumstances and consequent dangers, in absence of statute or ordinance to contrary no particular rate of speed is negligence per se.

27. Railroads ⚙️316(2)—Speed of train need not be slackened under ordinary circumstances at country crossings.

There is no legal obligation on part of railroad company to slacken speed of its trains under ordinary circumstances at country crossings.

28. Railroads ⚙️350(11)—Question of train's excessive speed as element of negligence in causing collision with automobile held properly submitted to jury.

Where, at time of collision of train at crossing with automobile, atmosphere was unusually foggy, and engineer admitted he could not see more than 100 feet ahead of engine, and train was 25 minutes late, and plaintiff as injured driver of automobile testified train was going fast, question of excessive speed as an element of negligence was properly submitted to jury.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by R. A. Hoffman against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 84 Cal. App. 337, 258 P. 397.

Levinisky & Jones, of Stockton, for appellants.

F. M. Ostrander, of Merced, and Philip M. Carey and W. F. Ostrander, both of Oakland, for respondent.

THOMPSON, J. This is an appeal from a judgment for damages for injuries which were sustained in a railroad crossing casualty. The facts are related in greater detail in the opinion which was rendered in an appeal from a former judgment in the same case reported in 84 Cal. App. 337, 258 P. 397.

The defendant Southern Pacific Company's

Oakdale branch of its railway system extends from Merced to Stockton through an open flat country. According to schedule the regular passenger train left Merced daily at 7 o'clock a. m., but on the morning of the accident this train was about 25 minutes late in leaving Merced. The plaintiff resided on the Cox Ferry highway, 3 miles from Merced, for more than a year prior to the accident, and was therefore familiar with the train schedule. In the locality of plaintiff's home this highway paralleled the railway track at a distance of 50 feet therefrom. On the morning of the accident a dense fog prevailed, obscuring the landscape so that it was difficult to discern an object more than a hundred feet distant. At 7:30 o'clock the plaintiff in his Buick automobile, accompanied by a companion by the name of Hawkins, who sat upon the front seat by his side, left home and drove along the Cox Ferry road at a speed of 25 or 30 miles an hour, to a cross road about a mile distant, where he turned abruptly to his left up a slight ascent and across the railroad track. The automobile was an open car. The train was approaching from their rear. Neither of the occupants of the machine heard a crossing whistle or bell or the rumbling of the train. They were not expecting it at that time. Both of them, however, claim to have carefully listened for a train as they approached the track, and assert that they looked down the track in the direction of Merced and saw no train. Except for the dense fog, there was no obstacle to obscure a clear view of the track for the distance of more than a mile. Before reaching the track the speed of the automobile was reduced to 6 or 8 miles an hour. When the front wheels of the machine reached a point 5 or 6 feet from the nearest rail, suddenly the headlight of the approaching engine appeared through the fog about 100 feet away. The train was rapidly bearing down upon them. At about the same time both occupants of the machine saw this light and had a glimpse of the engine upon their left. Both exclaimed with surprise. Doubtful of his ability to stop the machine in time to avoid a collision, and fearing that an attempt to increase the speed of the car would kill the engine, in the emergency, the plaintiff promptly shifted the clutch into the intermediate gearing and accelerated his speed. At the same time Hawkins opened the door at his right and jumped from the machine. As the car crossed the track the pilot of the engine struck the rear end of the automobile and hurled it into the ditch. The plaintiff was seriously injured. Chief among his injuries was a triangular fracture of the frontal bone of the skull penetrating to the brain, exposing the cerebrum, and requiring the trephining of the skull. Upon the trial the jury rendered judgment for the plaintiff.

The appellant seriously contends that the record will not support the implied finding of the jury to the effect that the defendant was guilty of negligence in failing to ring a bell or blow a whistle as required by section 486 of the Civil Code. It is also contended that the court erred in permitting the amendment of the complaint; in issuing a special venire for trial jurors; in admission of evidence; and in giving, refusing to give, and modifying instructions. The chief contention and the serious question is whether the plaintiff was guilty of contributory negligence in failing to stop his machine before attempting to cross the railroad track in a dense fog.

[1] The law does not require the driver of a vehicle to actually stop under any and all circumstances, before crossing a railway track. There is no absolute duty on the part of one to first stop before he attempts to cross the track. In 33 Cyc. 1010, it is said: "By the weight of authority it is not necessarily negligence on the part of one about to cross a railroad track to fail to stop in addition to looking and listening for trains, unless under the existing circumstances he cannot listen without stopping; but whether such a traveler must stop in addition to looking and listening depends upon the facts and circumstances of each particular case and so is usually a question for the jury. So it is held that a person need not stop before going on the track if he can look and listen effectively without doing so."

[2-5] The test as to the existence of contributory negligence on the part of one who attempts to cross a railroad track ahead of an approaching train is the question as to whether under such circumstances a reasonably prudent person would have undertaken to do so. When the circumstances of a particular case are of such a nature that different conclusions may reasonably be drawn as to the prudence of a person in attempting to cross a railroad track, the question of contributory negligence becomes one for the determination of the jury. *Murray v. So. Pac. Co.*, 177 Cal. 1, 169 P. 675; *Whitney v. N. W. Pac. Ry. Co.*, 39 Cal. App. 139, 178 P. 326; *Firth v. So. Pac. Co.*, 44 Cal. App. 511, 186 P. 815, 41 A. L. R. 420, 424 (note); 22 R. C. L. 1034, § 267; 3 Elliott on Railroads, 358, § 1167. Where there is nothing to obstruct one's view of a railroad track for a distance from a proposed crossing amply sufficient to preclude the possibility of a train arriving before one could cross the track with reasonable safety, there is no reason for the driver of a vehicle to stop the machine before crossing the track. 22 R. C. L. 1034, *supra*. But when one's view is obstructed by buildings or other obstacles, or one's hearing is impaired by the noise of the operating of the machine which is being driven, it may be negligence for the driver not to stop so as to enable him to secure reasonably safe vision and hearing of an approaching train. *Barnett v. A., T. &*

S. F. Ry. Co. (Cal. App.) 278 P. 443; *Stephenson v. N. W. Pac. Ry. Co.* (Cal. App.) 278 P. 263; 22 R. C. L. 1030, § 262; 3 Elliott on Railroads, 358, § 1167; 33 Cyc. 1019. When a dense fog obscures one's view, greater caution should be observed in crossing a railway track than might suffice at a time when the atmosphere is clear. *Hoffman v. Southern Pac. Co.*, 84 Cal. App. 337, 258 P. 397; 19 A. L. R. 872, note. Under the circumstances of the present case, however, we are inclined to think it may not be said as a matter of law that the plaintiff was guilty of contributory negligence in failing to stop his machine or his engine before attempting to cross the track. In other words, this case appears to present a situation which properly requires the question of contributory negligence to be presented to the jury for its determination. It is self-evident that the plaintiff's vision down the track would be neither improved nor impaired by the mere stopping of his machine. His vision could penetrate the fog no farther from a stationary machine than from one which was in motion.

[6] While it might be a question ordinarily open to doubt, there is substantial evidence upon which the jury was warranted in concluding the plaintiff's engine made less noise while the automobile was running than it would have made while merely idling with the machine stationary. We are of the opinion that the evidence may be said to reasonably support the implied conclusion of the jury that the engine of the automobile while it was in motion was so noiseless as to impair the hearing of its occupants only slightly, and to, therefore, make it unreasonable to hold as a matter of law that it was negligence not to have actually shut off the gas and stopped the engine entirely before attempting to cross the track. The appellant argues that if the machine had been stopped just before reaching the crossing, the accident would not have occurred. But this is not conclusive of negligence. It is equally true that if the train had been on time the morning of the accident, or ten seconds later than it was, the accident would not have occurred. The real question to determine is whether the plaintiff could have seen or heard the approaching train to better advantage if he had stopped his machine; and whether a reasonably prudent person would under such circumstances have stopped his engine or his machine before attempting to cross the track. We are inclined to think that reasonable minds might differ as to whether one should or should not have stopped the machine under such circumstances and that the question of contributory negligence was therefore a question for the jury.

[7] While there are some circumstances from which the jury may have inferred that the train was running without due caution at an excessive rate of speed on account of the existence of an unusually dense fog which greatly obscured the view, the chief element

of negligence on the part of the defendant railroad company which is relied upon is the charge that the whistle was not blown and the bell was not rung before reaching the crossing. There was a serious conflict on this subject. The plaintiff testified that up to the time of the crash "there was no whistle blown or bell rang." He claimed to have been carefully watching and listening for the train; that before reaching the crossing he looked "back down the track towards Merced to see if the train was coming. Q. Did you see any? A. No sir. * * * Q. State what observation you made in going up the grade? * * * A. I was looking for the train all the time. Q. When for the first time did you see any train, if you did see any? A. Not until I got on the track, or almost on it. Q. Then to your best knowledge, where was the train? A. About 80 or 100 feet down the track. * * * I saw the headlight, is the first thing I saw. * * * I shifted the gears to second as soon as I saw the headlight. * * * I stepped on the gas with my foot, just as quick as I shifted. * * * I turned the wheel as far as I could * * * to the right." The plaintiff testified that if he had suddenly stepped on the accelerator while the machine was slowly going upgrade, it would have killed the engine. Mr. Hawkins, the companion of plaintiff, testified that both he and the plaintiff looked and listened for the train, and although the machine made no unusual noise, he heard no whistle or bell until immediately preceding the crash. Mr. Walker lived 200 yards from the crossing, and at the time of the accident was preparing to drive his own car out of his yard on his way to work. He was listening for the train and said he heard "a very indistinct whistle which I presume was about the cement plant," one mile distant. He had driven out toward the crossing, but did not see the train until it was about 80 feet away. In response to the question, "Why didn't you see it before?" he replied, "Because it was too foggy." He also testified that except for the faint sound of the whistle at the cement plant one mile away, he heard no other whistle or bell until just at the time of the crash. Both Ernest and John Campodonica, father and son, who lived only 25 or 30 yards from the scene of the accident, the father being engaged in the yard, and the son looking out of the window toward the crossing, heard neither whistle nor bell until immediately prior to the accident. Arthur, the son of plaintiff, and his wife, Josie, who were at their home, half a mile from the crossing and within 100 feet of the track where the train passed, testified that while they usually heard the morning train, they heard no whistle or bell on this occasion. Mr. Dysart, who also lived in the same vicinity, was working about his stable 200 feet from the track at the time the train passed, and testified to substantially the same thing. Since the fog was

so dense on the morning of the accident the jury may have assumed the engineer did not see the whistling post, and therefore may have omitted to give the usual crossing warnings. The foregoing testimony furnishes sufficient evidence to support the implied finding of a failure to blow the whistle or ring the bell.

[8, 9] During the process of the trial, on motion, the plaintiff was permitted to amend his complaint to include a demand for damages in the sum of \$1,500 for medical aid in the performance of a necessary surgical operation resulting from the injuries sustained. The original complaint alleged that the plaintiff was "severely and permanently injured." There was no abuse of discretion in permitting this amendment. The language of the original complaint was adequate upon which to admit evidence of permanent injuries. 7 Thompson's Comm. on Neg. 1009, § 7602. The amendment was sufficient upon which to admit testimony to include the necessary cost of future medical services. 8 Thompson's Comm. on Neg. 956, § 7327. In 3 Sutherland on Damages, 2781, § 944, it is said: "In estimating the pecuniary loss in such cases all the consequences of the injury, future as well as past, are to be taken into consideration. * * * These are presumed to embrace indemnity for actual nursing and medical expenses." Section 3283 of the Civil Code authorizes the recovery of damages which are reasonably "certain to result in the future." 8 Cal. Jur. 754, § 22. Dr. Parker testified that the fracture of the plaintiff's skull required the operation of trephining. He said this operation left a "depressed area in his skull and * * * a hard scar tissue formation there, which is deep in, and it has been producing a pressure on his cerebrum," together with frequent severe shooting pains in the head, and that epilepsy would probably result unless another operation were performed to relieve the pressure on the brain; that this operation would reasonably cost about \$1,500. The evidence amply supports the judgment with respect to the injuries and the necessary future expense which would be reasonably certain to accrue as a result of the accident.

[10] Over the objection of defendants, Dr. Parker, who treated the plaintiff for his injuries, and who subsequently examined him a short time before the last trial to ascertain his physical condition, was permitted to testify in response to a hypothetical question that the plaintiff's present condition as above stated was the result of the injuries sustained in the railroad crossing accident. The hypothetical question did not fully state the facts involved upon which his opinion was necessarily based. But the ruling was not erroneous, since all of the remaining necessary facts had been previously testified to by this witness and it is apparent that his opinion was based, not only upon the hypothetical question

which was propounded, but also upon his personal examination, treatment and knowledge of the patient's condition.

[11, 12] October 24, 1927, this case was set for trial, at which time the plaintiff demanded a jury according to the amended court minutes as shown under the date of the court proceedings of March 12, 1928. There is some controversy regarding the demand for a jury on this date. The court minutes, however, must control in this regard. But the case was formerly tried before a jury and reversed on appeal. It seems to be conceded a proper demand for a jury was made for the first trial. It was not necessary to repeat the demand for a jury at the time the case was finally set for trial. The original demand was continuing in its effect. Section 631 of the Code of Civil Procedure provides that the constitutional right to a trial by jury is waived under such circumstances as are here involved "by failing to announce that a jury is required, *at the time the cause is first set upon the trial calendar.* * * *" In the case of *Wendling Lumber Co. v. Glenwood Lumber Co.*, 19 Cal. App. 1, 6, 124 P. 734, 735, it is said: "It was not necessary to formally renew them [the demand for a jury and payment of fees], since it appears that plaintiff was still relying upon them. The demand must be considered as a continuous refusal to waive the right to a jury. It was not necessary to repeat the demand."

[13, 14] However, the demand for a jury appears to have been formally repeated on October 24, 1927, when the case was reset for trial. Instead of ordering a jury from the regular panel pursuant to section 214 of the Code of Civil Procedure, the court ordered a special venire under section 226 of the same Code. At the time of trial the defendants informally objected to the special venire and requested the court to draw a jury from the general panel, which was denied. The record contains no showing as to the existence or absence of names in the trial jury box, except that in the colloquy between counsel and the court, it was stated that it was the custom of the court to issue a special venire. The panel was not formally challenged. No evidence was adduced in support of defendants' objection to the special venire. There is no attempt to show that the defendants were prejudiced by the trial by jurors drawn by means of a special venire. It is the custom and preferable practice to order a trial jury to be drawn from the regular panel. *Amos v. Superior Court*, 196 Cal. 677, 682, 239 P. 317. In the absence of a formal showing that a special venire was not necessarily drawn pursuant to the specific authorization of section 226 of the Code of Civil Procedure, it must be assumed there was no abuse of discretion on the part of the court and that the denial of defendants' motion was not prejudicial or erroneous. *Estate of Wall*, 187 Cal. 50, 54, 200 P. 929.

[15, 16] After the jury had been impaneled and during the process of the trial, the defendants moved the court to discharge one juror by the name of Mary Hayes on the sole ground that she was the aunt of a clerk who was employed in the office of one of the attorneys for plaintiff. This juror was qualified on the voir dire. There is no abuse of discretion on the part of the court in refusing to discharge a juror in the midst of a trial where no prejudice is shown on the part of the juror. It cannot be presumed as a matter of law that a juror is biased and prejudiced in favor of a plaintiff merely because her niece is employed in the office of the litigant's counsel.

The appellants have cited 53 assignments of alleged misconduct of counsel for plaintiff in the process of trial. Most of them consist of interruptions of counsel on cross-examination with the evident purpose of correcting what was assumed to have been misstatements or misinterpretations of the evidence of a witness; some of them do contain suggestions as to the answers of witnesses under examination. It must be conceded some of these assignments of misconduct do illustrate the prevailing practice of interrupting the orderly trial of a case, frequently resulting in distracting contests of wits or zeal between counsel and an ignoring of the authority of the trial judge, to whom all such conflicts should be addressed. Probably the most flagrant transgression occurred in the examination of prospective jurors on the voir dire. Several jurors were asked if they would become prejudiced if it should appear that a verdict was secured by the plaintiff on a previous trial, and that the judgment was reversed on appeal. The purpose of these questions is apparent. It is a common fault to permit counsel in the examination of jurors to resort to argument, prejudicial inferences, and theoretical application of the law. However, the jury was subsequently furnished complete knowledge of the previous trial by the abundant use of the transcript of the former trial, on the part of respective counsel, for impeachment purposes. Moreover, upon objection the court instructed the jury as follows: "The jury are here for the purpose of trying this case right now, the same as if it never had been tried at all, that is their province and their duty to regard it in that way, and you are to act upon the evidence as it comes in here."

[17] Also in the court's charge to the jury, they were instructed to the effect that the judgment must be rendered solely upon the evidence adduced at the trial. Finally, the defendants failed to request the court to instruct the jury to disregard these expositions of counsel, and may ordinarily, therefore, not complain. *Scott v. Times-Mirror Co.*, 181 Cal. 345, 368, 184 P. 672, 12 A. L. R. 1007; *People v. Simon*, 80 Cal. App. 675, 678, 252 P. 758.

[18-23] The appellant has assigned some 65

specifications of alleged errors in the course of the trial, most of which are addressed to the admission of evidence. After an examination of the record as to each assignment, while it appears that liberal latitude was allowed the plaintiff in examination of witnesses and some technical errors in rulings exist, we are of the opinion there is nothing so prejudicial as to require a reversal of the judgment. Regarding the second assignment, it may have been a conclusion for Hawkins to say that if the headlight of the engine had cast rays of light along the track in front of the automobile, he could have seen them. There was no harm in permitting the answer. At most, it was only a question of how far the rays from the headlight of an engine would act as a warning in a dense fog. This would depend on the intensity of the light and the density of the fog. The common judgment of jurors must make allowance for such uncertainties in view of the physical conditions which appear to exist under the circumstances. There was no error in permitting the plaintiff to show the nature of the soil at the crossing. Since gravel and dirt were found in his wounds, it tended to show the seriousness of his injuries. The nature of plaintiff's employment as a well digger, and the cost of hiring a man to take his place while he was incapacitated from his injuries, tended to establish the measure of his damages. The evidence of plaintiff's subsequent injury from a blow on the head was not competent, unless it may have tended to show he was more susceptible to injury on account of the sensitive condition of his head owing to the fracture of his skull. It was, however, not prejudicial. Before permitting a witness to describe the position and condition of the automobile as it lay in the ditch at the crossing 24 hours after the accident, it should have been shown that no substantial change occurred in the meantime. But the machine was completely demolished by the collision. There was no contention to the contrary. It was stipulated that the reasonable value of the machine was \$200. There was therefore no prejudicial error in this ruling. The fact that the machine was found after the accident to be in the second gearing merely tended to corroborate the plaintiff's statement that he shifted to that gearing immediately before the collision. This ruling was harmless. No substantial error exists in these rulings of the court.

The defendants have challenged the giving, the refusing, and modifying of numerous instructions. To review each of these instructions would extend this opinion to unwarranted length. The objections to several of these instructions are covered by the principles of law heretofore announced. The jury was fully and fairly charged on all the material issues of the case, and we think the charge contained no prejudicial error. Among the instructions which were given the following one

is vigorously assailed: "It is not necessary that plaintiff prove all the allegations of negligence set forth in his complaint in order to recover. The proof of any one is sufficient. Therefore, even if you may find that the whistle was blown or the bell rung, as required by law, still if you find that the train was being operated at a dangerous and excessive rate of speed, and that by reason thereof the accident occurred, and that the injuries of the plaintiff were the proximate result thereof, such proof is sufficient to entitle plaintiff to recover damages in this action, providing that the plaintiff himself did not proximately cause or contribute to said injuries by any negligent act of his own."

[24, 25] Defendants assert that this instruction is erroneous for the reason that there is no evidence of the speed of the train measured in the number of miles an hour which it was running, which could be said to be a "dangerous or excessive rate of speed." While it is true that the estimated speed of the train in terms of mileage does not constitute negligence per se, and standing alone does not indicate negligence at all, still the question of excessive speed may be determined independent of an actual estimate of a specific number of miles an hour. Due caution with respect to the speed of a train or vehicle must be determined from all the surrounding facts, circumstances, and conditions. When there are substantial circumstances supporting a charge of excessive speed amounting to a lack of due care, it becomes a question for the jury to determine.

[26-28] While it is true that railroad trains must be run with reasonable care commensurate with the surrounding circumstances and consequent dangers, in the absence of a statute or ordinance to the contrary no particular rate of speed is negligence per se, and there is no legal obligation on the part of the railroad company to slacken the speed of its trains under ordinary circumstances, at country crossings. *Larrabee v. Western Pac. Ry. Co.*, 173 Cal. 743, 161 P. 750; 3 *Elliott on Railroads* (2d Ed.) 337, § 1160; 22 R. C. L. 1011, § 242; 33 Cyc. 791. But regardless of the actual rate of speed, usually it is a question of fact to be determined by the jury from the surrounding circumstances as to whether the speed at which the train is running constitutes negligence. *Bilton v. So. Pac. R. Co.*, 148 Cal. 443, 447, 83 P. 440; *Tousley v. Pac. El. Ry. Co.*, 166 Cal. 457, 137 P. 31; *Badostain v. Pac. El. Ry. Co.*, 83 Cal. App. 290, 295, 256 P. 576; 3 *Elliott on Railroads*, 337, §§ 1160, 1161; 22 R. C. L. 1011, § 242; 33 Cyc. 791. In the case of *Bilton v. So. Pac. R. Co.*, supra, it was held to be a question to be determined by the jury, where a train was running 35 miles an hour, as to whether this rate of speed was so excessive as to constitute a lack of due caution. In the present case the circumstances required the jury to determine whether the train was running at so excessive

a speed as to constitute negligence. It was an unusually foggy morning. The defendant engineer admitted he could not see more than 120 feet ahead of his engine. The train was 25 minutes late. The plaintiff testified the train "was going fast." Hawkins said: "It was going fast. * * * Well, I should judge, we will say 30 miles an hour, 35 or 40 maybe, I don't know how fast." The engineer said he was running 25 or 30 miles an hour, and the moment he saw the automobile on the track, he applied the emergency brakes, but the train ran some 500 feet before it was brought to a stop. Under such circumstances the question of excessive speed as an element of negligence was properly submitted to the jury under appropriate instructions.

The case of *Diamond v. Weyerhaeuser*, 178 Cal. 540, 174 P. 38, relied upon by appellants, is not applicable to the circumstances of the present case. That case merely held that evidence to the effect that an automobile was running within the limits of a city "very fast" would not support a claim that it was negligently traveling in violation of an ordinance which limited the speed to 20 miles an hour. In that case there were no facts indicating excessive speed or negligence on the part of the defendant, and a nonsuit was granted.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 769

OUGH v. ANSONIA OIL CO. et al.
(Civ. 6767.)

District Court of Appeal, First District, Division 1, California. July 11, 1929.

1. Limitation of actions $\S$ 49(2)—Limitations against action on implied promise to pay for labor and materials begins when materials were furnished and labor performed.

Limitations against cause of action based on implied promise to pay for labor and materials commences on date when materials were furnished and labor performed.

2. Limitation of actions $\S$ 28(1)—Action for materials and labor held barred two or four years after plaintiff ceased work and rent for equipment and watchman's hire were due (Code Civ. Proc. $\S$ 339).

Cause of action on implied promise to pay for materials and labor in drilling oil wells held barred two or four years after cessation of work by plaintiff and after date when rent of equipment and watchman's hire were due, under Code Civ. Proc. $\S$ 339.

3. Account stated $\S$ 5—Letter acknowledging receipt of statement showing balance due, and requiring plaintiff to explain account, was insufficient as account stated.

In action on an account stated for work done and materials furnished in drilling oil well,

letter by defendant, acknowledging receipt of statement showing balance due, and stating that its directors would meet and consider matter, and that it would be necessary for plaintiff to explain some of items, and also objecting to time taken for work, did not meet requirements of an account stated, since not containing absolute acknowledgment of certain sum due.

4. Account stated $\S$ 5—Account stated presupposes admission of sum due and assent to correctness of balance.

Account stated presupposes, not only acknowledgment or admission of certain sum due on adjustment of accounts between parties, but striking of balance and assent, express or implied, to correctness of balance.

5. Account, action on $\S$ 18—Ledger sheets, showing no items of materials or services, and showing balancing of account and nothing due, was insufficient to establish cause of action on open book account.

In action for balance due on mutual open and current book account, ledger sheets showing no items of materials furnished or services rendered, but merely reciting numbers of job and amounts and balance of credits and debits, and showing no balance due, was insufficient to establish cause of action on mutual open account.

6. Account, action on $\S$ 23—Account stated $\S$ 20(3)—Work and labor $\S$ 30(4)—Finding that defendants within four years became indebted for materials and services requested and agreed to be paid was not finding of book account, account stated, nor that materials and services were reasonably worth judgment.

In action based on implied promise to pay for materials furnished and services rendered, finding that within four years past defendants became indebted for materials furnished and services rendered at defendants' special request, and that defendants agreed to pay for materials and services, was not finding of book account nor account stated nor that materials and services were reasonably worth amount for which judgment was rendered.

7. Limitation of actions $\S$ 197(1)—Finding that within four years defendants became indebted for materials and services held against evidence (Code Civ. Proc. $\S$ 339).

Finding that within four years last past defendants became indebted to plaintiff for materials furnished and services rendered held against evidence showing action was barred by both two and four year periods of limitation after furnishing of last item of materials, under Code Civ. Proc. $\S$ 339.

8. Limitation of actions $\S$ 195(6)—Action for materials and labor to avoid bar of limitations must be based on open accounts, and plaintiff must show payments within four years and balance due.

To avoid statute of limitations, cause of action for materials furnished and labor performed must be based on open book account, and plaintiff must show payments by defendant within four years, and that balance is due.

9. Account, action on — Recovery on open book account requires showing of balance due.

To recover on open book account, balance due must be shown.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by J. M. Ough against the Ansonia Oil Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Earl S. Patterson, of Los Angeles, for appellants.

Robert R. Moody, of San Francisco, for respondent.

PER CURIAM. In this action plaintiff seeks to recover against the two defendant corporations for services alleged to have been rendered and materials furnished in connection with the drilling of certain oil wells and the cleaning out of a certain water well at Petaluma, Cal., during the year 1921.

A written contract was entered into between plaintiff and defendants on March 9, 1921, wherein it is provided that plaintiff is to place on the ground a complete Star drilling outfit capable of drilling at least 1,200 feet, and, as soon as the outfit is on the ground, to set it up with all possible speed consistent with careful work and commence to drill for oil; plaintiff to receive \$35 per day for each working day of eight hours so long as the work shall continue, such payments to be made at the end of each period of ten days, the company to furnish certain materials and reserving the right to discontinue the work at any time, in which event the compensation of plaintiff ceases. On execution of the contract, the company paid plaintiff \$1,000 on account.

Plaintiff commenced work under this contract and continued the work until about January 24, 1922, at which time he was notified by defendants to cease work on the oil wells he was drilling, and thereafter, until March 22, 1922, his equipment remained on the ground with a watchman. Plaintiff, by reason of being prevented by defendants from completing the contract, did not bring the action upon the written contract, but elected to sue on four different counts: (1) A common count in indebitatus assumpsit for materials furnished and services rendered; (2) an account stated; (3) for a balance due upon a mutual open and current account; and (4) a common count in quantum meruit for the reasonable value of the materials furnished and work and labor performed.

The answers of the defendants, each of which is the same, contain complete denials of the allegations of each count of the complaint, and in addition thereto, as separate and special defenses, pleaded the bar of the statute of limitations to each cause of action.

[1, 2] The first cause of action set forth in the complaint, which was filed June 22, 1926, is not based upon an agreement in writing, but upon an implied promise to pay. The time at which the statute begins to run is the date when the materials were furnished and the labor was performed. As stated, plaintiff ceased work January 24, 1922, and the rent of equipment and watchman's hire are charged as of dates between September, 1921, and March, 1922. The cause of action, therefore, under this count and the fourth count on a quantum meruit, was barred January 24, 1924, two years after the cessation of work by plaintiff, and on March 22, 1924, two years after the date the rent of equipment and watchman's hire were due. Code Civ. Proc. § 339. This would likewise be so if the period of limitation were four years; the action not being filed until June 22, 1926.

[3, 4] The second cause of action is on an account stated, and is based upon the following letter written by the secretary of defendant, the Ansonia Oil Company, to plaintiff, dated June 22, 1922, and reading as follows: "Your statement showing balance of \$4,449.32 addressed to the Analy Oil Company has been received and referred to this company. The Board of Directors of this company will meet to consider this matter within a few days and then report to you. We note that one of your statements, dated December 15th, 1921, is not included in your former statement. These items of rent of rig, etc., do not come under the contract with the Analy Oil Company. The same items appear on your statement dated January 25th, 1922. It will be necessary for you to appear before our board when convenient to you to explain some of these items, also some of the items on your statement dated April 15th, 1922. The report we have on the moving of the rig from the property shows a great waste of time. In fact this entire job seems to have cost both this company and the Analy Company more than twice what it should. But we wish to be fair and right with you." This does not meet the requirements of an account stated. The law as to how an account stated may be created is plain and not subject to controversy under the authorities. A general statement of this law is found in 1 Cal. Jur. 189: "An account stated has been defined by Bouvier as 'an agreed balance of accounts; an account which has been examined and accepted by the parties,' and this definition is generally accepted as a correct one." An account stated presupposes, not only an acknowledgment or admission of a certain sum due on adjustment of accounts between the parties, but the striking of a balance, or an assent, express or implied, to the correctness of the balance. *Beltaire v. Rosenberg*, 129 Cal. 164, 61 P. 916. If the acknowledgment or admission is qualified, or if the debtor, as

here, merely wrote that the statement of account would be considered, and that it would be necessary for the creditor to appear and explain the account, there is no account stated, as an account stated presupposes an absolute acknowledgment of a certain sum due. *Craig v. Lee*, 36 Cal. App. 335, 171 P. 1089. If the letter from the oil company to the plaintiff constituted an account stated, it would not be barred by the statute, but in our opinion it does not meet the requirements of an account stated. Furthermore, the court made no finding on this cause of action, and, if it had, the finding would have had to be against the plaintiff.

[5] As to the third cause of action for a balance due upon a mutual open and current book account, it may be said that the only proof of any books of account was two sheets of a ledger, an examination of which shows no items of materials furnished or services rendered, the charge side merely showing: "1921, April 26 Statement 317 and 320J 22, \$1818.04; May 21, statement job 317 and 320 Apr 30 J 34, \$1338.66; May 21, statement job 320 J 34 \$421.68; Aug. 9, statement job 320 J 54, \$2739.66"—which totals \$6,318.04. As against these debits, the ledger sheets show a balance by credits, with the exception of \$1,500, which was transferred on January 1, 1922, to the new ledger, which new ledger shows: "Jan. 1, 1922, balance on ledger J. V-7, \$1500; to job 317 \$350"—making the total debits \$1,850. The credits show a like amount of \$1,850, the account balanced, and nothing due.

[6] The findings and judgment are based upon the first cause of action, and are to the effect that within four years last past defendants became indebted "for materials furnished and services rendered" at defendants' special instance and request, and "that said defendants agreed to pay plaintiff for said materials furnished and services rendered." No other finding is made and such finding is not a finding of a book account, a finding on an account stated, nor that the materials furnished or services performed are reasonably worth the amount for which judgment is rendered.

[7] The finding that within four years last past defendants became indebted to plaintiff for materials furnished and services rendered is not supported, but on the contrary is against the evidence. Respondent concedes in his brief that "the plaintiff commenced work under this contract and continued the work under it until about January 24, 1922, at which time he was notified by defendants to cease work upon the oil wells which he was drilling under the contract, and thereafter until March 22, 1922, his equipment remained upon the ground with a watchman." Conceding the last item of "materials furnished and services rendered" to be March 22, 1922, the

action is barred by both the two and four year periods of limitation.

[8, 9] To avoid the statute of limitations, respondent must base his cause of action upon an open book account, and must show payments made by defendant companies within four years, and that a balance is due. There are three credits on the ledger sheets: August 5, 1922, \$100; August 31, 1922, \$100, and October 14, 1922, \$200—which are within the four-year period, but these payments, together with other payments made, aggregate the credit amount of \$1,850, which balances the \$1,850 debits. To recover, upon an open book account, it must show a balance due. *Merchants' Collection Agency v. Levi*, 32 Cal. App. 595, 163 P. 870.

There being no evidence to establish plaintiff's cause of action upon an account stated, the ledger sheets showing no balance due as claimed under his cause of action upon a mutual open and current account, and his causes of action upon an implied agreement to pay for materials furnished and services rendered and upon a quantum meruit being barred by the statute, the judgment must be reversed, and it is so ordered.

99 Cal. App. 783

CLAREY v. SECURITY PORTLAND CEMENT CO., Inc., et al. (Civ. 6720.)

District Court of Appeal, First District, Division 1, California. July 12, 1929.

1. Contracts ☞194—Agreement for royalty on cement produced until loan with interest is paid required payment of royalty on production during preceding month to be applied first to interest and then to principal.

Agreement providing that, in consideration of loan, cement manufacturer agreed to pay monthly royalty of five cents per barrel on all cement produced until full amount with 6 per cent. interest shall have been paid, held to show intention that manufacturer should pay each month sum equal to five cents per barrel of cement produced during preceding month, to be applied, first, to payment of interest at rate of 6 per cent. per annum and balance, if any, on principal of loan.

2. Contracts ☞10(6)—Agreement to pay royalty, on cement produced until loan was paid held not founded on mutual promises.

Where agreement provided that, in consideration of loan, manufacturer agreed to pay monthly royalty of five cents per barrel on all cement produced at plant until full amount, together with 6 per cent. interest, shall have been paid, agreement was not founded on mutual promises and doctrine of mutuality of obligation did not apply, in action to recover loan with interest.

3. Contracts $\S$ 314—If one voluntarily makes impossible performance of contract to pay loan and interest, he is immediately liable, though time for performance has not expired.

If one voluntarily puts it out of his power to perform contract to pay in consideration of loan certain amount per month, with interest until full amount is paid, he is immediately liable, though time specified for performance has not expired.

4. Contracts $\S$ 213(1)—Obligation to be performed on happening of contingency matures upon occurrence thereof.

Obligation which is to be performed on happening of contingency does not mature until occurrence of stipulated event.

5. Contracts $\S$ 313(2)—Obligation to repay loan dependent on production of cement being unilateral, failure to pay installments at maturity would not repudiate contract allowing full recovery contrary to terms.

Where agreement provided that, in consideration of loan, manufacturer agreed to pay royalty of five cents per barrel on all cement produced at plant until full amount, together with interest, is paid in monthly payments, so that production of cement was contingency on which depended obligation both as to amounts of installments and their maturity, obligation was unilateral, and failure to pay installment at maturity would not give promisee right to consider contract repudiated and to recover payment in full, contrary to its terms.

Appeal from Superior Court, Santa Barbara County; C. P. Vicini, Judge.

Action by J. A. Clarey against the Security Portland Cement Company and another. Judgment for plaintiff, and named defendant appeals. Reversed.

Sheran, Alvord & Hearn and Thos. H. Hearn, all of Los Angeles, for appellant.

W. P. Butcher, of Santa Barbara, for respondent.

PER CURIAM. An action was brought by the plaintiff against appellant corporation, which is engaged in the manufacture of cement, to recover the sum of \$5,000, with interest.

The court found that the plaintiff on July 26, 1926, loaned the above sum to the appellant; that the latter in consideration thereof agreed to repay the same in monthly installments, commencing on August 1, 1926, at the rate of five cents per barrel of cement produced, together with interest at the rate of six per cent. per annum, payable with each monthly installment of the principal sum. It was further found that appellant produced cement after August 1, 1926, and continued to do so from month to month; that it failed to pay any installment as provided by the agreement, except the sum of \$27.26, which was not the full amount due at the rate of five cents per barrel for all cement produced, and did not include the

agreed interest. The court further found the agreement to be without mutuality, uncertain and void, and "that there was a failure of consideration on the part of said defendant." Upon its findings, the court entered judgment against appellant for the full amount of the loan, with interest.

The following is the contract which appellant in consideration of the loan executed to the plaintiff:

"For and in consideration of loan of \$5,000.00 the Security Portland Cement Co. Inc. agrees to pay a royalty of five cents per bbl. on all cement (commencing August 1st, 1926, and until paid), produced at their plant at Devore, San Bernardino county, California, until the full amount together with 6% interest shall have been paid. Payments on principal and interest on royalty account shall be paid monthly."

On December 13, 1926, appellant sent the following letter to the plaintiff:

"Dear Sir:—Below you will find statement of cement sold by barrels up to December 1st, 1926. There was very little cement manufactured in the month of October and so consequently it is included in November sales.

Am't sold bbls.	Royalty per bbl.	Am't due Clarey
545½	5c	\$27.26

"Trusting that this statement is satisfactory, we are," etc.

A second letter inclosing a check was sent by appellant on December 14, 1926; this letter being as follows:

"Mr. J. A. Clarey, Santa Barbara, Calif. Dear Sir: Herewith our check in amount \$27.26 to cover royalties due you for cement production to December 1st. Trusting that this slight delay and forwarding this check has not inconvenienced you greatly, and assuring you that the next royalty check due you will be forwarded by the 10th of the month, and that also it will be larger due to our increased production—

"Very truly yours," etc.

The last letter with the check was returned by the plaintiff, who wrote upon the letter the following: "Mr. G. F. Sondrake (General Manager): I herewith return check 1230 and letter until things are cleared up."

So far as shown, no other communications passed between the parties, and on December 15, 1926, the present action was commenced.

It appears that the plaintiff at or about the time when the loan was made was employed in some capacity in connection with the operation of appellant's plant. The capacity of the plant was from 150 to 200 barrels of cement per day, but the only evidence as to the amount of cement produced was the testimony of the company's manager. According to this evidence, no cement was produced between August 1, 1926, and October 7, 1926, but between the latter date and the middle of December, 1926, the production was about 2,000 barrels. How much

of this was produced prior to December 1, 1926, the evidence does not show. The witness also testified that the plant was shut down some time during December, 1926, and from then until the date of the trial on February 4, 1927, no cement was produced; and, further, that it was the intention of the appellant to erect a larger plant, plans for the procurement of the capital necessary being then under way.

The foregoing is practically all the evidence as to the condition of appellant company, the past production, and its future prospects.

[1] We find nothing uncertain in the terms of the agreement. It was clearly the intention that the defendant should pay each month a sum equal to five cents per barrel of cement produced during the preceding month, this amount to be applied, first, to the payment of interest at the rate of 6 per cent. per annum, and the balance, if any, upon the principal of the loan.

[2] Nor can the contention that there was a lack of mutuality be sustained. The contract was not founded upon mutual promises, and the doctrine of mutuality of obligation is consequently inapplicable. *Mathewson v. Fitch*, 22 Cal. 86; *Nevada Bank v. Steinmiz*, 64 Cal. 301, 30 P. 970; *Chrisman v. Southern Cal. Edison Co.*, 83 Cal. App. 249, 256 P. 618; *Noble v. Reid-Avery Co.* (Cal. App.) 264 P. 341. As said in 1 Williston on Contracts, § 140, p. 314: "It is often stated as if it were a requisite in the formation of contracts that there must be mutuality. This form of statement is likely to cause confusion, and, however limited, is at best an unnecessary way of stating that there must be a valid consideration. In unilateral contracts there is never mutuality of obligation; and in bilateral agreements, though it is necessary that there shall be such a promise on each side as will furnish valid consideration, to express the idea by saying that mutuality is necessary is sure to cause confusion with the use of the same word by courts of equity."

* * * The particular error which is traceable to the misleading use of the word as a requirement for the formation of a contract is a tendency observable in some of the cases to hold a contract invalid because the obligation undertaken on one side is not commensurate with that undertaken on the other. * * *

[3-5] While it is probable that the appellant produced less cement than was anticipated at the time the loan was made, nothing in the evidence supports the conclusion that there was a failure of consideration. It is the rule that, if one voluntarily puts it out of his power to perform a contract of this character, he is immediately liable, though the time specified for performance has not expired. *Wolf v. Marsh*, 54 Cal. 228; *Bagley v. Cohen*, 121 Cal. 604, 53 P. 1117; *Carter v.*

Rhodes, 135 Cal. 46, 66 P. 985. But here, so far as shown, no act of the kind was done or contemplated, and the defendant in good faith and with reasonable diligence was proceeding with its operations. Subject to the above rule, an obligation which is to be performed upon the happening of a contingency does not mature until the occurrence of the stipulated event (*Hathaway v. Patterson*, 45 Cal. 294; *McAfee v. Fisher*, 64 Cal. 246, 30 P. 811; *Lynch v. Keystone Consol., etc., Co.*, 163 Cal. 690, 126 P. 968); and in the present case the production of cement was the contingency upon which depended appellant's obligation both as to the amounts of the installments to be paid and their maturity. This obligation, however, being unilateral, a failure to pay an installment at maturity would not give the promisee the right to consider the contract repudiated and to recover payment in full contrary to its terms. *Flinn & Treacy v. Mowry*, 131 Cal. 481, 63 P. 724, 1006. It may be, as found by the court, that more cement was produced between the date of the agreement and December 1, 1926, than that stated in the letter from the defendant. The amount, however, the evidence leaves uncertain, and no finding thereon was made.

In view of the foregoing, the conclusions of the trial court cannot be sustained, and the judgment is accordingly reversed.

99 Cal. App. 709

GEORGE et ux. v. CHAPLIN et al.
(Civ. 6744.)

District Court of Appeal, First District, Division 1, California. July 3, 1929.

1. Master and servant ⇨316(1)—"Independent contractor" is one exercising independent employment and representing employer only as to results of work, not as to means whereby accomplished.

An "independent contractor" is one who, in rendering services, exercises an independent employment and represents employer only as to results of his work, and not as to means whereby it is to be accomplished, and, when essential object of employment is performance of the work, relation of master and servant does not exist, unless employer retains right to direct mode and manner of doing work.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Independent Contractor.]

2. Master and servant ⇨318(1)—Test whether relationship is that of "independent contractor" or master and servant is whether employee is subject to employer's control and liable to discharge.

Real test to determine whether relationship is that of independent contractor or master and servant is whether employee is subject to employer's order and control, and is liable to be discharged for disobedience or misconduct, and

fact that a certain amount of freedom of action is inherent in nature of work does not change character of employment, where employer has general supervision and control thereof.

3. Master and servant ⚡318(1)—In absence of express stipulation, existence of employer's right to control manner of work must be determined by reasonable inferences from circumstances.

On issue whether relationship is that of independent contractor or master and servant, existence of right of employer to control manner of doing the work must be determined by reasonable inferences drawn from the circumstances shown, in absence of express stipulation in respect thereto.

4. Automobiles ⚡245(32)—Evidence held to present jury question whether automobile salesman, whose negligence caused automobile accident, was defendants' employee or independent contractor.

In action for injuries sustained in automobile accident caused by negligence of defendants' automobile salesman, evidence held sufficient to present question for jury as to whether salesman was defendants' employee or independent contractor.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Action by Clarence George and wife against D. H. Chaplin and another, individually, and as copartners doing business under the firm name and style of the Chaplin Motor Sales Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Redman & Alexander, of San Francisco, and Donahue, Hynes & Hamlin, of Oakland, for appellants.

Ford, Johnson & Bourquin and Dinkelspiel & Dinkelspiel, all of San Francisco, for respondents.

PER CURIAM. An action to recover damages for personal injuries sustained by plaintiff Georgie George and for the expense incurred in that connection by her husband.

The injuries arose out of an automobile accident, and were caused by the negligence of Robert Simmons, who is alleged to have been the agent and servant of appellants, Chaplin. A jury returned a verdict for the plaintiffs and, a motion for a new trial having been denied, an appeal was taken from the judgment.

Appellants contend that the implied finding that Simmons was their servant is unsupported, and that the evidence shows that he was an independent contractor.

Appellants are dealers in automobiles. From the month of September, 1925, to and including the date of the accident, which happened on February 10, 1926, Simmons, who was a salesman, had been engaged in selling the automobiles owned and dealt in by appellants. Simmons testified that he

was paid a commission on cars sold by him; that he was required to report daily at 9 o'clock a. m. at appellants' salesroom, at which hour sales conferences were held, and to spend portions of certain days, as directed by appellants, at the salesroom for the purpose of showing visitors the cars placed therein for sale; that his duties included the appraisalment of cars taken by appellants in trade; that he received instructions from their sales manager, and on occasions used for demonstration purposes cars owned by them. According to the testimony of one of the appellants, their salesmen were subject to discharge at any time, and it was testified by their sales manager that salesmen were expected to render reports as to how their time was spent and as to prospective customers and the persons interviewed, and also that a salesman "could go and come as he pleased, but he had to keep in contact with the office." Each salesman was required to purchase a car from appellants, and on January 15, 1926, Simmons executed a contract for the purchase on installments of an automobile from them, the title to which they retained. After its execution, he continued to use for demonstration purposes other cars owned by appellants, but the latter allowed him \$10 per month for the use for that purpose of the car contracted for, and that at the time of the accident he was demonstrating this car to the plaintiffs, who were riding therein. No part of the purchase price of the automobile, which exceeded \$1,600, was paid, and shortly after the accident the car was repossessed by appellants. Certain of the salesmen employed by appellants, including Simmons, were required to sign what appellants called their pay roll instructions. This paper stated the percentage of commission to be paid on cars sold; provided for the monthly allowance above mentioned; and also provided for a monthly deduction from the commissions earned until a certain sum had been accumulated, which was to be retained by appellants until the termination of the employment. Other than the above, the terms of the employment were oral.

The foregoing is, in substance, the evidence from which the jury concluded that Simmons was a servant, and not an independent contractor.

[1, 2] An independent contractor is one who, in rendering services, exercises an independent employment, and represents the employer only as to the results of his work, and not as to the means whereby it is to be accomplished (*Green v. Soule*, 145 Cal. 96, 78 P. 337; *Moody v. Ind. Acc. Comm.* [Cal. Sup.] 269 P. 542); and, when the essential object of the employment is the performance of the work, the relation of master and servant does not exist, unless the employer retains the right to direct the mode and man-

ner of doing the work (Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721). The real test is whether the employee is subject to the employer's order and control and is liable to be discharged for disobedience or misconduct; and the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control of it. Cameron v. Pillsbury, 173 Cal. 83, 159 P. 149; Sumner v. Nevin, 4 Cal. App. 347, 87 P. 1105.

[3,4] So far as shown, there was no express stipulation as to the right of the employer to control the mode and manner of doing the work; and, in the absence of such a stipulation, the existence or nonexistence of the right must be determined by reasonable inferences drawn from the circumstances shown. Press Publishing Co. v. Ind. Acc. Comm., 190 Cal. 114, 210 P. 820. The fact that Simmons at the time of the accident was furnishing his own transportation did not affect his status as an employee (Press Publishing Co. v. Ind. Acc. Comm., supra; Eng-Skell Co. v. Ind. Acc. Comm., 44 Cal. App. 210, 186 P. 163; and it has been held that evidence that the employer might terminate the employment at any time tended to negative the independence of the employee. Press Publishing Co. v. Ind. Acc. Comm., supra; Brown v. Ind. Acc. Comm., 174 Cal. 457, 163 P. 664. The writing, which was signed by Simmons alone, was silent as to the mode or manner of doing the work, contained no provisions respecting its supervision or direction, and was manifestly not intended to be a complete statement of the rights and obligations of the parties. Under such circumstances, where from the evidence different conclusions might be drawn, the question whether the right to direct the manner of doing the work was reserved by the employer was one for the jury. Perkins v. Blauth, 163 Cal. 782, 127 P. 50; Sacchi v. Bayside Lumber Co., 13 Cal. App. 72, 108 P. 885.

Appellants, in support of their contention, rely upon the case of Barton v. Studebaker Corporation, etc., 46 Cal. App. 707, 189 P. 1025. There it was held that a salesman employed on commission, with no salary or fixed hours, and over whom the employer exercised no authoritative control, was an independent contractor, for whose negligence the defendant was not liable. In the present case, however, many circumstances are disclosed by the evidence, which strongly tend to prove that the right was claimed, and that such control was exercised by appellants, to the extent at least that the character of the employment made reasonably possible. From the facts shown, the inference was not unreasonable that, subject to the freedom of

action inherent in the employment, it was understood that the right to direct the manner of performance was reserved by appellants. The question was properly submitted to the jury (Majors v. Connor, 162 Cal. 131, 121 P. 371; Buckley v. Harkens, 114 Wash. 468, 195 P. 250), and their conclusion is supported by the evidence.

The judgment is accordingly affirmed.

99 Cal. App. 756

MORGAN v. CALLAHAN et al. (Civ. 6772.)★

District Court of Appeal, First District, Division 1, California. July 10, 1929.

Rehearing Denied Aug. 9, 1929. Hearing Denied by Supreme Court Sept. 3, 1929.

1. Chattel mortgages ⇨287—Mortgagor does not become liable for debt secured, in absence of promise to pay it (Civ. Code, §§ 2890, 2928).

Mortgagor of personal property does not become liable for debt secured, in absence of promise to pay it, under Civ. Code, §§ 2890, 2928.

2. Corporations ⇨657(4)—Mortgagor corporation's failure to file articles with secretary of state did not make corporation's obligation enforceable against one having no interest in corporation who joined as mortgagor (St. 1915, p. 422, § 1, as amended by St. 1923, p. 1034).

That foreign corporation executing mortgage failed to file copy of its articles with secretary of state, as required by St. 1915, p. 422, § 1, as amended by St. 1923, p. 1034, did not make obligation of corporation enforceable against one joining in mortgage but having no interest in corporation and receiving no benefit from transaction.

Appeal from Superior Court, City and County of San Francisco; E. N. Rector, Judge.

Action by W. J. Morgan against Richard E. Callahan and others. From a judgment for plaintiff, defendants appeal. Affirmed in part, and in part reversed.

Nelson & Nelson, of San Francisco, for appellants.

H. L. McAllister, of San Francisco, for respondent.

PER CURIAM. This action is one to recover sums aggregating \$4,532.87 loaned by the plaintiff to the Radio-Therapy Corporation, a Nevada corporation. To evidence portions of the amount loaned, two promissory notes were executed to the plaintiff on behalf of the corporation—the first, for \$2,500, was executed by defendant Richard E. Callahan and C. R. Gailfres as its president and secretary, respectively; and the second, for \$1,771.11, by Richard E. Callahan as president and

Miriam A. Callahan as its secretary, no note being executed for the balance of the loan. As security for the several notes, two chattel mortgages were executed by the same officers of the corporation, neither of which contained a covenant to pay the debt. In the mortgage securing the first note, defendant Mathilde P. Callahan joined with the corporation as a mortgagor. The plaintiff, as grounds for recovery, alleged that the loans were made at the request of defendants Callahan, and were induced by the false and fraudulent representations of Richard E. Callahan, the president of the corporation, as to his own financial condition and that of the corporation, which the plaintiff believed and upon which he relied in making the loans; that, contrary to his agreement to use these sums to reorganize the corporation under the laws of California, Callahan diverted the same to other corporate purposes; that the latter, in addition to this agreement, promised to issue to the plaintiff certain stock of the new corporation, neither of which promises did he perform or intend to perform when the same were made; and, further, that the plaintiff had given notice of rescission upon the above grounds.

The court found in accordance with the complaint and that the plaintiff had promptly rescinded. Judgment was entered against the defendants for the amounts loaned with interest, from which they appeal.

They contend that the findings are unsupported, and that the conclusions of the trial court thereon are against law.

As to defendants corporation and Richard E. Callahan, it will be sufficient to say that a careful reading of the evidence shows the findings as to the acts and representations of the latter to be fully supported, and a review thereof would answer no useful purpose.

[1, 2] As to defendant Mathilde P. Callahan, however, a different situation is presented. So far as shown, she had no interest in the corporation, nor does it appear that her husband, Richard E. Callahan, represented her in any of the transactions with the plaintiff. Furthermore, the record wholly fails to disclose any evidence that she met or conversed with the plaintiff previous to the making of the loans, nor was it shown that she had any interest in the mortgaged property; the only reason for her signing the mortgage being, as testified by the plaintiff, that he specially requested it. The object of the request does not appear, but it is clear that no part of the money was received by her, and it is not contended that she derived a benefit from the transaction.

It is well settled that a mortgagor of real or personal property does not become liable for the debt secured in the absence of a promise to pay the same. Civil Code, §§ 2890, 2928; Garretson Investment Co. v. Arndt, 144 Cal. 64, 77 P. 770. The corporation, however,

failed to file a copy of its articles with the secretary of state of California, and respondent contends that a section of the statute in effect at the time of the transaction, which provided that "in addition to the penalty herein provided every contract made by or on behalf of any such foreign corporation affecting the personal liability thereof or relating to property within the state shall be held void on its behalf and on behalf of its assigns, but shall be enforceable against it or them" (St. 1915, p. 422, § 1, as amended, St. 1923, p. 1034), makes the obligation of the corporation enforceable against Mrs. Callahan.

We find no merit in this contention, as no contract was made by her on its behalf, nor did she by any act represent the corporation; her only connection with the transaction being to mortgage her interest, if any, in the property described as security for its obligation, no part of which did she agree to perform.

For the above reasons, the judgment as to defendants Richard E. Callahan and Radio-Therapy Corporation, a corporation, is affirmed, and, as to defendant Mathilde P. Callahan, it is reversed.

99 Cal. App. 778

PEOPLE v. KINSER. (Cr. 1787.)

District Court of Appeal, Second District, Division 2, California. July 11, 1929.

1. Infants $\hookrightarrow$ 20—Evidence held to sustain conviction of defendant charged with contributing to minor's delinquency (St. 1915, p. 1225, § 21).

In prosecution for contributing to delinquency of minor, as prohibited by St. 1915, p. 1225, § 21, evidence held to sustain conviction as against defendant taxi driver claiming he merely drove parties to address where alleged acts took place.

2. Infants $\hookrightarrow$ 20—Information alleging that defendants gave minor intoxicating liquor and left her in man's room held to charge offense of contributing to minor's delinquency (Juvenile Act, § 21).

Information alleging, in prosecution for contributing to delinquency of minor, that minor was taken riding by defendants, who gave her intoxicating liquor, made her drunk, and left her in man's room, did not fail to charge offense under Juvenile Act (St. 1915, p. 1225) § 21, providing that any person who shall commit act or omit performance of duties tending to encourage person under 21 years of age to do any act or follow any course of conduct within provisions of act shall be guilty of misdemeanor.

3. Infants $\hookrightarrow$ 20—That minor, in prosecution for contributing to delinquency, suffered no harm, held not available as defense (Juvenile Act, § 21).

That minor, in prosecution for contributing to delinquency of minor, under Juvenile Act (St. 1915, p. 1225) § 21, suffered no harm from al-

leged association with defendant, was not available as defense.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

J. B. Kinser was convicted of contributing to the delinquency of a minor, and he appeals. Affirmed.

George W. Rochester, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

CRAIG, J. The appellant, together with two codefendants, was charged by information filed in the superior court of Orange county with having contributed to the delinquency of a minor, and appeals from the judgment of the superior court finding him guilty as charged. The grounds assigned for reversal are asserted insufficiency of the information and of the evidence.

Briefly stated, it was alleged that J. B. Talley, Lucy Martinez, and Kinser did willfully and unlawfully contribute to the delinquency of a female minor child, to wit, Irene Parra, aged 16 years, said minor child then and there coming within the provisions of the Juvenile Court Law (St. 1915, p. 1225); that they placed said minor in danger of leading an idle, dissolute, lewd, and immoral life, by giving her intoxicating liquor and causing her to become drunk, and by taking her to the apartment of the defendant Talley and there leaving her alone in a room with him.

The defendants Talley and Martinez pleaded guilty, and the latter testified on behalf of the people. It is appellant's contention, principally, that, under numerous authorities cited in his behalf, the evidence is not alone insufficient to support the judgment, but was such as to require an acquittal. It is insisted in his business of driving taxis he merely answered a call, drove the parties to destinations requested by them and that, while liquor was consumed and the minor may have imbibed to excess, he was not the instigator, nor aider of the commission of any offense, and that in any event the minor did not become delinquent.

The positive testimony of six witnesses called by the people, including Irene Parra, is to the effect that on or about January 10, 1929, Lucy Martinez telephoned a taxi company for whom Kinser was a chauffeur and with whom she had previously ridden without charge; that they drove to the home of Miss Parra, where she joined them, and thence to the center of the city of Santa Ana, where they picked up Talley, whereupon the men and the two girls drove to Talley's apartment. Miss Martinez said to Talley, who was waiting for them on a street corner, "Well, I got a partner for you," and at his apartment she asked him if he had any wine, to which he replied in the affirmative, produced a bot-

tle, and they all drank the contents. Soon afterwards Talley suggested that Miss Parra go to another room with him, which she hesitated to do, but the Martinez woman told her to "go on, he won't hurt you," and she complied. Other occurrences between them were excluded from the record, it appearing that they were in a separate room, with the door closed. Thereafter Kinser suggested that he drive the girls about town in the air to "sober up," though each denied that she was intoxicated at the time. Accordingly, they left Talley at home, drove toward Balboa and at a house or service station Kinser obtained a bottle of gin, which he and his two companions drank, and, after driving around, Irene Parra was returned to her home so intoxicated that she was unable to proceed from the machine to her house without assistance. Two physicians who examined her testified that she was in a comatose condition and could not be aroused; that her breath smelled strongly of alcohol, her pulse was above normal, her eyes were glassy; and, when they were asked if she was slightly or considerably intoxicated, stated that she was "considerably so."

[1] Owing to the illiteracy of witnesses and the inexperience of the minor, there is much apparent conflict in their testimony. Miss Martinez swore that the beverage supplied by Talley at his apartment was gin, while other evidence tended to show that it was wine. Appellant vigorously denied all of the foregoing statements of witnesses under oath which tended to connect him with any wrongdoing, and their testimony is branded as perjured and unreliable. It is quite plainly to be observed from the record that the girls were of foreign extraction and in some instances failed to understand, but in the main their ultimate answers harmonized and were corroborated by many unquestioned circumstances. Appellant also corroborated their testimony in substantial detail, but his memory was remarkably vague as to essential acts and circumstances in his immediate presence. His flat denials of the testimony of other witnesses, tending to show culpability, were not corroborated. In this state of the record we are neither authorized nor inclined to disturb the conclusion of the trial court that the evidence preponderated against innocence. It is argued for appellant that he was a mere innocent bystander and a victim of circumstances, and that he was not responsible for the derelictions of his fares, since, under cited authority, participation in the commission of an offense may not be legally inferred from unavoidable presence and observation of its perpetration. But eyewitnesses testified to facts which constituted him a participant in procuring, drinking, and sharing the liquors with Irene Parra and two other persons and in driving them about without charge. Surely, it cannot be urged with sincerity that these are necessary adjuncts to

his vocation as driver of a public conveyance for hire.

[2, 3] With the remaining points, that the information failed to charge an offense as contemplated by the Juvenile Act, and that evidence was insufficient to warrant a conviction because Irene Parra was induced to embark upon a first escapade, and that there is no evidence that she became morally depraved because of her experience, we cannot coincide. It was alleged, and the evidence strongly tended to show, that the minor was taken riding by the three defendants, who gave her intoxicating liquor, made her drunk, and guided her into the apartment of one of the men, with whom she was left alone, in one of the rooms. It also appears that when she was returned to her parents she was helpless, and that she was unconscious when examined. Section 21 of the act provides that any person who shall commit any act or omit the performance of her duty, which act or omission tends to cause or encourage a person under 21 years of age to do any act or follow any course of conduct within the provisions of said act, shall be guilty of a misdemeanor. In response to the contention that the prosecuting witness suffered no harm from alleged associations with the defendant, and that there was no proof that she was a delinquent, a like defense was rejected in *People v. Cohen*, 62 Cal. App. 521, 217 P. 78, 80. As was there said:

"On the other hand, we are of the opinion that the law, in providing that a person shall be deemed guilty of violating the statute when he commits any act which causes, or manifestly tends to cause, a person under the age of 21 years to come within the provisions of section 1 thereof, means that his guilt attaches whenever he commits such an act, independent of the success of his efforts or its effect upon the minor.

"The purpose of the juvenile law as now framed, as we have already seen, is to protect the youth of our state from those evil and designing persons who would lead them astray, and we are not disposed to in any way impair its usefulness by giving any narrow or strained construction to any of its plain and obvious provisions."

People v. Hemma (Cal. App.) 270 P. 457, and other decisions since the amendment of the statute, have been unanimous in holding that its provisions are intended to be preventative and protective, and that to hold that a conviction thereunder must depend upon proof of the accomplishment of the wrong against which its framers sought to provide a safeguard would often practically result in its nullification.

The judgment is affirmed.

I concur: IRA F. THOMPSON, J.

Owing to the absence of WORKS, P. J., he does not participate in this decision.

99 Cal. App. 791

GALLAGHER v. VOYCE et al. (Civ. 6660.)

District Court of Appeal, First District, Division 2, California. July 12, 1929.

1. Appeal and error ⇨1058(1)—Excluding document showing mathematical calculation by witness, if error, held not prejudicial; witness having testified.

In action for assessment for installing certain street work, error, if any, excluding document made by one of defendant's witnesses in nature of extended mathematical calculation, held not prejudicial where witness testified.

2. Municipal corporations ⇨493(6)—Property owner appealing from assessment for certain street work could not attack it, where he did not prosecute appeal which was denied.

Where street work was done under ordinance providing that board of public works would make assessment and that if assessment is claimed incorrect property owner might within 30 days appeal to board of supervisors, property owner whose property was assessed for improvement held not entitled to attack assessment, where he did not prosecute appeal and appeal was denied.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by E. J. Gallagher against Alfred Voyce, Jr., and others. Judgment for plaintiff, and the defendant named appeals. Affirmed.

Raymond D. Williamson, of San Francisco, for appellant.

Oscar Samuels and Jacob Samuels, both of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action to recover the amount of an assessment alleged to be due him as contractor for installing certain street work. The defendants appeared and answered. Their answer contained certain denials and also pleaded affirmatively other defenses. Among the affirmative defenses was the claim that the assessment was excessive. A trial was had before the court sitting without a jury. The trial court made findings in favor of the plaintiff, and from a judgment entered thereon the defendant Voyce has appealed.

[1] The defendant contends that the trial court erred in sustaining an objection to the introduction by the defendant of evidence tending to show that the amount sued for by the plaintiff was an overcharge. The plaintiff makes two replies. He asserts that the trial court did not make the ruling complained of, and, in the second place, if it did, the ruling was correct. Both replies are sustained by the record. As to the matter of excluding proof the record clearly shows that the trial court offered to allow the proof to be made and that the actual adverse ruling

of which the defendant complains consisted of an order excluding a document made by one of the defendant's witnesses and which was in the nature of an extended mathematical calculation. The witness having testified, an exclusion of his notes was not error, and if it was, the error was not prejudicial.

[2] Taking up the second reply, it should be remarked that the work was done under Ordinance No. 4720, N. S. It is unnecessary to recite all of the provisions of that ordinance. It is sufficient to remark that it is provided in the ordinance that at a certain time the board of public works will make the assessment; that if the assessment is claimed to be incorrect or illegal any property owner may, within 30 days, appeal to the board of supervisors; that the board of supervisors is vested with power to "confirm, amend, set aside, alter, modify or correct the assessment"; and that "all the decisions and determinations of the supervisors, upon notice and hearing aforesaid, shall be final and conclusive. * * *" It was an admitted fact that the defendant appealed but did not prosecute his appeal, and that his appeal was denied. However, it was his claim that he did not discover the facts showing an excessive charge until his appeal was denied. Neither by pleading nor proof did the defendant show any right to attack the assessment. *Lambert v. Bates*, 137 Cal. 677, 678, 70 P. 777.

We find no error in the record.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

LOS ANGELES CITY SCHOOL DIST. OF LOS ANGELES COUNTY v. TUCKER et al. (Civ. 3756.)

District Court of Appeal, Third District, California. July 11, 1929.

Mechanics' liens ⇨113(2)—**Materialman's stop notice** filed June 8, 1925, held timely as within 30 days, where completion notice was filed May 9, 1925.

Where stop notice was filed by materialman on June 8, 1925, and notice of completion was not filed until May 9, 1925, stop notice was timely, and surety for alteration and repair of school building was liable to materialman who had 30 days after filing of notice of completion of contract within which to file stop notice.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

On petition for rehearing. Petition denied. For former opinion, see 278 P. 507.

W. I. Gilbert, Kenneth Keeper, and Wilson, Haas & Stevens, all of Los Angeles, for appellant.

Dana R. Weller and Glen Behymer, both of Los Angeles, for respondents.

G. C. Mansfield, of Los Angeles, for defendant.

Everett W. Mattoon, of Los Angeles, for city school district.

Harry G. Sadicoff, of Los Angeles, for cross-defendants Harris & Harris.

PER CURIAM. The petition for a rehearing is denied.

Appellant contends in the petition for a rehearing that the Noyes Marble & Tile Company is not entitled to judgment because its stop notice was not filed in time. This point was not urged in the original briefs. There is, however, no merit in this contention. The Noyes Marble & Tile Company had *thirty days after filing of notice of completion of contract within which to file its stop notice*. *Bird v. American Surety Co.*, 175 Cal. 625, 166 P. 1009; *Hughes Mfg. & Lumber Co. v. Hathaway*, 174 Cal. 44, 161 P. 1159; *Simons Brick Co. v. Hetzel et al.*, 72 Cal. App. 1, 236 P. 357.

The notice of completion was not filed until May 9, 1925, and said stop notice was filed June 8, 1925; therefore the stop notice was in time, and the surety is liable to Noyes Marble & Tile Company.

99 Cal. App. 759

WHITTIER v. AUTH. (Civ. 6823.)

District Court of Appeal, First District, Division 2, California. July 10, 1929.

1. Jury ⇨25(8)—**Denial of defendant's motion for jury trial, not limited to counts pleading actions at law, held not error, where certain counts were equitable.**

Where complaint, in action to quiet title to realty, was in five counts, some of which were equitable, trial court's denial of defendant's motion demanding jury trial was not error, where motion was so broad as not to be addressed to counts pleading actions at law.

2. Trial ⇨396(2)—**Special finding entirely without issues made by pleadings was nugatory.**

Alleged special finding, which was entirely without the issues made by the pleadings, was nugatory and of no service to either party.

3. Trial ⇨404(1)—**Findings should be construed to support, rather than to overthrow, judgment, if possible.**

Trial court's findings should be construed, if possible, to support, rather than to overthrow, judgment.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Gloria Whittier, an infant, by John R. Tyrrell, as her guardian, against Henry Auth. From an adverse judgment, defendant appeals. Modified and affirmed.

Reisner & Deming, of San Francisco, for appellant.

Kington & Cunningham, Leo A. Cunningham, Frank V. Kington, and Thomas M. Foley, all of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant, and later she filed an amended complaint. The amended complaint was answered; a trial was had before the trial court sitting without a jury. It made findings of fact in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed.

[1] The plaintiff is the daughter and adopted daughter of Alice V. Whittier, deceased, and claims title under a deed executed December 1, 1922, by the terms of which decedent conveyed to plaintiff's father, and later, on October 31, 1927, be conveyed to the plaintiff. The defendant is the second husband of the deceased, and claims title under a deed dated April 23, 1926. The last-named deed recites that it was made " * * * for and in consideration of the love and affection which the said party of the first part has and bears unto the said party of the second part and for the trust I repose in him that he will care for my child Alicia Gloria Whittier, does by these presents give, grant," etc. In her complaint the plaintiff inserted five different counts: The first was to remove a cloud on the title to real property; the second was to quiet title to real property; the third was to cancel a deed to real property because of undue influence exercised in the execution thereof; the fourth was to impress a trust on real property; and the fifth was for recovery of chattels with alternative damages. The action was tried on the 14th day of December, 1927. On the 29th day of November, the defendant made a written demand "that the above-entitled cause be tried before a jury; and said defendant does hereby demand a jury trial in said cause." The motion was denied. The defendant claims that the court erred in denying his motion. The plaintiff calls to our attention the fact that some of the counts were distinctly equitable, and all counts were in one and the same action, and that the motion made by the defendant was so broad as not to be addressed to the counts pleading actions at law. The plaintiff then asserts that the ruling was not error, and she cites and relies on *Meek v. De Latour*, 2 Cal. App. 261, 83 P. 300; 35 C. J. 217. The court did not err in making the ruling.

[2, 3] The trial court made a finding which appears on page 38 of the clerk's transcript and which the defendant prints on page 15 of his brief. The latter part of it the defendant has printed in italics. The portion ital-

icized he claims to be a special finding. Thereupon he argues that the special finding controls the general findings, and that the judgment as entered should have been in his favor instead of being against him. The vice in this argument is that the so-called special finding was entirely without the issues made by the pleadings, is nugatory, and of no service to either party. Again, the alleged special finding is one of several findings, all of which were made of and concerning a deed dated December 1, 1922, which was made by the decedent and which is one of the deeds in the plaintiff's chain of title. The pleadings, the evidence, and the findings are harmonious as showing that on the 1st day of December, 1922, the decedent caused to be written, signed, and acknowledged a deed in favor of Vernon S. Whittier, the father of this plaintiff, and that said deed was delivered to John R. Tyrrell, Esq., as the agent of the grantee, to be held by him and recorded upon the death of the grantor. It may be conceded that the pleadings and the findings are slightly ambiguous, but the ambiguity is such that it readily disappears on taking up the findings and comparing one with the other. The findings should be construed, if possible, to support, rather than to overthrow, the judgment. In the instant case, if we follow that rule, the contention of the defendant must be decided against him.

The court made a finding to the effect that the damages amounted to \$3,600. Claiming that the judgment should have been in his favor as to the title, the defendant asserts that the plaintiff suffered no damage. However, the trial court made a finding that the title rested in the plaintiff; therefore the defendant's claim is without merit. In this connection the defendant asserts that there is no evidence in the record that the rental value of the real property was \$200 per month, but an examination of the record discloses that at least one witness gave direct and positive testimony supporting the finding.

The defendant objects to the finding regarding the title to the personal property and the value thereof as set forth in the fifth count. The plaintiff recites facts occurring since the entry of the judgment, and stipulates that the judgment may be modified in so far as it awards damages against the defendant for the value of the personal property by deducting therefrom \$1,000. The point has become a moot question.

The last point made by the defendant is that the evidence is insufficient to justify the finding that the deceased was of unsound mind when she deeded the property to the defendant, or that she was acting under undue influence, or that defendant practiced fraud in obtaining this deed. In reply, the plaintiff claims that there were conflicts in the evidence, and that the defendant did not sustain the burden of proof resting on him when it transpired that the deed in his fa-

vor was made without consideration, and that the grantor and grantee were husband and wife. After examining the record, we are unable to say that the trial court erred in making a finding in favor of the plaintiff to the effect that, when the deceased executed the deed dated April 23, 1926, to the defendant, she was of unsound mind, was acting under undue influence, and that defendant practiced fraud in obtaining this deed. But, be that as it may, the findings attacked were not prejudicial when considered with the rest of the findings. The court also made findings in favor of the plaintiff on the count which pleaded an action to quiet title. The count was fully proved, and on the findings based on that count alone the judgment must necessarily have been for the plaintiff.

Acting on the stipulation above mentioned, \$1,000 is deducted from the judgment, and, as so modified, the judgment is affirmed. The plaintiff will recover her costs on this appeal.

We concur: KOFORD, P. J.; NOURSE, J.

99 Cal. App. 736

DUTART v. WOODWARD et al.*
(Civ. 3746.)

District Court of Appeal, Third District, California. July 5, 1929.

Rehearing Denied Aug. 3, 1929. Hearing Denied by Supreme Court Aug. 29, 1929.

1. Mandamus ⇨79—School teacher may enforce legal rights by writ of mandate.

Writ of mandate furnishes proper remedy by which legal rights of school teacher may be enforced.

2. Mandamus ⇨13—Permanent teacher seeking to enforce right to active service in school district need not appeal to county superintendent before applying for mandamus (Pol. Code, § 1609(e)).

Permanent teacher under Pol. Code, § 1609(e), seeking to assert legal right to be assigned to active service within district, need not appeal to county superintendent of schools before applying for mandamus, in view of section 1609, providing that nothing in act shall be construed to deprive teacher of rights and remedies in court of competent jurisdiction on question of fact or law.

3. Schools and school districts ⇨136—School board has no arbitrary authority to assign teacher to unsanitary school or where pupils are afflicted with contagious disease, nor to some useless task.

While school board possesses exclusive province of assigning teacher to specific work within limitations prescribed by law and reason, board has no arbitrary authority to assign teacher to school where sanitary conditions will endanger her health or life nor to school wherein pupils are afflicted with contagious disease,

nor to idle and useless task of continuously sitting around waiting room.

4. Schools and school districts ⇨141(4)—School board may not deprive teacher of status as permanent teacher for refusal to comply with unreasonable or dangerous assignments (Pol. Code, § 1609(e)).

School board has no legal authority to prefer charges against teacher and deprive her of her lawful status as permanent teacher under Pol. Code, § 1609(e), for refusal to comply with unreasonable or dangerous assignments.

5. Schools and school districts ⇨136—School board in classifying and assigning teacher must act in good faith and in accordance with law (Teachers' Tenure Act, Pol. Code, § 1609, as amended by St. 1927, p. 1913).

Action of school board in classifying and assigning teacher to specific work must be performed in good faith and in accordance with Teachers' Tenure Act, Pol. Code, § 1609, as amended by St. 1927, p. 1913, prescribing manner in which board may classify substitute, probationary, and permanent teachers.

6. Schools and school districts ⇨136—Permanent teacher is entitled to active employment (Pol. Code, § 1609(e)).

School teacher classified as permanent under Pol. Code, § 1609(e), is entitled to active employment.

7. Schools and school districts ⇨136—Marriage of permanent teacher held not to warrant board in transferring her to tubercular institution in another county in which elementary classes were maintained (Pol. Code, §§ 1609(e), 1618b as added by St. 1927, p. 261).

Where school teacher having status as permanent teacher under Pol. Code, § 1609(e), married, marriage not being legal ground for forfeiture of status as permanent teacher held not to warrant school board transferring teacher to district in another county where elementary department was maintained in tubercular institution, pursuant to Pol. Code, § 1618b, as added by St. 1927, p. 261, though retaining of teacher's services in district would necessitate suspension of some other teacher or incur likelihood of another mandamus proceeding.

8. Schools and school districts ⇨136—School board held not authorized to assign permanent teacher to tubercular sanatorium in another county without her consent (Pol. Code, §§ 1609(b), 1609(e), 1618b, as added by St. 1927, p. 261).

Pol. Code, § 1609(b), authorizing school board to fix and prescribe duties of teachers in school district, and section 1618b, as added by St. 1927, p. 261, authorizing school district to maintain at tubercular institution elementary classes for inmates thereof, and providing that classes shall be considered part of school system of district establishing them, held not to authorize school board to assign permanent teacher, under section 1609(e), to position as teacher in such sanatorium in another county without her consent.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Mandamus by Ruth Dutart against Marion Woodward and others, as directors and trustees of Stockton School District and as directors of the Board of Education of the City of Stockton. From a judgment granting peremptory writ, respondents appeal. Affirmed.

Guard C. Darrah, Dist. Atty., Tom H. Louttit, and Scott Rex, all of Stockton, for appellants.

Geo. F. Snyder, of San Francisco, for respondent.

THOMPSON, J. This is an appeal from a peremptory writ of mandate requiring the appellants, as directors of the school board, to assign the petitioner to teach in the elementary department of the Stockton school district.

The petitioner is classified as a permanent teacher in the elementary department of the Stockton school district pursuant to section 1609(e) of the Political Code of California. She taught acceptably for seven consecutive years in that department of the Lafayette school in the city of Stockton. Prior to the end of the school year of 1928, the petitioner married, and the appellants then requested her to tender her resignation as a teacher in that district, which she declined to do. In March, 1928, pursuant to statute, San Joaquin and Calaveras counties jointly established and are maintaining within the boundaries of the Murphy's school district of Calaveras county a free tubercular hospital and sanatorium. In this sanatorium there are about 25 children of school age who are not afflicted with the disease, but who have tubercular tendencies and who are therefore segregated from the actual tubercular patients. Pursuant to section 1618b of the Political Code, as added by St. 1927, p. 261, the appellants, as trustees of the Stockton school district, established and are maintaining elementary classes in that sanatorium for the education of these children, who are inmates thereof, and in August, 1928, assigned the petitioner to teach therein. It is conceded that the petitioner is entitled to maintain her status as a permanent instructor under the Teachers' Tenure Act of California (section 1609 of the Political Code as amended by St. 1927, p. 1913) in the Stockton school district, and that she is entitled to draw her salary therefor. The petitioner asserts that she is entitled to be assigned to active service in the elementary department of some school within the Stockton school district, and that the trustees have no legal authority to assign her to teach outside of that district, or in the tubercular sanatorium in Murphy's school district of Calaveras county.

[1, 2] The writ of mandate furnishes the proper remedy by means of which the legal rights of a teacher may be enforced. It is not necessary, under such facts as are presented in the present petition, to first appeal

to the county superintendent of schools. The application for the writ was therefore not premature. *Saxton v. Board of Education of Los Angeles County School Dist.* (Cal. Sup.) 276 P. 998. Section 1609 of the Political Code provides, with relation to the powers of school boards, in part: "Nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law."

The appellants assert that the right to determine the nature and location of the teacher's assignment to services is exclusively vested in the school board acting in a quasi judicial capacity, with which province the courts have no right to interfere. In the appellants' brief it is said: "The right to assign teachers, and by this we here mean the right to direct teachers what service they shall perform in return for the salary paid them, is vested exclusively in the employing board, and whether a teacher is assigned to teach in the most desirable schoolroom in an exclusive residential district, or to teach in a shack in the slums, or to teach as a substitute, or to sit in the waiting room of the board and there await the further pleasure of the board, is a right and discretion vested by the law in the board—and nowhere else."

[3-5] There is no doubt that within the limitations prescribed by law and reason the school board possesses the exclusive province of assigning teachers to their specific work. But the board has no arbitrary authority to assign a teacher to a school where the sanitary conditions would endanger her health or life, nor to a school wherein the pupils are afflicted with a contagious disease, nor to the idle and useless task of continuously sitting around a waiting room. For the refusal on the part of the teacher to comply with such unreasonable or dangerous assignments, the board would have no legal authority to prefer charges against the teacher and deprive her of her lawful status as a permanent teacher. The action of the board in classifying and assigning a teacher to a specific work must be performed in good faith and in accordance with the law. Section 1609 of the Political Code prescribes the manner in which the board may classify substitute, probationary, and permanent teachers. The classification must be made in the manner here prescribed.

[6, 7] The wisdom of creating a permanent tenure of certain teachers is no longer an open question. The Legislature has conferred upon teachers, under specified circumstances, a vested right to be so classified and to teach as permanent instructors, in the particular district where this right has been secured, subject to such reasonable rules as may be adopted, which are not in conflict with law. Among these vested rights is the privilege of actually engaging in teaching. It would be a violation of good faith and contrary to the spirit of the law to relegate a permanent

teacher to the idle and useless task of sitting around a waiting room. No other design could so successfully destroy the ambition of a teacher or advertise her inefficiency. As a permanent teacher she is entitled to active employment. The efficiency and fitness of the petitioner in the present case is conceded. After seven years' service in the Stockton schools, there is no criticism of her ability or fitness. Since no other reason is assigned, it must be inferred that the only objection to the petitioner continuing in her former assignment is because she married. The transfer to a class in a tubercular institution remote from the district where she earned her status as a permanent teacher is too severe a penalty for marriage. Marriage is not a legal ground for forfeiture of one's status as a permanent teacher. The inevitable result of the procedure in the present case is to accomplish by circuitous methods what the law does not directly permit. It is inferred that the retaining of petitioner's services in the Stockton district will necessitate the suspension of some other teacher, or incur the likelihood of another mandamus proceeding. The overcrowded condition of classes in our public schools is prevalent. If a district is fortunate enough to have the means to employ an unlimited number of teachers, a segregation of the crowded classes may solve the problem of superfluous teachers. The real remedy against enforced idleness on account of the employment of too many teachers is for the board to hire no more than are required to adequately serve the number of pupils in attendance. If the board has made a mistake in assigning a teacher to service in a tubercular institution outside of their district, it is not good reason to argue that the correction of this error may embroil them in other difficulties.

[8] We are inclined to think that the law precludes a school board from assigning a teacher to a school outside of its district. Section 1609, *supra*, authorizes the boards of school trustees, "(b) To fix and prescribe the duties to be performed by * * * teachers * * * *in the school district.*" (Italics ours.) Section 1618b of the Political Code, as amended by St. 1927, p. 261, under which the appellants claim the authority to assign the

petitioner to the tubercular sanatorium classes in another county and school district 50 miles from the Stockton school district in which she holds a permanent tenure as a teacher of elementary instruction, is as follows: "Education of persons in Tubercular sanatoriums and preventoriums. Whenever a sanatorium or preventorium is established for the cure of pretuberculous, and tuberculous, or other physically afflicted persons, any school district may in its discretion establish and maintain in such institution, with the consent of the authorities thereof, special classes to provide elementary, secondary, and vocational education to the inmates of such institutions who are residents of such school district. Said classes shall be considered a part of the school system of the district establishing them, and attendance shall be so reported even though such classes are maintained beyond the boundaries of said district. Such school district may admit to such classes residents of other school districts on such terms and conditions as the governing board may prescribe."

While it is provided that these sanatorium classes "shall be considered a part of the school system of the district establishing them," this does not make it a part of the school district. In fact, in the present case, it appears that the sanatorium classes to which the petitioner was assigned is within the duly organized Murphy's school district of Calaveras county. We have no doubt, under the provisions of section 1618b, *supra*, that the school board of Stockton school district may employ teachers with the understanding and for the express purpose of teaching the children in the sanatorium, but we are of the opinion that the board may not lawfully assign a permanent teacher of the Stockton school district to that position without her consent.

In view of the foregoing, there is no necessity of passing upon the constitutionality of section 1618b, *supra*, which is challenged by the petitioner.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 775

SOUTHERN LAND CO. v. PAULK et al.
(Civ. 6218.)

District Court of Appeal, Second District, Division 1, California. July 11, 1929.

1. Corporations ⚡592—Decree against persons described as trustees held void on face as to corporation not paying franchise tax, since corporation was not thereby dissolved (St. 1917, pp. 371-377; Pol. Code, § 3669c, subd. 2).

In suit to quiet title, where corporation which had not paid franchise tax was not sued, but named parties were sued as trustees of such corporation on theory it was defunct, decree for plaintiff was void on its face, and did not operate to vest plaintiff with right, title, or interest of corporation in property, since, under St. 1917, pp. 371-377 (Pol. Code, § 3669c, subd. 2), failure of corporation to pay tax did not create forfeiture of corporation nor cause it to become dissolved and did not create any trustees thereof.

2. Corporations ⚡619—Six-month limitations statute as to setting aside action of trustees did not apply to suit to quiet title by corporation which failed to pay franchise tax (Code Civ. Proc. § 341, subd. 3).

Code Civ. Proc. § 341, subd. 3, prescribing six months as period within which action may be commenced to set aside or invalidate any action taken by majority of trustees of corporation dissolved by operation of law, did not apply so as to bar suit to quiet title by corporation which failed to pay its franchise tax, since such failure did not cause a forfeiture or a dissolution of corporation, and hence did not create any trustees thereof.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action to quiet title by the Southern Land Company against Herman A. Paulk and others. From the judgment, defendants appeal. Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellants.

Randall J. Hood and Emmet Wilson, both of Los Angeles, for respondent.

HOLLZER, Justice pro tem. Defendants appeal from a decree quieting title in favor of plaintiff. At the trial, it was stipulated that in 1916 plaintiff became the owner of the property in question. Defendants claim title by virtue of a decree quieting title to the same property, entered June 9, 1923, in another action, wherein one Joseph Blanchard was plaintiff and H. A. Paulk and W. S. Brush, George B. Raum, and one Doe, as trustees of Southern Land Company, an alleged defunct corporation, and certain fictitious named persons, were defendants.

By the decree in that action, hereinafter referred to as the Paulk Case, Paulk was substituted as party plaintiff, and he was ad-

judged to be the owner of the property as against all of the remaining parties. In the action at bar, the only evidence offered on behalf of the defendants was the judgment roll in the Paulk Case, and, upon plaintiff's objection, the trial court refused to admit the judgment roll in evidence.

The argument advanced in appellants' brief proceeds upon the assumption that, not only this judgment roll, but also that other documents, had been received in evidence. The record, however, discloses that the offers to introduce all evidence of a documentary nature with the exception of the previously mentioned judgment roll, were withdrawn. Although no point is raised with respect to the ruling of the lower court in rejecting the offer to introduce this judgment roll, we shall assume that counsel by this appeal really intend to attack such ruling and are seeking a reversal on that ground.

Virtually the precise question involved in the action at bar was presented, and determined adversely to the contention of appellants, in the case of *Usher v. Henkel* (Cal. Sup.) 271 P. 494, hereinafter referred to as the Usher Case. In that action it was stipulated at the trial that the Southern Land Company, a corporation, had become the owner of certain property in July, 1916. It further appeared that Usher subsequently had received a tax deed to the same property, and thereafter had procured a decree against the said company quieting his title to the said property. In the case cited, Usher brought suit to quiet title against one G. V. Henkel, evidently the same Henkel who is one of the defendants in the present suit, and incidentally represented by the same counsel who now appear for appellants here. In the Usher Case, Henkel claimed title under a decree in an action, hereinafter referred to as the Henkel Case, wherein Josephine Blanchard was the original plaintiff and said Henkel and Usher and said Brush, Raum, and one Doe, as trustees of Southern Land Company, an alleged defunct corporation, and certain fictitious named persons, were defendants. The decree in the said Henkel Case recited that suit had been dismissed as against Usher, and that G. V. Henkel had succeeded to the rights of the plaintiff Blanchard and had been substituted as party plaintiff, and the decree further purported to quiet title in favor of Henkel as against the remaining parties.

In the Usher Case, the lower court entered a decree quieting title in his favor as against the defendant therein. Upon appeal, that decree was affirmed by the Supreme Court, which, in substance, held that, under the law in effect since 1917 (St. 1917, pp. 371-377; Pol. Code, § 3669c, subd. 2), the failure of the Southern Land Company to pay its taxes did not create a forfeiture of that corporation, nor cause it to become dissolved, but that such

failure only suspended the corporation's right to transact business, and hence there were no trustees of the company. Accordingly, since the company was not a party to that action, and since the decree did not purport to be against the company, the Supreme Court held that the decree entered in the Henkel Case was void upon its face as against the company, and did not operate to vest Henkel with the right, title, or interest of the company in the property involved in that action.

[1] Upon the authority of the foregoing decision, it must be concluded that in the case at bar the decree entered in the Paulk Case was void upon its face as against the respondent herein, because the latter was not sued, and there were no trustees of said company who could be sued in the last-mentioned action. Hence such decree did not operate to vest Paulk with the right, title, or interest of the respondent in the property in question.

[2] The only remaining point mentioned in appellants' brief is to the effect that the action was barred by the provisions of section 341, subd. 3, Code of Civil Procedure. In that connection it is further asserted that no finding of the court was made on the issue of the statute of limitations. Such defense was pleaded in an amendment to defendants' answer, and the court expressly found "that none of the allegations contained in the amendment to defendants' answer herein filed by leave of the court on the 5th day of May, 1926, is true."

Subdivision 3 of section 341, Code of Civil Procedure, prescribes six months as the period within which an action may be commenced "to set aside or invalidate any action taken or performed by a majority of the *trustees of any corporation heretofore or hereafter dissolved by operation of law*, including the revivor of any such corporation." (Italics ours.)

The decision in the Usher Case, *supra*, wherein it was held, in substance, that the failure of the Southern Land Company to pay its franchise tax did not cause a forfeiture or a dissolution of the corporation and hence did not create any trustees thereof, is determinative of the special defense here raised.

For the reasons herein set forth, the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

207 Cal. 605

PEOPLE v. KOEHN. (Cr. 3217.)

Supreme Court of California. July 17, 1929.

1. Indictment and information ⇨129(1)—Allegation in indictment that crimes charged relate to single transaction is not indispensable, where that fact appears clearly from context (Pen. Code, § 954).

Where it appears clearly from allegations of indictment or information that two crimes charged therein were connected together in their commission, it is not necessary to allege that fact under Pen. Code, § 954, though better practice to allege in specific terms that offenses charged do relate to same act, transaction, or event.

2. Indictment and information ⇨127—Where from single statement of facts there is doubt as to particular crime which defendant intended to commit, circumstances may be set forth in separate counts with separate charges as to commission of stated crimes (Pen. Code, § 954).

Where from a single statement of facts it appears that a crime has been committed, and there exists a doubt as to the particular crime which the defendant intended to commit, it is proper to set forth the facts and circumstances in separate counts and charge the defendant with as many specific crimes as facts will warrant under Pen. Code, § 954; determination of specific crime of which defendant is guilty being matter for jury.

3. Indictment and information ⇨129(1)—Information charging in first count attempt to murder judge by placing explosive near his dwelling, and charging in second count attempt to injure and intimidate judge by malicious use of explosive, held not defective for failure to show crimes were connected together (Pen. Code, §§ 601, 954, and § 664, subd. 1).

Information charging in first count that defendant attempted to murder judge in violation of Pen. Code, § 664, subd. 1, by placing explosive substance near his dwelling house with intent that fuse should ignite and cause explosion, eventuating in death of judge, and charging in second count that defendant maliciously deposited explosive substance near judge's dwelling house, with intent to injure, intimidate, and terrify judge, in violation of section 601, held not defective for failure to show on its face that the two crimes were connected together in their commission within section 954, since such fact sufficiently appeared, though it was not expressly alleged.

4. Criminal law ⇨878(4)—Conviction for attempt to murder judge by use of explosive held not sustained, in view of conviction on second count of information for depositing explosive to intimidate judge, where defendant admitted use of explosive for that purpose (Pen. Code, §§ 601, 664, subd. 1).

In prosecution for attempt to murder judge by placing explosive substance near his dwelling house under Pen. Code, § 664, subd. 1, and for maliciously depositing explosive with intent to injure and intimidate judge under section 601, conviction for attempted murder held not sustained, where verdict of guilty was likewise returned as on charge of use of explosive to intimidate, and defendant admitted that he used explosive for purpose of intimidating judge to give him favorable decision in pending litigation.

5. Criminal law ⇨48—Defendant is responsible for his crimes, if he knows that act committed is wrongful.

Whether defendant is responsible for his crimes depends on whether he knew nature and quality of act which he committed, and, if so, whether he knew that the act was wrongful and unlawful, and mere inability to reason correctly on plan for executed crime is no defense.

6. Criminal law ⇨1175—Improper submission and verdict of attempted murder held not to require reversal of conviction for maliciously depositing of explosive with intent to intimidate, where such crime was admitted (Pen. Code, §§ 601, 664, subd. 1).

Submission to jury of question of defendant's guilt of attempted murder of judge to use of explosive, in violation of Pen. Code, § 664, subd. 1, though error, and though jury returned a conviction under count for attempted murder, held not to require reversal of conviction returned on another count charging deposit of explosive near dwelling house with intent to injure and intimidate judge, in violation of section 601, where defendant admitted use of explosive to intimidate.

In Bank.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Charles A. Koehn was convicted of an attempt to commit murder and of maliciously depositing an explosive substance at or near a dwelling house with intent to injure and intimidate, and he appeals. Affirmed in part, and reversed in part, with directions.

Superseding opinion 274 P. 595.

Carl E. Lindsay and Lindsay & Gearhart, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Glenn M. De Vore, Dist. Atty., and Richard K. Stewart, Asst. Dist. Atty., both of Fresno, for the People.

SEAWELL, J. The defendant was convicted, September 25, 1928, upon the second trial, in the superior court of the county of Fresno, on both counts of an information which accused him in count 1 with making an attempt to commit murder, in that, on or

about May 17, 1928, he did willfully, unlawfully, and with malice aforethought, attempt to kill and murder Hon. C. E. Beaumont, who was then and there a judge of the superior court of the State of California, in and for the county of Fresno. The manner of the attempt to kill is alleged to have consisted in placing a certain explosive and inflammable material at and near the dwelling house occupied by said Hon. C. E. Beaumont, located at 3957 Kerckhoff avenue, in the city and county aforesaid, to which a fuse was attached and lighted by the defendant with the intent that said fuse would ignite said inflammable material and cause an explosion, which would eventuate in the death of said Hon. C. E. Beaumont.

The second accusatory count of the information is substantially in the language of section 601, Penal Code, and alleged that upon the same day as alleged in count 1 the defendant "did willfully, unlawfully and maliciously put, place, deposit and attempt to explode a certain nitroglycerine explosive substance at and near a certain dwelling house occupied by one C. E. Beaumont, located at 3957 Kerckhoff avenue, in the city and county aforesaid, with intent to injure, intimidate and terrify the said C. E. Beaumont."

At the first trial, which resulted in a disagreement by the jury, the defendant was represented by counsel of well-recognized ability. A demurrer, upon general and special grounds, was lodged against each count of the information, the most important objection and the objection specially urged upon this appeal being that more than one offense was charged therein, to wit, "the offense of attempt to commit murder, and the offense of malicious use of explosives, and it does not appear on the face of said information that said two offenses so charged were connected together in their commission, but that said two offenses so charged are different offenses, not connected together in their commission, and not different statements of the same offense, and not offenses of the same class of crimes or offenses." In the respect above pointed out it is urged that said counts violate section 954, Penal Code, which provides that an indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and, if two or more indictments or informations are filed in such cases, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict. Said section further provides that the court may, in the

interest of justice, order that the different offenses or counts set forth in the indictment or information be tried separately or divided into two or more groups, and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.

Appellant made two objections in the trial court, which were overruled, as to the sufficiency of the information, and which are renewed upon this appeal, to wit, first, that the two offenses are not of the same class; second, that it does not appear upon the face of the information that the two crimes were connected together in their commission within the meaning of section 954, Penal Code.

[1] If the last objection is not tenable, and we are of the view that it is not, it becomes unnecessary to consider the first ground of objection. Counsel's contention in the court below, as renewed here, was that the information does not show upon its face that the two crimes were connected together in their commission. A number of authorities are cited to the effect that in charging under said section 954 it is necessary that care be taken to make it clearly appear that the offenses set forth relate to but one act, transaction, or event. No doubt it is better practice to allege in specific terms that the offenses charged do all relate to the same act, transaction, or event, as suggested by some of the authorities, but, where it appears clearly from the allegations of the indictment or information that such is the case, and a contrary or other construction would do violence to common understanding, an allegation of that which obviously appears is not required.

[2, 3] The counts of the information are identical as to the description of the person upon whom said act was intended to operate, and also as to place, time, and manner of accomplishing said unlawful act, to wit, by the use of an explosive placed at or near the residence of Judge Beaumont, situate at 3957 Kerckhoff avenue, in the city of Fresno. The act as described in each count is the same, and from said act the jury was to determine upon a trial of the case whether the accused placed said explosives at the door of said judge with intent that he should be killed thereby, or, as contended by defendant at the trial, to intimidate or terrify the judge to the extent that he would decide a case then pending in his court, in which the defendant was a party, in his favor.

When from a single statement of facts it appears that a crime has been committed, and there exists a doubt as to the particular crime the accused intended to commit, it is entirely proper to set forth the facts and circumstances in separate counts and charge the accused with as many specific crimes as the facts will warrant. The specific crime intended, or attempted to be committed, is a

matter resting with the jury. The demurrer was properly overruled.

Upon arraignment, the accused was represented by counsel. He entered the general plea of not guilty and the special plea "not guilty by reason of insanity." This trial resulted in a disagreement by the jury. Upon the second trial, having dismissed his attorneys, he appeared in propria persona, and at the outset of the trial requested and was granted leave to withdraw the plea of "not guilty by reason of insanity." At the conclusion of the trial, the jury found the defendant guilty on both counts, but in each verdict interlined the words "and for obvious reasons, ask the Honorable Court to exercise leniency in the measure of punishment to be inflicted."

Two of his former counsel entered his defense after conviction, and are prosecuting this appeal. The usual motions were made for a new trial, arrest of judgment, etc., but each was denied, and the defendant was sentenced under both counts, said sentences to run consecutively. An appeal was taken directly to the District Court of Appeal, First Appellate District, Division 2, and said court affirmed the judgment of conviction on the first count, to wit, an attempt to commit murder, and reversed the judgment of conviction upon the second count, which charged malicious use of explosives. Both the people and the defendant thereafter petitioned for a hearing by this court, which petition was granted, and the cause was transferred to this court for hearing and decision.

We are satisfied that the pleading does not violate the rule as announced in *People v. Plath*, 166 Cal. 227, 135 P. 954, and other cases decided before and subsequent to the *Plath* Case, to the effect that it must clearly appear upon the face of the information that the offenses set forth therein relate to but one act, transaction, or event. The pleading is in entire harmony with the provisions of said section 954 in its present amended form, and which section further provides that the prosecution may not be required to elect between the different offenses or counts set forth in the information, but the defendant may be convicted of any number of the offenses charged, each offense being stated in the verdict.

While the pleading is in harmony with the provisions of said section, that is to say, the jury was free to determine from the act the particular crime that the accused intended to commit, we are of the view, from the nature of the two offenses charged, that he could not be guilty of both. The inconsistency of so holding will be latterly considered.

The circumstances of the act of which the defendant was convicted being so unusual, both in their inception and attempted execution, have caused us to examine into the record in an effort to discern as nearly as it may

be done the motive of the accused. Our investigation has not proved to be fruitful. Defendant was married and of the age of about 67 years at the time he committed the self-confessed act. He had resided for a period of 30 years upon lands which he had acquired, situated in the Mojave desert, and latterly became involved in litigation. An action for damages in a large sum of money on a breach of contract in connection with the operation of certain mining properties owned by him was commenced against him in the superior court of Kern county, and Hon. C. E. Beaumont of the county of Fresno was assigned to try said cause. The defendant, although represented by counsel, insisted upon personally conducting his cause, and did at times assume control of the proceedings. The judge, at the conclusion of the trial, requested that oral argument be dispensed with, and that the cause be submitted on briefs. Defendant felt disappointed and dissatisfied that he was not given an opportunity to orally argue the cause. He, as well as his attorney, thereafter submitted briefs. The cause being submitted, the judge repaired to his home at the city of Fresno. During the trial the defendant had offered two or three letters written by himself and others, which were excluded from evidence by the court. By this and other rulings and observations made by the court during the progress of the trial, the defendant presaged a decision against him. Having had a large experience with nitroglycerine and explosives, according to his story, he conceived the plan of placing a nitroglycerine bomb, which he had perfectly constructed, at the doorstep of the judge, under cover of night, to be found by him as he went to the front door in quest of his morning newspaper. The bomb was placed at about 1 o'clock a. m. and discovered by the judge later the same morning. The bomb, which weighed a fraction more than three pounds, was equipped with fuse and cap, and upon it was placed a coffee can containing gasoline. The bomb contained all the ingredients essential to cause a violent and destructive explosion. The fuse had the appearance of being charred; that is, it appeared to have been lighted and burned to a certain point and from some cause become extinguished. Shortly after he had thus placed the bomb, the defendant, by reason of his unusual conduct, was detained by a police officer, and his automobile, which he had left parked in a conspicuous place, was searched and found to contain pieces of fuses and other scraps of telltale evidence which readily connected the defendant with the placing of the bomb after its discovery was made. The defendant for a period denied any connection with the placing of the bomb, but finally admitted that he had made and placed the bomb on the judge's porch near the front door. He also stated during the trial, as a witness, that he had car-

ried the bomb in his automobile for two weeks before depositing it, wrapped in such a manner as to protect it from detonation or explosion.

His claim at the trial was that he had charred the fuse before it was placed on the judge's porch, and that it was worthless as a fuse, and it could not have ignited or set the bomb off. His story, told as a witness, was that it was not his purpose or intention to injure the judge, but solely to intimidate and terrify him into doing justice in his cause. He also testified that he expected to be, and it was his purpose to be, apprehended for his act in order that the attention of the public might be called to any injustice that might be done him by an adverse decision, which would mean financial ruin to him.

[4, 5] Returning to the question whether a conviction on both counts of the information may be sustained, we are of the view that the two conclusions are inconsistent with each other and cannot be reconciled by the application of any rule by which the purposes of a rational mind may be determined. If the defendant's purpose to kill the judge had succeeded, no decision would have been rendered by him, and the slaying would have been barren of its terrorizing example even as to another judge who might be called to try the cause, unless it became known that the defendant was responsible for the homicide. If, on the other hand, the bomb was placed near the front door of the judge's residence with the intent of terrorizing and intimidating him, the identity of the defendant as the author of the deed must necessarily become known to him in order to produce the result sought to be accomplished. The act seems to be void of rationality, whatever may have been the end attempted to be attained. From the nature of the case we are unable to perceive upon any theory how the defendant could have intended to commit both of the offenses charged in the information. That he was properly convicted of the malicious use of explosives with the intention of terrifying and intimidating the judge of the court was the defendant's repeated admission at the trial of the case, both as a witness and in the conduct of said cause. His defense was predicated on the assumption that the exigency of the situation justified the means resorted to by him to save himself from hazards which threatened. That the defendant was, to say the least, laboring under abnormal mental agitation at the time of, and for some time prior to, the placing of the bomb at or near the door of the judge's residence, cannot be doubted. It is also equally true that he was able to distinguish between right and wrong, and knew that he was doing a wrongful and wicked act at the time he committed it. The legal question as to mental responsibility is, Did the accused know the nature and quality of the act which he committed, and, if so, did he know it was a wrongful act and one for-

bidden by law? From the admissions of the defendant alone, as well as the convincing circumstances of the commission of the act, we are forced to make an affirmative answer to the interrogatory. A person may be unable to reason correctly upon the plan which he is formulating to execute a crime, and, notwithstanding his defective reasoning, be responsible to the law, if he comes within the legal test of the rule above stated. Such is the policy of the law. While the defendant withdrew from the consideration of the law his mental status, we have considered it as a matter of law, for the reason that the case cannot well be discussed without doing so.

The punishment and confinement prescribed by statute for a violation of section 601, Penal Code, defining the malicious and unlawful use of explosives, is from one year to the end of life, in the state prison, and for an attempt to commit murder, not more than 20 years in the state prison. Pen. Code, § 664, subd 1. Said section 601 makes the offense complete when any person maliciously places or deposits, explodes, or attempts to explode, near any building or dwelling house, any dynamite, nitroglycerine, or other chemical compound or explosive "with the intent to injure, intimidate or terrify any human being." The placing of the explosives was done with the expressed purpose of intimidating and terrifying Judge Beaumont. The penalty for such an act, by reason of the lethal and destructive properties of the substances from which bombs are constructed, and the terrifying effect which nitroglycerine and kindred explosives have upon the minds of the public, is greater than the penalty prescribed for an attempt to kill a single person. Therefore, so far as the punishment for the two crimes is concerned, the greater included the lesser.

[6] The prosecution was not required to elect upon which count it would contend for a conviction. The defendant was convicted upon both counts, and there is no question of his guilt of the greater. His admissions in court in effect amounted to a plea of guilty. The submission of the question of his guilt upon the count charging an attempt to murder could not have, under the state of the record, prejudiced the jury in its consideration of the crime which, by his own admissions, he committed.

No other serious questions are presented by the appeal. It is ordered that the judgment pronounced on count 2 of the information, which adjudged defendant guilty of the malicious use of explosives, be, and it is hereby, affirmed; the judgment pronounced upon count 1, which charged an attempt to commit murder, is set aside and vacated, and the trial court is directed to dismiss the count upon which said conviction was had.

It is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

207 Cal. 617

PERRY v. MAGNESON et al. (S. F. 13062.)

Supreme Court of California. July 18, 1929.

1. Dismissal and nonsuit $\S$ 60(2)—Mere lapse of five years between filing of answer and trial does not deprive court of jurisdiction to thereafter try case (Code Civ. Proc. $\S$ 583).

Under Code Civ. Proc. $\S$ 583, providing for dismissal of actions, mere lapse of five years between filing of answer and the date of trial did not deprive court of jurisdiction to thereafter try case.

2. Dismissal and nonsuit $\S$ 79—Only relief granted under statute providing for dismissal for not bringing case to trial is to require order of dismissal on proper showing (Code Civ. Proc. $\S$ 583).

Under Code Civ. Proc. $\S$ 583, providing for dismissal of action where there has been lapse of five years between filing of answer and date of trial, only relief granted is to require on proper showing that an order of dismissal be entered.

3. Appeal and error $\S$ 870(2)—Mandamus $\S$ 43—Remedies available to party injured by refusal to dismiss action after lapse of five years are mandamus or review on appeal from judgment (Code Civ. Proc. $\S$ 583).

Where court fails to grant relief provided for by Code Civ. Proc. $\S$ 583, providing for dismissal of action after lapse of five years between filing of answer and date of trial, two remedies are available to injured party, namely, mandamus directed against trial court to compel dismissal, or by noting exception to ruling of court and properly presenting same by bill of exceptions order may be reviewed upon appeal from judgment.

4. Appeal and error $\S$ 105, 277—Order refusing to dismiss action after lapse of five years is not appealable order nor one deemed excepted to (Code Civ. Proc. $\S\S$ 583, 647).

Order refusing to dismiss action under Code Civ. Proc. $\S$ 583, providing for dismissal after lapse of five years between filing of answer and date of trial, is not an appealable order nor one deemed excepted to under section 647.

5. Appeal and error $\S$ 257—No exception having been taken to decision of court refusing to dismiss action, objection will not be considered on appeal (Code Civ. Proc. $\S$ 583).

Where no exception was taken to decision of court in refusing to dismiss action for lapse of more than five years between filing of answer and date of trial under Code Civ. Proc. $\S$ 583, it will be presumed that injured party acquiesced in ruling of court, and objection will not be considered on appeal.

6. Principal and surety $\S$ 149—Surety, agreeing to meet liability on bond when determined, waived provision requiring suit thereon to be brought within specified time.

Where building contract bond provided that surety should in no event be subject to suit in-

stituted later than specified date, but surety accepted notice of contractor's default and agreed to waive requirements of bond and notified holder that it would be ready to meet liability, if any, when liability was finally determined, failure to bring suit within time specified did not preclude recovery, since surety cannot hold out hope of amicable adjustment of claims, and thus delay action, and plead delay caused by its own conduct as defense to action when brought.

7. Appeal and error $\S$ 1011(1)—Finding on conflicting evidence is conclusive.

Inferences to be drawn from conflicting evidence and what conclusions conflicting evidence warranted held for trial court, and its findings thereon will not be reviewed on appeal.

8. Judgment $\S$ 253(2)—Court may grant relief embraced within issues, including interest not within prayer (Code Civ. Proc. $\S$ 580).

Under Code Civ. Proc. $\S$ 580, where answer is filed, court may after trial grant any relief consistent with case made by complaint and embraced within issues, including judgment for interest, though not prayed for.

9. Interest $\S$ 44—Generally interest is allowable from time amount in suit becomes due, if sum is certain or can be made certain.

Generally interest is allowable from time sum in suit becomes due, if sum is certain or can be made certain by calculation.

10. Interest $\S$ 39(3)—Amount due under bond being uncertain and unliquidated and dependent upon reasonable cost of completing building, surety was not liable for interest prior to judgment.

In action on contractor's bond, where amount due by surety depended upon amount found to be cost of completing building based upon reasonable value of necessary labor and materials, and under provisions in bond it was necessary for owner to prove loss before he would be entitled to recover, claim was uncertain and unliquidated and surety was not liable for interest prior to entry of judgment.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by R. A. Perry against O. M. Magneson and another. Judgment for plaintiff, and defendant United States Fidelity & Guaranty Company appeals. Remanded with directions to modify, and as modified affirmed.

C. L. Colvin, of Oakland, and Thomas, Beedy, Presley & Paramore, of San Francisco, for appellant.

F. Eldred Boland and Knight, Boland & Christin, all of San Francisco, for respondent.

WASTE, C. J. The defendant United States Fidelity & Guaranty Company, a corporation, appeals from a judgment entered against it and in favor of the plaintiff R. A. Perry, on a bond executed by it, conditioned

upon the performance of a building contract by the defendant O. M. Magnuson.

On June 10, 1910, plaintiff and defendant Magnuson entered into a contract whereby the defendant agreed to construct a residence and garage for the plaintiff in accordance with certain plans and specifications, and to furnish all labor and materials necessary for such construction, at the agreed price of \$23,567, the building to be completed within a designated period of time. Concurrently with the execution of the contract, the defendant surety company executed and delivered to plaintiff its bond in the penal sum of \$6,000, agreeing to indemnify plaintiff for any pecuniary loss resulting from the breach of any of the terms and conditions of the contract by the defendant contractor. Magnuson breached the contract by abandoning the work on February 11, 1911. On notification of the abandonment the surety company declined to take any steps in connection with the contract, and the work was completed by the plaintiff-owner, who thereafter instituted this action to recover on the bond. The prayer of the amended complaint was for the sum of \$6,000, and costs. Judgment was given in favor of the plaintiff and against the surety company in the full penal amount of the bond, with interest at the rate of 7 per cent. from October 16, 1911, the date of the commencement of the suit, aggregating \$12,834.32, together with interest thereon from the date of judgment until paid, and costs. No judgment was rendered against defendant Magnuson, he having been previously adjudged a bankrupt.

It appears that after the completion of the building by the owner many lien suits were filed. As the determination of the action to recover on the bond was somewhat dependent upon the outcome of the lien cases, it was agreed between counsel for the respective parties hereto that the trial of this action should be postponed until the lien suits were finally determined. They therefore entered into a stipulation on November 30, 1915, that this case should be dropped from the calendar, to be restored on five days' notice by either party. The judgment in the lien cases, after two appeals, became final in June, 1919. Shortly thereafter the present cause was set for trial, and was continued from time to time until November, 1922, when the trial actually commenced. Judgment was ordered for the plaintiff. The surety company's motion for a new trial was granted, and on April 30, 1926, the second trial commenced, at which time the surety company objected to proceeding with the case, and moved to dismiss the action for want of prosecution; the same objection and motion having been made prior to the commencement of the first trial. The motion to dismiss was denied, and judgment in favor of the plaintiff was entered on January 28, 1928.

[1-5] Appellant contends that, more than

five years having elapsed between the time of the filing of the answers to plaintiff's amended complaint and the date when the trial of the action commenced, and the parties not having entered into a written stipulation extending the time, its motion to dismiss should have been granted under the provisions of section 583 of the Code of Civil Procedure. *Miller & Lux, Inc., v. Superior Court*, 192 Cal. 333, 219 P. 1006. The mere lapse of five years between the filing of the answer and the date of the trial does not deprive the court of jurisdiction to thereafter try the case. The only relief granted under section 583, supra, by our decisions has been to require, on proper showing, that an order of dismissal be entered. *Rio Vista Mng. Co. v. Superior Court*, 187 Cal. 1, 5-6, 200 P. 616. If the court fails to grant that relief, two remedies are available to the injured party. He may, by mandamus directed against the trial court, compel the dismissal (*Andersen v. Superior Court*, 187 Cal. 95, 97, 200 P. 963), or, by noting an exception to the ruling of the court and properly presenting the same by means of a bill of exceptions, he may have the order reviewed upon an appeal from the judgment. The appellant took neither of these steps. The order refusing to dismiss the action is not itself an appealable order, and is not one deemed excepted to under section 647 of the Code of Civil Procedure. No exception having been taken at the time the decision was made, it will be presumed that the appellant acquiesced in the ruling of the court, and the objection cannot now be urged on appeal. *Davies v. Ramsdell*, 40 Cal. App. 424, 427, 181 P. 94.

[6] The contractor's bond provided that in no event should the surety be subject to any suit, action, or other proceeding thereon that was instituted later than the 13th day of June, 1911. It is the contention of the appellant, therefore, that this action is barred by the fact that suit was not instituted until October 16, 1911. In this connection, the trial court found that immediately upon the abandonment of the contract by Magnuson, and within 30 days after knowledge of his default, the plaintiff, in writing, as provided in the bond, notified the United States Fidelity & Guaranty Company of the fact, showing the abandonment by Magnuson; that the guaranty company declined to assume and complete or procure the completion of the contract, but accepted the notice and "thereupon agreed to and with plaintiff to waive the requirements of said bond that suit be commenced thereon on or before the 13th day of June, 1911, and agreed to and with plaintiff to pay to plaintiff the amount of the liability thereunder when the exact amount of plaintiff's damage be ascertained, and further agreed to and with plaintiff that action might be commenced upon said bond at any time subsequent to said 13th day of June, 1911, when such amount of damage was ascertained." Reasonable in-

tendments and inferences to be drawn from the evidence support the finding. The provision for the limitation of time for the commencement of suit upon the bond was no doubt reasonable in point of time under ordinary circumstances, and, had the surety merely insisted upon a strict compliance with the provision, its position here would be tenable. *Fitzpatrick v. North American Accident Ins. Co.*, 18 Cal. App. 264, 123 P. 209. But the appellant here did not do that. While it declined to take any steps in connection with the contract with Magneson in relation to the completion of the building when the contractor abandoned the work, it notified the plaintiff in writing that it would "be ready to meet its liability, if there is any, upon the bond when the amount of that liability is finally determined." We believe that agreement brings the case well within the rule that a surety cannot hold out a hope of amicable adjustment of claims and thus delay action against it, and then plead the delay caused by its own conduct as a defense to the action when brought. 14 R. C. L. 584; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 S. Ct. 1019, 34 L. Ed. 408, 413.

[7] The trial court found that after Magneson abandoned the work the plaintiff completed the building according to the plans and specifications, and at the reasonable cost of \$16,926.74. The appellant challenges this finding, and contends that it is clearly contrary to the evidence. In considering this contention, it is but necessary for us to say that there is evidence from which both parties to the controversy may argue in support of their respective positions, for the evidence is conflicting in this regard. The inferences to be drawn, and what conclusion the evidence warranted, were matters for the trial court, and its findings preclude the necessity for any inquiry into that subject.

[8] The trial court also found that plaintiff suffered a pecuniary loss in the sum of \$10,055.03 by reason of Magneson's breach of the contract, and that he was entitled to judgment against the appellant surety for the full penalty of the bond, \$6,000, with interest thereon at 7 per cent. per annum from October 16, 1911, the date of the commencement of the action. Judgment was entered accordingly. Appellant contends that in no event was plaintiff entitled to recover interest prior to the date judgment was given in his favor. It advances two reasons for this contention: First, that the damages sought to be recovered in the action were uncertain and unliquidated; and, second, the complaint did not pray for interest. As to the latter point, under the liberal rule prevailing in this jurisdiction, where an answer is filed the court may, after the trial, grant any relief consistent with the case made by the complaint and embraced within the issues. *Code Civ. Proc.* § 580. It may therefore render a judg-

ment for interest, though not prayed for. 14 Cal. Jur. p. 691, par. 15.

[9, 10] As to the time from which interest on the amount found due should have been allowed, respondent asserts that the trial court was correct in awarding interest from the date of the commencement of the suit, on the theory that the action was not one for damages, but was upon an obligation to pay a sum certain, which obligation must be treated as any other instrument calling for the payment of money. The general rule is that interest is allowable from the time the sum in suit becomes due, if the sum is certain or can be made certain by calculation. The test, then, to be applied in the instant case is whether or not the sum found to be due was known and admitted by the appellant to be due to the respondent. *Gray v. Bekins*, 186 Cal. 389, 399, 199 P. 767. It is apparent that, until the trial court determined the cost of completing the building, based upon the reasonable value of the necessary labor and materials, the amount, if any, due from appellant to respondent upon the bond in question could not be fixed. Had the cost to respondent not exceeded the amount specified in the building contract for the completion of the work, the surety would not have been liable in any sum. Under the terms of the bond the surety agreed to "save harmless the said Oblige [the respondent] from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of said Principal [the building contractor] to be performed." It was necessary, therefore, for the respondent to prove a loss before he would be entitled to recover on the bond; and it follows that, until the amount of that loss should be determined by the judgment of the court, the claim was uncertain and unliquidated. As was said by this court in *Cox v. McLaughlin*, 76 Cal. 60, 67, 18 P. 100, 104 (9 Am. St. Rep. 164): "The reason of such denial of interest is said to be that the person liable does not know what sum he owes, and therefore can be in no default for not paying. The damages in such cases are an uncertain quantity, depending upon no fixed standard, * * * and can never be made certain except by accord or verdict. As to such damages there can be no default, and hence the initial point at which to fix the starting of interest is wanting." It follows, therefore, that respondent was not entitled to interest prior to the entry of judgment, and to that extent the judgment was erroneous.

The cause is remanded with directions to the court below to modify its judgment in favor of the plaintiff by eliminating therefrom interest from the date of the commencement of the suit, thereby reducing the amount to be recovered by plaintiff from \$12,834.32 to \$6,000, the full penal amount of the bond, with interest thereon at the rate of 7 per cent. per

annum from January 28, 1928, the date of the entry of judgment, together with costs of suit; the judgment as thus modified to stand affirmed.

We concur: RICHARDS, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

207 Cal. 582

LYNCH v. LYNCH et al. (two cases).
(S. F. 13045.)

Supreme Court of California. July 16, 1929.
As Modified Aug. 12, 1929.

1. Appeal and error ⇨1011(1)—Trial court's findings on conflicting evidence are conclusive on appeal.

Trial court's findings on conflicting evidence are conclusive on appeal.

2. Deeds ⇨68(1½)—Deeds executed by deceased to members of family as his voluntary rational act and deed must be sustained by court.

Deeds executed by deceased to members of family, when he was owner of property, as his voluntary rational act and deed, must be sustained by court, and court may not substitute its own ideas of what would have been equitable division of family fortune.

3. Deeds ⇨211(4)—Deed from father to son was not presumptively fraudulent, where no fiduciary relationship existed between them.

Deed from father to son was not presumptively fraudulent, where no business or fiduciary relationship existed between father and son at time father executed deeds.

4. Husband and wife ⇨267(7)—Wife's deed to daughter conveying one-half interest in property was not void, even if it was community property, where wife survived husband who died intestate.

Wife's deed to daughter conveying one-half interest in property was not void, even if it was community property, where wife survived husband who died intestate, since she thereby became vested with one-half interest in community property which passed under deed to daughter as after-acquired interest.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Two actions to set aside deeds by Peter E. Lynch against Thomas B. Lynch and others. From judgment for defendants, plaintiff appeals. Affirmed.

Bert Schlesinger and John L. McNab, both of San Francisco, for appellant.

Leo J. McEnerney and Alexander L. O'Grady, both of San Francisco, for respondents.

LANGDON, J. Plaintiff has appealed from judgments against him in two actions in which he sought to have set aside certain deeds made by his father, Peter Lynch, now deceased, conveying certain property to his brother, defendant herein.

[1] The record consists of 4 volumes of typewritten matter, comprising over 1,800 pages, and the briefs contain lengthy arguments as to the purport of this evidence. The testimony is conflicting upon every matter of importance to the inquiry here, and the trial court has made elaborate findings against plaintiff, and, as stated in his opinion, the trial judge made such findings most reluctantly, with his sympathies enlisted for the plaintiff. Under such circumstances, the findings are conclusive here, as we have repeatedly held.

Two separate pieces of property are involved here, one at Twenty-Third and Mission streets, San Francisco, and the other at Tenth and Howard streets, San Francisco. They will be referred to hereinafter as the Mission and Howard street properties, respectively. In December, 1913, Margaret Lynch, the mother of plaintiff and the record owner of the properties in question, executed two deeds, conveying to Peter Lynch, her husband, and Kathryn C. Lynch, her daughter, respectively, an undivided one-half interest in the Mission street property. In June, 1916, Margaret Lynch conveyed to Peter Lynch the property referred to as the Howard street property.

On June 20, 1916, Peter Lynch executed and delivered to his sons Francis I. Lynch and Joseph H. Lynch deeds conveying to each of them a one-quarter interest in the Mission street property. On June 24, 1916, Peter Lynch executed a deed conveying to his eldest son, Thomas B. Lynch, the Howard street property, which he, after the death of his mother in 1920, conveyed to his sister, the defendant Kathryn C. Lynch, without valuable consideration.

[2] According to the findings of the trial court, the last illness of Peter Lynch continued intermittently from the 18th day of June, 1916, to the date of his death on July 2, 1916, but during that period Peter Lynch was not at all mentally incapacitated from transacting any business or entering into any contracts or unable to understand or comprehend the nature, purpose, or effect of any of his business acts. During the period from the 19th day of June, 1916, to the date of his death, Peter J. Lynch was up and about his home in his usual and customary manner, and while he left his home and was out of doors on or about the 24th day of June, 1916, he did not leave the premises whereon his house was situated during said time. During this period, Peter Lynch did not suffer phys-

ical or mental pain and was not either physically or mentally incapacitated from entering into any contracts, or from executing any deeds disposing of his property. The findings negative all the allegations of the complaint respecting the weakened mental and physical condition of Peter Lynch shortly prior to his death, and they also determine, adversely to plaintiff, the allegations of his complaint to the effect that the deceased directed deeds of the property to be prepared in a manner to transfer a portion thereof to plaintiff and that an older brother, defendant Thomas B. Lynch, prepared the deeds contrary to instructions and contrary to the intention of the grantor, and that the said Thomas B. Lynch presented said deeds to the grantor and requested that he sign them. On the contrary, it is found that on the 20th day of June, 1916, Peter Lynch signed, acknowledged, and delivered the deeds involved here, transferring the property to certain of his children, at his own instigation and of his own initiative and volition; that he signed them all in the presence of Margaret Lynch, his wife, Kathryn C. Lynch, his daughter, Thomas B. Lynch, his son, and James F. McCue, a notary public; that each of said deeds was executed and delivered by said Peter Lynch to the grantee named therein in the presence of Margaret Lynch, his wife, Kathryn C. Lynch, and Thomas B. Lynch.

It is also found that Peter Lynch neither had nor needed any separate or independent advice with respect to the preparation or execution of said deeds, and acted in all said matters freely and independently and upon and according to his own will and judgment, and that all said deeds accord with the intention and wish of Peter Lynch; that Peter Lynch never expressed and never had the intention that all of his five children should share equally in his properties, or that any conveyance of any thereof should be made to Peter E. Lynch; that Peter Lynch, the father, at the time of the execution of said deeds knew and understood the contents thereof, and knew and understood the effect of his act in acknowledging, signing, and delivering said deeds, and knew and understood and fully comprehended the nature, purpose, and effect of each and all of said deeds at the time of the execution of the same, and thereby intended to convey the said property described in said deeds to the respective grantees named therein.

The findings then determine, adversely to plaintiff, the allegations of his complaint to the effect that he was misled by his brothers into believing that he would share in the property after his mother's death and into believing that he was an equal owner with them in said property, but, on the contrary, it is found that plaintiff has known since Sep-

tember, 1916, that his brothers and sisters were the owners of the property in dispute.

It appears that after the death of Peter Lynch, the father, the mother and her five children resided together until the marriage of plaintiff, and thereafter the other children resided in the family home with their mother until her death, in May, 1920. The oldest brother, Thomas, then transferred the property received by him from his father to his sister and died before the present action was brought to trial. It appears from the record that there were family reasons to explain the action of the father in not naming the plaintiff herein as grantee in any of these deeds and to explain why the oldest brother did not permit the plaintiff to share in his generosity to his brothers and sisters. Indeed, the trial court found that while Peter Lynch, deceased, had affection for all his five children, by reason of certain conduct of plaintiff, the father had less affection for him than for the other children. It having been found by the trial court that these deeds were executed by Peter Lynch, deceased, when he was the owner of the property, as his voluntary, rational act and deed, this court must sustain them and may not substitute its own ideas of what would have been an equitable division of the family fortune for the ideas of the deceased.

[3] It is also contended that the deed from Peter Lynch to his son Thomas was presumptively fraudulent because a fiduciary relationship existed between them. This contention is destroyed by the findings to the contrary and to the effect that the relationship between the parties was that of the greatest friendship and that Peter Lynch had great confidence in his son Thomas, but that no business or fiduciary relationship existed between them at the time the father executed the deeds.

[4] The only other point requiring discussion is the contention of the appellant that the conveyance by Margaret Lynch, executed in 1913, to Kathryn C. Lynch, her daughter, conveying a one-half interest in the Mission street property, was void because the property was at that time community property of Peter and Margaret Lynch. The trial court found "that it is untrue that said property was at any time subsequent to the 8th day of January, 1916, community property of Margaret and Peter Lynch." The record shows several reasons why the property in question was not community property, but we shall not discuss them, because, assuming that it was community property at the time of the execution of the deed from Margaret Lynch to Kathryn C. Lynch and that Peter Lynch did not direct the execution of the deed by his wife, that deed nevertheless vested in Kathryn C. Lynch an undivided one-half interest in the property which purported to be

conveyed by the deed, because Margaret Lynch, the grantor, survived Peter Lynch, who died intestate, and thereby she became vested with a one-half interest in the community property which passed under the deed to Kathryn C. Lynch, as an after-acquired interest.

The judgment in each case is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; PRESTON, J.; RICHARDS, J.

207 Cal. 556

UNITED STATES FIDELITY & GUARANTY CO. v. MATHEWS et al. (Sac. 4021.)

Supreme Court of California. July 13, 1929.

1. Descent and distribution §75—Title of decedent in properties of estate vests immediately on death in heirs, subject to debts, etc.

Title of decedent in and to properties of his estate vests immediately on his death in his heirs, subject only to payment of debts of decedent, funeral expenses, family allowance, and expenses of administration.

2. Descent and distribution §86—Right of heir to assign interest in estate is absolute right of property, subject only to certain rights in administrator.

Right of heir to assign or to hypothecate his interest in estate of deceased ancestor is absolute right of property, which is subject only to right of possession in administrator for purpose of administration and to payment of charges in course of administration.

3. Executors and administrators §87—Assignee of heir's interest in estate had superior right over that of surety of such heir as administrator misusing funds to have heir's share distributed to it.

Assignee of interest of heir in estate of deceased father held entitled to superior right over that of surety of such heir as administrator misusing funds and properties of estate to have distributed to it share of such heir in estate.

In Bank.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action to establish the priority of interest in the distributive share of an estate by the United States Fidelity & Guaranty Company against N. G. Mathews, personally and as administrator of the estate of Thomas W. Wilson, deceased, and another. From a judgment for defendants, plaintiff appeals. Affirmed. Superseding opinions in 273 P. 822, and 274 P. 769.

Horace W. B. Smith and P. R. Lund, both of San Francisco, for appellant.

Julien E. Pardee, of Susanville, for respondents.

RICHARDS, J. This appeal is from a judgment in favor of defendants, and is presented upon the judgment roll alone. The facts as set forth in plaintiff's complaint and as found by the trial court are briefly these: Thomas W. Wilson died intestate on the 18th day of June, 1920, in the county of Lassen, leaving estate therein to which his three children, George W. Wilson, Rena M. Lucius, and Dorothy Wilson, succeeded share and share alike. On August 2, 1920, George W. Wilson was appointed administrator of the estate of his deceased father, and qualified by giving a bond in the sum of \$5,300, with two personal sureties, and entered upon his duties as such administrator. On March 3, 1921, George W. Wilson borrowed from the Growers' Bank of San Jose, Cal., the sum of \$2,600, and as security for such loan gave to said bank his promissory note for that amount, together with an assignment of all of his interest in the estate of Thomas W. Wilson, deceased, and in and to all of the property of said estate to which he might be entitled, and all fees and commissions accrued or to accrue to him as administrator of said estate. This assignment was a few months after the making thereof filed with the papers of the estate. On September 12, 1921, the personal sureties upon the bond of George W. Wilson made application to the court to be released from further liability, and on November 10, 1921, the said administrator filed a new bond in the same amount and upon which the plaintiff herein was the sole surety. On June 27, 1922, for value received, and after the maturity of the note, the said Growers' Bank assigned and delivered to the Bank of Lassen County said note, together with an assignment of the interest of said George W. Wilson in the estate of his deceased father, and which assignment was also duly filed with the papers in said estate. On January 8, 1924, the Bank of Lassen County filed a petition in the matter of said estate, praying for the revocation of the letters of administration theretofore issued to said George W. Wilson and for the appointment of N. G. Mathews, one of the respondents herein, as the administrator of said estate. On January 31, 1924, an order was duly made by the said court granting the prayer of said petition, and thereupon said Mathews qualified as such administrator, and has ever since been the administrator of said estate. On April 9, 1924, Mathews as such administrator commenced an action against George W. Wilson and his surety, the plaintiff and appellant herein, seeking to compel said Wilson to make an accounting of his transactions as administrator of said estate, and that it be determined in what amount, if any, said Wilson was indebted to said estate, and that judgment be rendered against him for such amount, and that the plaintiff in that action

also have judgment against the said surety for such portion of said indebtedness as it should be found liable for under its surety bond. On or about May 6, 1924, George W. Wilson filed in said court what purports to be a final account of his administration of said estate, and thereafter and upon October 20, 1924, the court in which the above action was pending made and filed its findings of fact and conclusions of law by which it was held that George W. Wilson was indebted to the estate of said deceased in the sum of \$2,807.16, and of this amount his liability for the sum of \$2,249.77 had accrued during the period covered by his second bond upon which the appellant herein is surety. Thereafter, and on the 15th day of May, 1925, the appellant herein paid the administrator of said estate in full of its liability as such surety the sum of \$2,267.29, and immediately thereafter brought this action against N. G. Mathews as administrator of said estate and the Bank of Lassen County, the purpose of said action being that of obtaining a decree to the effect that after its foregoing payment of the amount for which it had been held liable as such surety to said estate it became subrogated to all of the rights, remedies, and facilities which the estate of Thomas W. Wilson then had or might thereafter acquire to collect said sum of \$2,267.29, with interest from said George W. Wilson, and to retain said sum with interest from any distributive share due said Wilson out of the estate of his deceased father, and that the plaintiff's right to have said sum retained for its benefit was superior to the right of the Bank of Lassen County existing by virtue of its transferred assignment from the Growers' Bank of San Jose. Upon the trial of the cause, the trial court found the foregoing to be the facts, but as to the law applicable thereto rendered judgment in favor of the defendants in the action. From such judgment, this appeal has been taken, and is presented upon the judgment roll.

The sole question presented by this appeal is as to whether by his assignment of all of his right, title, and interest in the estate of his deceased father consummated prior to the existence of any liability on the part of said George W. Wilson to said estate arising out of his misuse as such administrator of the funds and properties thereof a prior right had been created in the transferee of said assignment and interest of the assignee thereof to receive from said estate the full distributive share of said Wilson therein, and that such right was superior to the claim of said estate to be repaid the amount of his defalcations out of his distributive share of said estate and hence as to the right of this plaintiff to be repaid the amount which it

had been compelled to pay to said estate by virtue of its suretyship.

The appellant argues that, by virtue of its payment of the amount which it was compelled to pay to said estate as the surety of said George W. Wilson, it became subrogated to the right of said estate to retain the said amount of his delinquency as administrator of said estate in making distribution thereof to the heirs of Thomas W. Wilson otherwise entitled thereto. This contention on the part of the appellant is not seriously disputed, but the difficulty is that it does not go far enough to entitle the plaintiff herein to a superior right to the distribution of the interest of said George W. Wilson in said estate in the presence of his assignment and transfer of his entire interest therein prior to the time when his delinquency as such administrator arose.

[1-3] It is well-settled law that the title of a decedent in and to the properties of his estate vests immediately upon his death in his heirs, subject only to payment of the debts of the decedent, the funeral expenses, the family allowance, and the expenses of administration. 9 Cal. Jur., p. 472, §§ 19, 20, and cases cited. It is equally well settled that this right of an heir to assign or to hypothecate his interest in the estate of his deceased ancestor is an absolute right of property, which is subject only to the right of possession in the administrator for the purpose of administration and to the payment of the foregoing charges in the course of such administration. 9 Cal. Jur. p. 477, § 24, and cases cited. This court has had frequent occasion to decide that this right of an heir to transfer his interest in an estate is superior to any claims other than those above enumerated, and that the fact that an heir may be indebted to the estate in any unliquidated and unsecured amount does not give the estate precedence over his assignment of his interest therein prior to the distribution thereof. Estate of Smith, 108 Cal. 115, 40 P. 1037; Estate of Moore, 96 Cal. 522, 31 P. 584; Estate of Polito, 51 Cal. App. 752, 197 P. 976; 12 Cal. Jur., p. 483, § 929. In the light of the foregoing authorities, there is no escape from the conclusion that the trial court was correct in its judgment herein to the effect that the Bank of Lassen County by virtue of the assignment to it of the entire interest of George W. Wilson in the estate of his deceased father was entitled to a superior right over that of the plaintiff herein to have distributed to it the share of George W. Wilson in said estate.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRES-TON, J.

207 Cal. 613

**SAN BERNARDINO NAT. BANK et al. v.
JONES et al. (L. A. 9461.)**

Supreme Court of California. July 18, 1929.

1. Easements ☞22—Defendants were bound by notice given by reservation contained in patent in their chain of title.

Notice given by reservation contained in patent in defendant's chain of title was binding upon defendants.

2. Waters and water courses ☞154(1)—Where plaintiffs' predecessors acquired water rights by appropriation while defendants' land was government land, language of patent was sufficient to give defendants notice water had been appropriated.

Where predecessors of plaintiff acquired water rights in defendants' land while defendants' land was government land, language of patent to effect that it was subject to any vested or accruing water rights for mining, agricultural, manufacturing or other purposes and rights to ditches or reservoirs used in connection with such water rights as might be recognized by local customs, laws, etc., was sufficient to give defendants notice that water of spring on property had been appropriated before land was acquired by private owner.

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action to quiet title by the San Bernardino National Bank and others against W. J. Jones and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Superseding opinion in 271 P. 1103.

Jones, Hoyt & Rifkind, of Los Angeles, for appellants Jones.

Swing & Wilson, of San Bernardino, for respondents.

LANGDON, J. This action was brought by plaintiffs to quiet title to their rights in a tunnel and pipe line conveying water therefrom and situated on the lands of defendants, and to the easement therefor and to prevent the destruction of the said pipe line by defendants.

[1] It appears, without dispute, that the predecessors of plaintiffs acquired the water rights in question by appropriation while the land now owned by defendants was government land. When patent issued it contained the usual provision: "Subject to any vested or accruing water rights for mining, agricultural, manufacturing or other purposes and rights to ditches or reservoirs used in connection with such water rights, as may be recognized by the local customs, laws and decisions of courts, etc. * * *" This patent was duly recorded and whatever notice is given by the reservation contained therein is binding upon the defendants here, as the patent is in their chain of title.

The physical facts at the time defendants

purchased the property and took possession thereof appear from the findings of the trial court to be: "Plaintiffs' predecessor entered in and upon lot 9 (now defendants' property) and constructed a tunnel at a spring thereon and thereby developed water in said tunnel and conveyed said water through a pipe line from said spring and tunnel to and across said lots 9 and 8 to the lands of plaintiffs." A concrete bulkhead was constructed in the mouth of the tunnel by one of plaintiffs' predecessors in interest in 1906, causing water to accumulate in a small reservoir, and an underground pipe, at some places three-quarters of an inch and at other places an inch in diameter, extended from the reservoir in a general southwesterly direction about 300 feet to a house on lot 8 and thence in the same general direction approximately 1,500 feet to a house on the plaintiffs' land.

The trial court found that the defendants acquired their property in 1923 with notice and knowledge of facts and circumstances sufficient to put a prudent man on inquiry as to the existence of rights, claims, and ownerships of plaintiffs in and to the tunnel situated on said lot 9 and the water flowing therein, and that, by prosecuting such inquiry, said defendants would have learned of the existence of such rights. Upon such findings, judgment was entered for plaintiffs, from which the defendants appeal.

[2] The appellants urge that, while the rec ordation of the patent to defendants' land constituted constructive notice to them of its contents, the language thereof was not sufficient to give notice that the waters of the spring upon the property purchased by them had been appropriated before the land was acquired by a private owner; that no actual knowledge is chargeable to defendants. The position taken by appellants, if sound, would make it incumbent upon an appropriator, in order to protect his rights, to give notice to each subsequent purchaser of the servient tenement as to the nature and extent of the rights appropriated.

Conceding, although not deciding, that the physical facts gave no actual or constructive notice to defendants of the nature and extent of plaintiffs' rights, and that the findings upon these matters are not supported by the record, we think the situation here presented is controlled by the holding in *Cave v. Tyler*, 147 Cal. 454, 82 P. 64. In that case there was a grant by the government to a railroad company subsequent to the congressional act of 1866. Prior to the grant to the railroad company Cave and his predecessors in interest had appropriated the water of Mill creek five miles below the then government land. There was nothing on the government land to give notice of such appropriation, nor was there anything to show that either the Southern Pacific Company or its grantee had either

notice or knowledge of such appropriation, nor was there any record thereof except the usual reservation in the patent, as in the case at bar. The court said: "Mrs. Skinner derived title to her land under a grant from the United States to the Southern Pacific Railroad Company under the act of Congress approved March 3, 1871. By the provisions of the Act of July 26, 1866, this grant is subject to all water rights which had vested and accrued prior to the grant. The court found that the rights of the plaintiffs and their predecessors in interest had accrued prior to that time, and upon this finding the decree is based that the plaintiffs' rights by appropriation and diversion exercised below the lands of the appellant are paramount to her riparian rights. The law upon this subject is not disputed."

To the same effect is the case of *Le Quime v. Chambers*, 15 Idaho, 405, 98 P. 415, 21 L. R. A. (N. S.) 76.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.

207 Cal. 561

SHAW v. FEEHAN et al. (S. F. 13014.)

Supreme Court of California. July 15, 1929.

1. Insane persons ⇨51—Signature of superintendent of state hospital for insane to certificate for discharge of patient may be affixed by another under superintendent's direction (Pol. Code, § 2189).

Pol. Code, § 2189, providing that superintendent of state hospital for insane may discharge any patient on filing his written certificate with secretary of board of managers, does not necessarily require that superintendent's signature be affixed by him in all cases, but his signature may be affixed by his secretary or any other person under his direction and authority.

2. Evidence ⇨83(1)—It must be assumed that superintendent of hospital for insane ratified act of his secretary in signing name to certificate for discharge of patient (Pol. Code, §§ 2152, 2189).

It must be assumed that superintendent of hospital for insane, who is chief executive officer of hospital under Pol. Code, § 2152, was conversant with acts of his subordinates and ratified act of his secretary in signing certificate with his own name signed thereto by his secretary in his behalf to secure discharge of patient under section 2189.

3. Insane persons ⇨51—Certificate for discharge of patient from insane hospital, though superintendent's name was attached thereto by secretary, held valid, where certificate was recorded and no attempt was made to set aside discharge or reincarcerate patient (Pol. Code, § 2189; Civ. Code, § 40).

Certificate for discharge of patient from state hospital for insane under Pol. Code, §

2189, though signature of superintendent thereon was affixed by his secretary, held valid, precluding defense that notes and trust deed thereafter executed by former insane person were void for want of capacity under Civ. Code, § 40, where certificate was accepted for filing by secretary of board of managers of hospital and was recognized as regularly issued and was recorded and nothing was done for period of almost 11 years to set aside discharge or to reincarcerate patient.

4. Insane persons ⇨51—Patient's escape from hospital for insane prior to discharge held not to deprive superintendent of power to order his release (Pol. Code, § 2189).

Fact that patient had escaped from state hospital for insane and was absent therefrom at time of granting of discharge held not to deprive superintendent of hospital of power to order release of such patient by filing certificate of discharge under Pol. Code, § 2189.

5. Evidence ⇨63—In action to set aside notes and trust deed executed by one discharged from hospital for insane 11 years before, mental competency at time of execution was assumed and strong showing necessary to warrant relief because of defect in discharge (Pol. Code, § 2189, Civ. Code, § 40).

Where certified copy of discharge of patient from state hospital for insane under Pol. Code, § 2189, had been on file for almost 11 years, and there was no showing that former patient had ever had guardian appointed or was mentally incompetent to transact business at time of execution of notes and trust deed, court, in action by his administrator to set aside notes and trust deed executed by him, was required to assume that he was at time of their execution in full possession of his faculties, and a very strong showing was necessary to grant plaintiff relief because of technical defect in discharge permitting application of Civ. Code, § 40, which provides that no one can make conveyance or other contract after being judicially determined of unsound mind.

In Bank.

Appeal from Superior Court, San Benito County; John L. Hudner, Judge.

Action by R. Shaw, substituted in place of Joseph A. Fleming, as administrator of the estate of James F. Fleming, deceased, against James B. Feehan and others. Judgment for plaintiff, and defendants appeal. Reversed, with direction.

James B. Feehan and Joseph Farry, both of San Francisco (John B. Lounibos, of San Francisco, of counsel), for appellants.

James Snell and A. M. Runnells, both of Hollister, for respondent.

CURTIS, J. This action was instituted to set aside and have declared illegal and void two promissory notes, and a trust deed given to secure their payment, on the ground that James F. Fleming, whose name was signed to said notes and deed, had, prior to the date of said notes and deed, by an order and judgment of the superior court of San Benito coun-

ty, been declared and adjudged to be insane and committed to the state hospital at Agnews, and that he had never been legally discharged therefrom. The facts of the case are undisputed, and show that Fleming was on the 25th day of August, 1909, by an order and judgment of the superior court of the county of San Benito, declared to be insane and so far disordered in mind as to endanger health, person, and property. By said order and judgment he was committed to the state hospital at Agnews for treatment. Shortly after being committed and delivered to said hospital, that is, on September 8, 1909, he escaped therefrom and was never thereafter apprehended or returned to said hospital. On March 31, 1912, there was filed with the secretary of the board of managers of the Agnews State Hospital a purported discharge of said Fleming from said hospital, and on April 8, 1912, there was filed in the office of the county clerk of said county of San Benito a certified copy of said purported discharge, which said certified copy, together with the certification thereof, is in the following words and figures:

"Agnews State Hospital, Agnews, California.

"I, Leonard Stocking, Medical Superintendent of Agnews State Hospital, hereby certify that I do hereby discharge James F. Fleming, a patient at said State Hospital, committed from San Benito County, August 26th, 1909, upon the ground that the said patient has recovered as provided in Sub. 1, Section 2189 Political Code.

"Dated March 31, 1912.

"Leonard Stocking, Medical Superintendent.

"By Geo. B. Waterhouse, Secretary.

"State of California, County of Santa Clara.

"I, L. M. Simonsen, Secretary of the Board of Managers of Agnews State Hospital, hereby certify that I have compared the foregoing copy with the original certificate of discharge of James F. Fleming, the patient therein named, filed with me on the 31st day of March, 1912, and that the same is a full, true and correct copy of such original and of the whole thereof.

L. M. Simonsen,

"Secretary Board of Managers,
Agnews State Hospital."

On March 1, 1923, almost eleven years after the filing of said certified copy in the office of the county clerk, said Fleming executed and delivered his promissory note for \$1,500 and interest to the Yerba Realty Company, and at the same time and for the purpose of securing the payment of said promissory note he executed and delivered to James B. and Grace S. Feehan a trust deed to certain real property owned by him and situated in said county of San Benito. He later executed a second promissory note for \$100.90 in favor of the Yerba Realty Company, which was also secured by the terms of said trust deed. On June 7, 1923, Fleming died, and thereafter

Joseph A. Fleming was appointed the administrator of his estate. On June 13, 1923, said administrator instituted this action. Since the entry of the judgment herein, said Joseph A. Fleming has resigned as such administrator and R. Shaw was appointed administrator of said estate in place of the said Joseph A. Fleming, and the said R. Shaw has been regularly substituted as the plaintiff herein.

It is not contended that Fleming at the time he executed the said notes and trust deed was not in full possession of all his mental faculties, neither is it contended that any advantage was taken of him or that any fraud was practiced upon him in the transaction involving said notes and trust deed, nor is it contended that he did not receive full and adequate consideration for the execution and delivery of said notes and deed.

Section 40 of the Civil Code is as follows: "After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person has been discharged therefrom, cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge."

Section 2189 of the Political Code prescribes the manner in which a patient committed to one of the hospitals of this state for the insane may be discharged therefrom. At the time Fleming was discharged from the Agnews Hospital, as claimed by appellants, this section read in part as follows:

"The superintendent of a state hospital on filing his written certificate with the secretary of board of managers, may discharge any patient, except one held upon an order of a court or judge having criminal jurisdiction in an action or proceeding arising out of a criminal action or proceeding arising out of a criminal offense, at any time, as follows:

"A patient who, in his judgment, has recovered. * * *

"When any person is discharged as recovered from a state hospital, a copy of the certificate of discharge, duly certified by the secretary of the board of managers, may be filed for record with the clerk of the superior court of the county from which said person was committed. The clerk shall record the same in a book kept for that purpose and shall keep an index thereof. No fees shall be charged by the clerk for performing such duties. Such certified copy of such certificate and the record of the same shall have the same legal effect as the original, and if no guardian has been appointed for such person as provided by sections 1763 and 1764 of the Code of Civil Procedure, such certificate, duly certified copies thereof and such record there-

of shall have the same legal force and effect as a judgment of restoration to capacity made under the provisions of section 1766 of the Code of Civil Procedure."

The trial court concluded that the requirements of section 2189 of the Political Code relating to the discharge of persons committed to a hospital for the insane had never been complied with, in so far as Fleming's purported discharge had been brought about, and therefore held in accordance with the terms of section 40 of the Civil Code that Fleming at the date he signed the promissory notes and trust deed involved herein was legally incapable of executing said instruments by reason of this previous order and judgment adjudicating him to be insane. This decision of the trial court was in accordance with the contention of the respondent made in said court, and now made here for the purpose of sustaining said judgment. The basis of respondent's said contention is that the written certificate filed with the secretary of the board of managers of the Agnews State Hospital, which purported to discharge Fleming as cured, was not signed by the superintendent of said hospital but by Geo. B. Waterhouse, his secretary; that there was no law authorizing the secretary of the superintendent to sign such a certificate; and therefore said certificate was and is void and of no effect in so far as it purported to be a discharge of Fleming from said hospital.

[1-3] The provision of section 2189 of the Political Code regarding this certificate of discharge declares that, "The superintendent of a state hospital on filing his written certificate with the secretary of board of managers, may discharge any patient." Nothing is said in this or any other section of the Code that this certificate shall be signed by the superintendent, although in our opinion the natural inference to be drawn from the language used is that it should bear the signature of that official. This does not mean that in all cases it must be actually and personally signed by the superintendent. If his signature thereto is affixed by his secretary, or by any other person under his direction and authority, the signing of said instrument would be the act of the superintendent himself. There is no showing that the superintendent did not authorize and direct his secretary to sign his name to the discharge of Fleming. From the surrounding circumstances it must be assumed that such authority and direction were actually given by said superintendent to his secretary. The certificate was accepted for filing by the secretary of the board of managers of said hospital. It appears that the hospital authorities recognized this certificate to be regularly issued, as no attempt, so far as the record shows, was ever made to apprehend Fleming for the purpose of restoring him to the custody of said authorities. A copy of said certificate of discharge, duly certified by the

secretary of said board of managers, was regularly issued and recorded in the office of the county clerk of the county of San Benito. Nothing was ever done thereafter by said authorities or by the officials of said county, or by any one else during the lifetime of Fleming, a period of almost eleven years as we have already seen, to set aside said discharge or to reincarcerate Fleming under the judgment committing him to said hospital. The only inference to be drawn from these acts of the hospital authorities is that they recognized this certificate of discharge as one issued by the superintendent himself. It must be assumed that the superintendent, who is the chief executive officer of the hospital (Pol. Code, § 2152), was thoroughly conversant with the acts of his subordinates, and therefore if he had not previously expressly authorized the signing of his name to said certificate by his secretary, that he acquiesced and approved such practice and thereby ratified the act of his secretary in filing the certificate with his own name signed thereto by his secretary. Respondent cites the cases of *Warren v. Ferguson*, 108 Cal. 535, 41 P. 417, and *Rauer v. Lowe*, 107 Cal. 232, 40 P. 337, in support of his contention that the certificate not having been signed by the superintendent, or one empowered by law to act for said superintendent, is void. These were cases involving street assessments, where the proceedings were in invitum and which were invalid if the statute under which said proceedings were taken was not strictly complied with. We do not think that the same rule should apply in proceedings for the release of a patient from an insane asylum where the result of such a release would be the restoration of the patient to his liberty and freedom. It is therefore our opinion that the certificate of discharge in the case of Fleming was not invalid by reason of the facts shown in this case.

[4] It is further contended by respondent that the superintendent had no jurisdiction to release Fleming, he not being an actual inmate of said hospital at the time of said release. This question was before this court in *People v. Geiger*, 116 Cal. 441, 48 P. 389. In that case the defendant while an inmate in an insane asylum of this state, to which he had been regularly committed by order of court, escaped therefrom. He was never retaken. The resident physician, being of the opinion before his escape that the patient had been fully restored, intended to discharge him. Very shortly after his escape the resident physician had an appropriate record made of the discharge of the patient as recovered. Upon this state of facts this court held: "The statute concerning the management of the asylum provides that the resident physician shall be the executive officer of the institution, and shall discharge such patients as, in his opinion, have permanently recovered their

reason.' St. 1875-76, p. 135. And the fact that defendant had escaped when his recovery was thus determined by competent authority is no ground for impeaching such determination. The statute did not make his corporeal presence a condition of the valid exercise of the power to discharge him. See *Kellogg v. Cochran*, 87 Cal. 192, 25 P. 677 [12 L. R. A. 104]. Respondent relies upon *Aldrich v. Barton*, 153 Cal. 488, 95 P. 900, as laying down a different rule. The facts in that case are essentially different from those before us and from those before the court in *People v. Geiger*, supra, as will be readily seen from a reading of the following excerpt from the opinion found at page 496 of 153 Cal. (95 P. 904) of the reported case: "One who has for many years been away from the asylum, claiming, without opposition, to have been discharged by virtue of an order purporting to have that effect, and over whom the asylum authorities do not exercise, or claim the right to exercise any power of restraint whatever, cannot be said to be a 'patient' within the meaning of the law. Such was the condition of the plaintiff, as is found by the court on ample evidence." In that case this court held that the superintendent had no jurisdiction to grant to such a person a discharge for the reason that a prior discharge had been issued to the patient, which, "whether valid or not, was treated as effectual by the asylum authorities and by the plaintiff."

We find nothing in the statute which would deprive the superintendent of the power to grant a discharge to a patient who had escaped from the hospital, and who was absent therefrom at the time of the granting of said discharge. In fact, this court held in *People v. Geiger*, supra, that a discharge granted under such circumstances was valid, and we see no reason to depart from the ruling announced by the court on that occasion.

[5] The equities in this case are all on the side of the appellants. In good faith they have parted with their money or property in the belief that Fleming was competent to transact business, and that he was not under any restraint which would legally disqualify him from dealing with his property. A certified copy of his discharge had been on file in the office of the county clerk of the county in which the property described in the trust deed was situated for almost eleven years before the trust deed was executed. Presumably during this period of time Fleming had been caring for said property and dealing with it as one competent to care for his own property. There is no evidence that Fleming ever had a guardian appointed either of his person or his property. We have before referred to the fact that the respondent does not seek to avoid said notes and trust deed on the ground that Fleming was mentally incompetent to transact business at the time of

their execution. We must assume, therefore, that at the time of this transaction Fleming was in the full possession of all his mental faculties and was in every way mentally competent to transact business. It would require a very strong showing under these circumstances for a court to hold that because of some slight technical defect in Fleming's discharge from the Agnews hospital years before, the appellants in this case are to be despoiled of their money or property of which Fleming received the benefit during his lifetime. Such a case has not been made out. The discharge granted to Fleming, in the words of Mr. Justice Sloss, in *Aldrich v. Barton*, supra, "whether valid or not, was treated as effectual by the asylum authorities." It must have been so treated by Fleming himself, for the reason that after its issuance he assumed the care and management of his property, even to the extent of borrowing money thereon as evidenced by the execution and delivery of the notes and trust deed involved herein. To permit him or his personal representative under these circumstances to repudiate his acts to the detriment and loss of persons dealing with him in utmost good faith would be to countenance a most flagrant fraud against innocent persons. We do not feel called upon under the facts in this case to pursue such a course.

The judgment is reversed, with direction to the trial court to dismiss the action.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

207 Cal. 595

STEWART v. ENGELBERG et al.★
(S. F. 12835.)

Supreme Court of California. July 17, 1929.

Rehearing Denied Aug. 15, 1929.

I. Corporations ⇨225—Stock authorized to be issued on condition that holder waive certain rights should have been included in determining stockholders' liability (Civ. Code, § 322).

Where permit from corporation commissioner, authorizing corporation to sell one share of its stock to each of its five incorporators at par for cash and 254 shares to K. for his option to purchase certain realty, was issued on condition that K. should first execute a written waiver of his right to participate in distribution of corporation's assets, in case of dissolution, until owners of all other securities should be paid in full, and K. executed waiver which was accepted by directors, and contract on basis of which plaintiff was suing to enforce stockholders' liability for corporate indebtedness under Civ. Code, § 322, was executed immediately thereafter, held that the 254 shares issued to K. should have been included in category of subscribed stock in determining stockholder's lia-

bility, notwithstanding waiver so filed by K. was rejected by commissioner and a new waiver, which in fact added nothing to the first, was subsequently accepted.

2. Corporations ⇨225—Stock issued under waiver accepted by corporation commissioner should have been included in determining stockholders' liability on contract subsequently ratified (Civ. Code, § 322).

Where contract between plaintiff suing to enforce stockholders' liability for corporate indebtedness under Civ. Code, § 322, was not considered binding until ratified by officers of corporation, which was done after written waiver of right to participate in assets and dividends of corporation in case of dissolution until after other security holders had been paid in full had been filed by certain stockholder and accepted by corporation commissioner, stock subsequently issued under such waiver should have been included in computing stockholders' liability.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Joseph L. Stewart against Louis E. Engelberg and others. Judgment for plaintiff, and defendants appeal. Reversed.

William F. Rose, of San Francisco (R. C. Young, of San Francisco, of counsel), for appellants.

Arthur L. Shannon, of San Francisco, for respondent.

PRESTON, J. Action upon stockholders' liability for corporate indebtedness (Civ. Code, § 322).

Plaintiff sued each of the five directors of United Income Properties, Inc., a corporation, for a one-fifth of his demand. Issue was joined by all the defendants other than Ray B. Nisbet, who was not served with process. A jury was called in the action and by its verdict fixed the corporate indebtedness at \$25,000, and the share of each of the defendants at one-fifth thereof. Judgment passed for plaintiff accordingly. Defendants have appealed upon the full record.

[1] The sole proposition requiring discussion is the claim of defendants that one Harry Klarman owned 254 shares of the subscribed capital stock of the corporation at the time the liability sued upon was incurred, and from this fact it is contended that the liability of each of the defendants was a $\frac{1}{250}$ instead of a $\frac{1}{5}$ of said corporate debt. We agree with this contention of appellants, although we base our conclusion, shown by the following recital of facts to be justified, primarily upon a ground not urged by them:

On and prior to February 27, 1925, Harry Klarman and B. J. Klarman, his brother, were acting in concert to promote the erection at Twenty-Eighth street and San Pablo avenue, Oakland, of a \$1,000,000 structure to be known as the Boulevard Hotel. To that

end Harry Klarman had secured an option on a building site, and on the date above mentioned he had caused to come into being said United Properties, Inc., a corporation, the charter of which named five persons to act as directors thereof for the first year. On March 17, 1925, at the first meeting of the board of directors, said Klarman proposed in writing to said corporation to assign to it his option for a certain number of shares of stock and a certain amount of money. By resolution of the board this offer was accepted, subject to approval of the state corporation department. On March 19th application was made to said department to confirm this arrangement and to authorize the sale of 12,741 shares of treasury stock to the public. The corporation department made certain objections to this transaction. Later and about April 28, 1925, at the second meeting of the board of directors of said corporation, said Klarman made in writing a second proposal designed to meet the objections of the corporation department. This new proposition was also promptly ratified by the board of directors, the essence of which arrangement called for the issuance to said Klarman of 254 shares of stock in exchange for said option and for promotion stock to the amount of 2,000 shares to be issued share for share as treasury stock was sold. On the same day an amended application for a permit was filed, and thereafter, on May 6, 1925, a permit was duly issued, the material portions thereof here involved being as follows:

"United Income Properties, Incorporated, a California corporation, is hereby authorized to sell and issue 15,000 shares of its capital stock as herein below set forth: 1st. To sell and issue one share of its capital stock to each of its five incorporators, at par for cash, lawful money of the United States, for the uses and purposes recited in its application, and so as to net the applicant the full amount of the selling price thereof. 2nd. To issue to Harry Klarman, 254 shares of its capital stock, in exchange for the considerations recited in its application. * * *

"This permit is issued upon each of the following conditions: * * * (e) That this permit shall not become effective for any purpose unless and until said Harry Klarman shall execute his or their agreement in writing with said company (and file a copy thereof with the Commissioner of Corporations) in which he or they shall, in effect, agree as owner of 2000 shares, herein authorized to be issued to him or them, that in the event of the dissolution or insolvency of said company, occurring while said shares shall be so required to be held in escrow, the owner of such shares shall not, without the consent of said Commissioner, participate in any distribution of assets of the company until after the owners of all other securities shall

have been paid the full face or par value thereof. That prior to the sale of any of said shares said Harry Klarman shall duly execute an instrument in writing whereby he or they shall in effect agree to waive the payment and accrual of dividends on any of the shares issued to him or them, until such time as all stockholders, who have paid money for their shares, shall have been paid dividends at the rate of 8 per cent per annum for two consecutive years."

In a bona fide effort to comply with all the requirements of the corporation department, said Klarman submitted to the corporation on May 29, 1925, a letter accepting unreservedly the restrictions imposed by said permit, which letter, after reciting at length the said paragraph (e) above quoted, ended with the following language: "Pursuant to the foregoing, I hereby agree on behalf of myself, my heirs, executors, administrators and assigns to comply with each, every and all of the foregoing provisions of said permit, and will in all respects conform thereto. Harry Klarman."

Thereupon the corporation on June 2, 1925, took the following action with respect thereto: "* * * 'The foregoing agreement is hereby accepted, confirmed and approved this 2nd day of June, 1925. United Income Properties, Inc., By Ray B. Nisbet, Vice-President.' On motion duly made, seconded and carried the following resolution was unanimously adopted: Be it resolved that the foregoing agreement of Harry Klarman be, and the same is hereby accepted, confirmed and approved, and the vice-president is hereby authorized and directed to formally execute on behalf of this company the said agreement of said Harry Klarman."

A copy of the communication of said Klarman and a transcript of the above-mentioned proceedings respecting same were forthwith and prior to June 4, 1925, lodged with the corporation department, whereupon the corporation department communicated with said corporation respecting said waiver in the following language: "* * * In re: United Income Properties, Inc. In connection with the agreements required to be entered into by Harry Klarman under the terms and conditions of the recent permit granted this company by this Department, you are advised that the proposed agreement of Harry Klarman does not constitute an actual waiver of his rights in case of dissolution and an actual waiver of dividends, and it is therefore unsatisfactory. * * *"

Thereafter, and on June 10, 1925, plaintiff, an architect, entered into a contract in writing with the corporation for the making of plans and the supervision of the construction

of said projected hotel. But for reasons not necessary to here relate, the whole scheme failed and out of said contract arose this cause of action. The day following the execution of the contract, to wit: June 11, 1925, said Klarman re-executed a new waiver intended to comply fully with subdivision (e) of said permit and to meet the criticism of said corporation department respecting said former waiver, but in our opinion nothing of substance was added that had not been previously included in the waiver already on file.

From the above recital of facts it seems too clear for controversy that 254 shares of stock were on and after June 4, 1925, the date of filing of the first waiver, in the category of subscribed capital stock owned by said Harry Klarman. Every condition of the permit had been complied with. The stock had been fully paid for; only the formal issuance of the certificate remained to be done, but this was not required to bind him. The whole scheme and plan was that of Klarman and his brother, and it would be an undue submission to form and a disregard of substance to hold otherwise than that Harry Klarman was the chief stockholder at the time the contract with plaintiff was entered into. Indeed, Klarman and his brother negotiated the contract with plaintiff, and why they were not made parties thereto is not thoroughly explained in the record.

[2] We reach the same conclusion from another standpoint. Admittedly plaintiff did not consider the contract for architect's fees and other services as binding or subsisting until ratified by the officers of the corporation. This was not done until June 22, 1925. On this date all terms and conditions of the permit had been fully complied with, even to the extent of meeting the technical objection of the corporation department as to the form of the said waiver. On that date Harry Klarman was recognized as the guiding spirit and chief stockholder of said corporation. It may also be noted in this connection that on said 22d day of June, 1925, the defendant R. C. Young retired from the board and B. J. Klarman took his place. It seems but reasonable to hold that the liability to plaintiff was incurred on that day, June 22d, and not on June 10th, the date appearing in the caption of the contract. *Unruh v. Kauffman* (Cal. Sup.) 270 P. 440.

From these two standpoints at least the judgment is erroneous, and it is hereby reversed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.

207 Cal. 600

CALIFORNIA PACKING CORPORATION v. LOPEZ et al. (Sac. 4031.)

Supreme Court of California. July 17, 1929.

1. Contracts ⚡311—Contracts for cultivation of soil are not generally terminable on death.

Contracts for cultivation of soil are not generally held to be contracts terminable on death.

2. Landlord and tenant ⚡322—Clause of cropping contract prohibiting assignment was not violated by assignment by operation of law.

Clause of cropping contract prohibiting assignment was not violated by an involuntary assignment by operation of law, since it forbade only voluntary assignment.

3. Landlord and tenant ⚡329—Presumption is that party making cropping contract intended to bind executors and administrators.

Presumption is that party making a cropping contract intended to bind his executors and administrators.

4. Landlord and tenant ⚡323—Cropping contract requiring second party to furnish labor at his own expense was not contract of employment.

Cropping contract, whereby first party agreed to furnish necessary tools, teams, asparagus roots, etc., and an allowance for preparation of land for planting and to pay second party certain percentage of proceeds from crops and requiring second party to furnish at his own expense all labor necessary for cultivation of crop, was not merely a contract of employment.

5. Landlord and tenant ⚡322—Cropping agreement, whereby first party agreed to furnish tools, teams, etc., and to pay second party percentage of proceeds, and second party agreed to furnish at its own expense all labor, survived death of second party.

Agreement, denominated a cropping contract, whereby first party agreed to furnish tools, teams, asparagus roots, etc., and an allowance for preparation of land for planting and to pay second party certain percentage of net proceeds of crops, and second party agreed to furnish at its own expense all labor necessary to cultivate and harvest crops, survived death of second party.

6. Estoppel ⚡119—Whether first party to cropping contract, by conduct in permitting second party's brother to continue in possession after second party's death, was estopped to claim agreement ended, or that provision against assignment was not waived, held for jury.

Whether first party to cropping contract, by its acts and conduct in permitting second party's brother to continue in possession of property for many months after second party's death, was estopped to claim that agreement ended with second party's death, or that provision against assignment without first party's consent was not waived, held for jury.

7. Vendor and purchaser ⚡245—Whether plaintiff was innocent purchaser for value without notice of defendant's occupancy of land purchased held for jury.

In action to eject brother going into possession of property after death of his brother who had had possession under a cropping contract, question whether plaintiff was innocent purchaser for value without due notice of defendant's occupancy of land held for jury.

8. Trial ⚡143—Court may direct verdict only when, disregarding conflicting evidence, result is determination there is no evidence which would support verdict contrary to one directed if given.

Court may direct verdict only when, disregarding conflicting evidence and giving opposing evidence all value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, result is determination that there is no evidence of sufficient substantiality which would support verdict contrary to one directed if given.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action of ejectment by the California Packing Corporation against Manuel Lopez, individually and as administrator of the estate of John Lopez, deceased. From a judgment for plaintiff, defendant appeals. Reversed.

Superseding opinions of District Court of Appeal in 273 P. 587 and 274 P. 358.

T. A. Farrell and George A. Work, both of Sacramento, and W. U. Goodman, of Fairfield, for appellant.

Rufus H. Kimball and Pillsbury, Madison & Sutro, all of San Francisco, and Joseph M. Raines, of Fairfield, for respondent.

PRESTON, J. Appeal from judgment entered upon a directed verdict for plaintiff in an action of ejectment.

The case involves the question of the survivability of rights under a written agreement denominated an "asparagus cropping contract" entered into on February 15, 1924, between plaintiff's predecessor, the Wright Corporation, and John Lopez and John Souza, copartners doing business as John Souza & Co., the pertinent terms of which are substantially as follows: The Wright Corporation covenanted to permit John Souza & Co. to occupy for the cropping seasons of 1924-1934, inclusive, certain lands comprising about 100 acres in the Sacramento River Delta district; and to grow asparagus thereon and intercrops as approved by said corporation, which was to furnish the company with all necessary tools, teams, asparagus roots, etc., and an allowance of \$5.50 per acre for the preparation of said land for planting, and to pay it after harvesting, washing, packing, and delivery of the crop, as directed by said corporation, 55 per cent. of the net pro-

ceeds of all asparagus and 75 per cent. of all intercrops. Said company covenanted to care for and cultivate said growing asparagus and to harvest, gather, wash, pack, and deliver it as directed by the corporation, to furnish at its own expense all labor necessary for that purpose, and in all respects to care for and improve the land, buildings, and equipment in its possession. Said contract contained the further covenant that: "The second party shall have no right to assign this agreement or sublet the above described land or any part thereof, without the written consent of the first party."

On February 23, 1925, with the written consent of the Wright Corporation, John Souza & Co. assigned said contract to John Lopez. On March 6, 1925, he was accidentally killed. His brother, Manuel Lopez, a minor at the time, but who became of age November 17, 1925, thereupon immediately took up his abode upon the land and assumed charge of the growing of said crops and of otherwise fulfilling in all respects the terms of said contract. On February 10, 1926, he was granted letters of administration upon the estate of John Lopez. In August, 1925, and January, 1926, the Wright Corporation, which had made no objection to his retention of the premises, issued and turned over to him checks made out to John Lopez covering the amounts due under said agreement from the sale of the 1925 bean and asparagus crops. On December 31, 1925, plaintiff, California Packing Corporation, purchased from the Wright Corporation about 5,000 acres of land, which included the 100 acres and pump house here involved. Defendant, then having learned that his right to continue under said contract was questioned, made no further effort to farm the land, but retained his residence at the pump house. Thereafter this action was instituted to eject him and to recover damages in the sum of \$100. Upon the trial, at the close of the testimony, the court directed the jury to return a verdict for plaintiff, which was done, and judgment thereon was duly entered in its favor. Defendant has appealed.

[1] If said contract is inherently assignable and survived the death of John Lopez, the correctness of appellant's contention that the court erred in directing the verdict for plaintiff cannot be doubted. Contracts for cultivation of the soil are not generally held to be contracts terminable upon death. *Gribbling v. Bohan*, 26 Cal. App. 771, 148 P. 530; *Husheon v. Kelley*, 162 Cal. 656, 124 P. 231; *LaRue v. Groezinger*, 84 Cal. 281, 24 P. 42, 18 Am. St. Rep. 179. Mute evidence that the contract here did not call for the peculiar skill or personal services of any one individual lies in the fact that the assignor of John Lopez was a copartnership.

[2-4] The prohibitory clause against as-

signment, hereinabove quoted, forbids only voluntary assignment by the parties; it is not violated by an involuntary assignment by operation of law (*Farnum v. Hefner*, 92 Cal. 543, 28 P. 602), and the fact that it was necessary to insert it is itself an implication of the inherent assignability of the contract, and hence its inherent survivability. These terms are practically interchangeable. *Wikstrom v. Yolo Fliers Club* (Cal. Sup.) 274 P. 959, and cases there cited. The presumption is that a party making such a contract intends to bind his executors and administrators. *Estate of Fulmer*, 203 Cal. 693, 265 P. 920, 58 A. L. R. 430. Furthermore, that said contract was not merely one of employment is shown by its context, particularly by the covenant charging John Lopez with the duty of furnishing at his own expense all labor necessary for cultivation of the crop. Even a contract of employment, coupled with such an interest, would be survivable.

[5] Appellant urges that, although denominated a cropping contract, the agreement really creates an interest in land and is a lease. The above pronouncement renders unnecessary a precise classification of the document, which in any event was inherently assignable and survived the death of John Lopez.

[6-8] Other considerations also justify a reversal of this judgment. Even if it were true that said contract called for such personal service by John Lopez as rendered it terminable upon his death, there would still remain the question of whether said corporation, by its acts and conduct in permitting Manuel Lopez to continue in possession for many months, was not estopped to claim that the agreement ended or that said provision against assignment without its consent was not waived. These are questions of fact for a jury, as is also the question of whether sufficient evidence was adduced to establish plaintiff as an innocent purchaser for value without due notice of defendant's occupancy of said land. The court has the right to direct a verdict only when, disregarding conflicting evidence and giving opposing evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality which would support a verdict contrary to the one directed, if given.

The record before us shows that the evidence upon the above issues was not without conflict and was in fact amply sufficient to warrant their submission to the jury. There is evidence that the Wright Corporation permitted defendant to come upon the said land without protest two days after the death of said John Lopez and to remain there for more than nine months without objection, during all this time dealing with its superin-

tendent and spending money, amounting to some \$4,000, for cultivation and labor as provided in said agreement; that said corporation during 1925 accepted from him and sold an asparagus crop and intercrop of beans, dividing the proceeds thereof as in said agreement provided and making payment to defendant by check made out to said John Lopez, during all of which time a correspondence was being conducted looking to the transfer of the instrument, therein called a lease, into the name of Manuel Lopez. There is evidence that plaintiff's representative went over said property thoroughly more than once prior to its purchase and learned of the possession of said acreage and pump house by Manuel Lopez. There is evidence that the heaviest expense in connection with growing asparagus in proportion to the profits is that of the first years, and therefore termination of such a contract prior to expiration of the term thereof results in an unjustified loss to the grower. As above stated, such evidence could have resulted in a verdict for the defendant, and it was for the jury to pass upon it.

Judgment reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

99 Cal. App. 762

REDWINE v. TROWBRIDGE et al.★
(Civ. 6835.)

District Court of Appeal, First District, Division 2, California. July 10, 1929.

As Modified on Denial of Rehearing Aug. 2, 1929.

1. Trover and conversion ⚡17—**Terms of conditional sales contract held binding as against buyer's judgment creditor and constable selling automobile under execution.**

Where plaintiff sold automobile under conditional sales contract reserving title in plaintiff, providing that if buyer failed to make payments on time seller could without demand or notice take possession of automobile, and defendant recovered judgment against conditional buyer in action in which conditional seller was named as defendant but in which no judgment was recovered against him, and defendant constable sold automobile under execution to satisfy judgment, *held*, that terms of conditional sales contract were binding as against defendants, and, since conditional buyer was in default, conditional seller was entitled to possession of automobile at time of execution sale and therefore had a complete case against defendants for conversion.

2. Trover and conversion ⚡3—**Denial of allegation that defendants sold automobile under execution with knowledge of conditional seller's rights created immaterial issue.**

Where complaint of conditional seller, suing conditional buyer's judgment creditor and constable who levied execution on automobile, alleged that defendants acted with full knowledge of seller's rights and claims when they sold automobile under execution, defendants' denial of such allegation created an immaterial issue.

3. Execution ⚡184—**Conditional seller made party defendant in action by conditional buyer's judgment creditor could make no claim as third party, in execution sale under judgment therein.**

Where conditional seller suing conditional buyer's judgment creditor and constable for conversion of conditional seller's interest in automobile by sale thereof under execution was party defendant to action in which judgment on which execution was had was rendered, he was a second party and not a third party, and therefore could make no claim as a third party, as against defendants' allegations that no sufficient third party claim was served on constable.

4. Automobiles ⚡19—**Where conditional sale contract was not registered, conditional buyer had no title subject to attachment, conditional seller being owner under statute (Motor Vehicle Act, § 45, subd. e).**

Where plaintiff, as conditional seller suing conditional buyer's judgment creditor and constable for conversion of conditional seller's interest in automobile by sale thereof under execution, showed that automobile was registered in name of "U— Garage" and that he was owner of said garage, and no evidence showed that conditional sale contract was registered, no title rested in conditional buyer subject to attachment, and plaintiff was owner of automobile under Motor Vehicle Act, § 45, subd. e (St. 1923, p. 524) and transfer to conditional buyer was incomplete.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Guy Redwine against E. George Trowbridge and another. Judgment for defendants, and plaintiff appeals. Reversed with direction.

G. E. Redwine, of Ukiah, for appellant.

H. W. A. Weske, of Santa Rosa, for respondents.

STURTEVANT, J. The plaintiff commenced an action to recover damages for an alleged conversion of his interest in an automobile. The defendants appeared and filed separate answers. A trial was had before the trial court sitting without a jury. The trial court made findings in favor of the defendants, and the plaintiff has appealed under section 953a of the Code of Civil Procedure.

Facts admitted by the pleadings, or found by the court, among others, included the following: The defendant Mathews was con-

stable of Santa Rosa township, Sonoma county, Cal., and the defendant Belden was his bondsman. On the 23d day of October, 1925, the plaintiff was the owner of an automobile. On that date the plaintiff and Jones entered into an executory contract of sale. By the terms of that contract there was a conditional sale to Jones, and the purchaser paid down \$300, leaving \$979.50 unpaid, and of that sum three installments of \$88.94 were past due at the time of the attachment. By the terms of that contract title to the automobile remained in the seller until all payments were made; and if the purchaser failed to make his payments on time the seller could at his option, without demand or notice, take possession of the automobile. On the 23d day of February, 1926, the defendant Trowbridge in the justices' court commenced an action against this plaintiff, Jones, and Morris, to recover a judgment for \$104.13. On the same day he took out an attachment which was levied on the automobile. On the 13th day of April, 1926, he recovered a judgment against the defendant Jones for his demand and costs. On the 9th day of May, 1926, Trowbridge took out an execution which directed the constable to levy on the property of the defendant Jones, and the constable proceeded to levy it and did levy it on the automobile. Thereafter notice was duly given, and on the 17th day of May, 1926, at the sale under execution the automobile was sold to the defendant Trowbridge. On the 11th day of May, 1926, this plaintiff served on the defendant Mathews a written claim and demand setting forth his title to the automobile, and therein reciting: "Demand is hereby made upon you for the payment of the balance of the purchase price of the aforesaid automobile amounting to the sum of \$979.50." At this point it should be noted that the judgment in the attachment case was entered on the 13th day of April, and the record shows that the case was not dismissed as to this plaintiff, but does not show whether an appeal had or had not been taken, and the time to appeal did not expire until the 13th day of May, two days after the claim and demand just mentioned and referred to. On the 14th day of June, 1926, this plaintiff made a demand on each of the defendants for the possession of the automobile or the payment of the balance due and such demand was refused. At the time of the sale of the automobile by the defendant Mathews to the defendant Trowbridge the automobile was of the value of \$1,025.

[1] As against the defendants in the attachment suit, the terms of the conditional sales contract are binding. The title to the automobile rested in this plaintiff. As Jones was in default, under the terms of the contract this plaintiff was entitled to the possession of the automobile at the time of the attachment and at the time of the execution sale. 35 Cyc.

710. It therefore appears that a complete case existed in favor of the plaintiff.

[2] In his complaint the plaintiff alleged that after full knowledge of his rights and claims the defendant Mathews sold to the defendant Trowbridge. That allegation was denied by the defendants. Such denial created an immaterial issue. *Poggi v. Scott*, 167 Cal. 372, 139 P. 815, 51 L. R. A. (N. S.) 925.

In the third and fourth findings of fact, and in another finding of fact misplaced and appearing as the second conclusion of law, facts are set forth to the effect that the certificate of registration which was in the container attached to the car when the car was attached, showed incomplete title in this plaintiff; in other words, that it showed title in C. L. Bihn. All of these facts were outside of the issues and, as will presently appear, were also immaterial.

[3] In the answers of the defendants they pleaded that no sufficient third party claim was served on the constable. As this plaintiff, Guy Redwine, was a party to the action in the justices' court, he was a second party and not a third party, and therefore had no opportunity to make a claim as a third party.

The defendants claim that this plaintiff had no complete title which would support his action. *Parke v. Franciscus*, 194 Cal. 284, 228 P. 435; *General Motors Accep. Corp. v. Dallas*, 198 Cal. 365, 245 P. 184. Those cases are not at all in point as to the facts of this case. *Balfour v. Burnett*, 28 Or. 72, 41 P. 1, 2.

On April 12, 1924, the Ukiah Auto Supply Company negotiated a sale to C. L. Bihn. That sale was registered April 19, 1924, and certificate issued. It was in the car when the car was attached. On October 23, 1925, Ukiah Garage made a purported sale to Jones. On February 4, 1926, a certificate issued to Ukiah Garage, Guy Redwine, proprietor. On April 13, 1926, the car was attached in the possession of Jones. Ukiah Auto Supply Company was Banker and Crawford. (Tr. 71a, 71b). Ukiah Garage was Guy Redwine. Guy Redwine brought this action in his own name. On the trial (Tr. 8) the variance between Ukiah Garage as owner and Guy Redwine as owner was challenged. The reply was that the defendant had not pleaded the defense. *Cook v. Fowler*, 101 Cal. 89, 35 P. 431. The objection was overruled. The ruling was correct.

[4] As the case was submitted to the trial court the plaintiff showed the car to be registered in the name of Ukiah Garage and that he was the Ukiah Garage. The evidence does not show that the transfer to Jones was registered. It follows that no title rested in Jones subject to attachment and, notwithstanding the contract of October 23, 1925, the plaintiff was the owner (Motor Vehicle Act, § 45, subd. e) and the transfer to Jones was incomplete.

From what we have said it appears that the judgment was erroneously entered in favor of the defendants, and that on the admitted facts and the findings as made by the trial court the judgment should have been in favor of the plaintiff for \$1,025, the admitted value of the car.

The judgment is reversed, and the trial court is directed to enter judgment in favor of the plaintiff in accordance with the views herein expressed.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 61

BLANCETT et al. v. BURR et al. (Civ. 5624.)

District Court of Appeal, Second District, Division 1, California. July 18, 1929.

1. Malicious prosecution $\S$ 3—One may be civilly liable who, without personally making affidavit, has falsely, maliciously, and without probable cause procured criminal process to issue.

One may be civilly liable who, without personally making affidavit required as basis for issuance of criminal complaint, has falsely, maliciously, and without probable cause procured criminal process to issue.

2. Malicious prosecution $\S$ 40—Defense of privilege under statute relating to libel is not bar to action for malicious prosecution (Civ. Code, $\S$ 47).

Defense of privilege, as provided by Civ. Code, $\S$ 47, relating to libel, is not a bar to an action for malicious prosecution.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action for damages for malicious prosecution by Earl R. Blancett and another against John Burr and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Chauncey Gardner, of Los Angeles, for appellants.

A. E. Moore, of Los Angeles, for respondents.

HOUSER, J. Plaintiffs appeal from a judgment rendered against them in consequence of an order sustaining a demurrer to their complaint against defendants without leave to amend the complaint.

The action was for damages alleged to have been suffered by plaintiffs by reason of the malicious prosecution of a criminal action against them instituted and maintained by defendants. The gist of the complaint was that "the said defendants, by joint and concerted action, and while contriving and maliciously intending to injure said plaintiffs,

falsely, maliciously and without probable cause, procured and caused, certain criminal process to be issued against said plaintiffs, by falsely, maliciously and without probable cause," making a certain specified statement "and others of like import" to a chief of police, by reason of which he made an affidavit and caused a search warrant to issue as against the home of plaintiffs, and also caused a criminal complaint to issue against plaintiffs wherein they were charged with the commission of a designated criminal offense.

[1] Without reference to what may be the necessary allegations in a complaint of the character of that here involved, the principal point suggested and presented to this court by the parties to this appeal is whether one may be civilly liable who, without personally making the affidavit required as a basis for the issuance of a criminal complaint, has falsely, maliciously and without probable cause procured the criminal process to issue.

The general rule appears to be that "one who procures a third person to institute a malicious prosecution is liable in damages to the party injured to the same extent as if he had instituted the proceeding himself, * * *" and "that it is not necessary that the complaint or information on which the prosecution is based should have been signed by the person sought to be held liable in order to establish his liability in an action for malicious prosecution. It is enough if he was instrumental in setting the law in motion and caused the prosecution to proceed." Ann. Cas. 1918A, pages 485, 486, where authorities, including Kinsey v. Wallace, 36 Cal. 462, 480, are cited. To practically the same effect is the declaration of the law in 38 Corpus Juris, 395, where reference is also had to many authorities, and wherein it is stated that the test of liability in an action for malicious prosecution is whether the defendant was actively instrumental or was the proximate and efficient cause of maliciously putting the law in motion.

A case which is nearly parallel in its facts with the instant case is that of Holden v. Merritt, 92 Iowa, 707, 61 N. W. 390. Therein it appears that the defendant furnished an inspector of the United States government with facts on which the inspector filed an information on which the plaintiff was arrested. The defendant insisted that there was no evidence that he had instigated or procured the prosecution. With reference thereto, in part, the court said: "* * * It need not be shown that the defendant ordered or directed the warrant or process to issue, or that he participated in its execution. If he, on his own motion, gave information or made complaint to the officers of the law in such a manner as that, in the regular and ordinary course of events, an arrest must be made, or will probably follow, this is suffi-

cient to warrant the jury in finding him the real prosecutor. [Citing authorities.]”

[2] In support of their contention that the defense of privilege, as provided by section 47 of the Civil Code, is a complete answer and bar to an action for malicious prosecution, respondents rely principally upon the case of Ball v. Rawles, 93 Cal. 222, 236, 28 P. 937, 27 Am. St. Rep. 174. However, so far as the instant question is involved, the point of that case and other authorities to which respondents refer is to the effect that, under the provisions of section 47 of the Civil Code, no civil liability is incurred by one who *libels* another through the instrumentality of statements contained within the allegations of a criminal complaint. It is apparent that falsely and maliciously instituting and maintaining a criminal action is materially different and distinct from false and libelous words and statements which may be contained in the criminal complaint in the action. If the respective situations were identical and the law applicable thereto were as claimed by respondents, it would be difficult, if not impossible, to ever maintain an action for the malicious prosecution of a criminal action, no matter how reckless and unfounded the statements of the instigator of the criminal process, nor how flagrant or manifest were his bad faith in the matter.

Treating the appeal herein solely in the light of the question presented, that is, whether the complaint was fatally defective in that it disclosed that defendants did not *personally* make the affidavit which resulted in the issuance of the criminal process against plaintiffs, this court is convinced that the demurrer to the complaint should have been overruled.

It is ordered that the judgment be, and it is, reversed.

We concur: CONREY, P. J.; HOLLZER, Justice pro tem.

100 Cal. App. 64

MATTESON v. KLUMP et al. (Civ. 6226.)★

District Court of Appeal, Second District, Division 1, California. July 18, 1929.

Rehearing Denied Aug. 13, 1929. Hearing Denied by Supreme Court Sept. 12, 1929.

1. Appeal and error ☞544(3)—Where record contained no bill of exceptions or reporter's transcript, only errors appearing from inspection of judgment roll could be considered.

Where record contained nothing other than a so-called clerk's transcript and contained no bill of exceptions or reporter's transcript of testimony or of any proceedings had in action, the only errors specified in appellant's brief which could be noticed by appellate court were those appearing from an inspection of judgment roll.

2. Judgment ☞570(5)—Where dismissal does not purport to go to merits, court may not include order precluding plaintiff from instituting another action.

Where dismissal of an action does not purport to go to merits of case, court has no authority to include within judgment of dismissal an order which in effect precludes plaintiff from instituting another action in which merits of controversy may be litigated.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Roy L. Matteson against Wm. Klump and others. From a judgment of dismissal, plaintiff appeals. Judgment modified, and, as modified, affirmed.

Roy L. Matteson, in pro per.

Earl D. Killion, of Hollywood, for respondents.

HOUSER, J. Plaintiff appeals from “the order of dismissal and the judgment * * * and presents for review * * * order denying motion for judgment; * * * order denying motion to return amended answer * * *; order denying motion to vacate order setting trial; * * * order denying motion to strike original answer.”

[1] The record herein contains nothing other than a so-called “Clerk's Transcript”—no bill of exceptions or reporter's transcript of the testimony, or of any proceedings had in the action. In view of such lack of conformity with statutory provisions and the practice regulating appeals, the only alleged errors specified in appellant's brief which may be noticed by this court are those which appear from an inspection of the judgment roll. 2 Cal. Jur. 816, and cases there cited.

[2] Appellant specifies prejudicial error in that by the judgment in question his action was dismissed “with prejudice to the commencement of another action.” The provisions of section 581 of the Code of Civil Procedure furnish the general authority for the trial court to order a dismissal of an action. As announced by decisions of the Supreme Court of this state, the ordinary rule is that the dismissal of an action does not operate as a bar to another action for the same cause of action as was stated in the action which was dismissed (*Westbay v. Gray*, 116 Cal. 660, 48 P. 800; *Davenport v. Turpin*, 43 Cal. 597; *Parks v. Dunlap*, 86 Cal. 189, 25 P. 916; *Rosenthal v. McMann*, 93 Cal. 505, 29 P. 121); but specifically, where the dismissal of an action does not purport to go to the merits of the case, the trial court has no authority to include within the judgment of dismissal an order which in effect precludes the plaintiff from instituting another action in which the merits of the controversy may be litigated. 18 Cor. Jur. 1201, and cases there cited. The

case of *Lindblom v. Mayar*, 81 Wash. 350, 142 P. 695 is particularly in point.

In the instant case the conclusion of this court is that the judgment should be modified by striking therefrom the words "with prejudice to the commencement of another action"; otherwise the judgment should be affirmed. So ordered.

We concur: CONREY, P. J.; HOLLZER, Justice pro tem.

99 Cal. App. 742

LAYNE v. MALMGREN et al. (Civ. 6762.)★

District Court of Appeal, First District, Division 1, California. July 8, 1929.

Rehearing Denied Aug. 7, 1929. Hearing Denied by Supreme Court Sept. 3, 1929.

1. Brokers ⇨4—Surety on bond covering damage caused by principal as "real estate broker" held not liable for damages from alleged misrepresentations in broker's sale of note secured by trust deed (Real Estate Brokers' Act, § 9a).

Sale of note secured by deed of trust under which owner of note was beneficiary did not constitute sale or offer to sell or negotiation for sale of real estate or negotiation of loan thereon within Real Estate Brokers' Act (St. 1923, p. 93), defining real estate broker, and surety on broker's bond whose obligation was confined to damages caused by its principal while acting as real estate broker, under section 9a, was therefore not liable for damages from broker's alleged misrepresentations in connection with the sale.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Real Estate Broker.]

2. Evidence ⇨474(18)—Witness who had no general knowledge of property values in vicinity and had never been in apartment house could not testify as to its value.

In action for damages for deceit in connection with sale of note secured by chattel mortgage and trust deed covering apartment house, witness who formerly owned building in vicinity, but whose knowledge of values was confined to his own property, and who had never been on real estate in question, was not qualified to testify as to value of apartment house.

3. Fraud ⇨57—Testimony as to price for which apartment house sold formerly was properly rejected on issue of its value in fraud action.

In action for damages for deceit in connection with sale of note secured by chattel mortgage and deed of trust on apartment house, testimony as to price for which apartment house sold on one occasion was properly rejected on issue of value of apartment house.

4. Appeal and error ⇨1056(4), 1071(6)—Exclusion of testimony as to misrepresentations in another transaction and omission of finding were immaterial in action for deceit, where court found representations were not relied on.

In action for damages for deceit in connection with sale of note secured by trust deed on apartment house, error in excluding testimony as to defendant's misrepresentations concerning property in another transaction and failure of court to find value of security or income therefrom or expense of foreclosure was immaterial, in view of finding that defendant's representations were not relied on.

5. Appeal and error ⇨1071(6)—Failure to find on additional issues is immaterial if findings made support judgment.

If findings actually made by trial court are sufficient to support judgment and are sustained by evidence, failure to find on additional issues which could not affect result is not material.

6. Fraud ⇨58(4)—Finding that plaintiff in buying secured note did not rely on defendant's representations held sustained.

In action for damages for deceit in connection with defendant's sale to plaintiff of promissory note secured by chattel mortgage and deed of trust on apartment house, evidence held sufficient to sustain finding of trial court that plaintiff did not rely on defendant's representations.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Charles H. Layne against Edward J. Malmgren and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John Ralph Wilson and Everette C. McKeage, both of San Francisco, for appellant. E. J. Tremont and Chas. A. Sweigert, both of San Francisco, for respondents.

PER CURIAM. An action to recover damages for alleged deceit in connection with the sale by defendant Malmgren to the plaintiff of a promissory note secured by a chattel mortgage and a deed of trust.

Defendant Dempsey, who was a real estate broker, acted for defendant Malmgren in the transaction. The Fidelity & Deposit Company of Maryland, a corporation, on November 28, 1924, as surety for defendant Dempsey, issued to the real estate commissioner its bond in the form prescribed by the Real Estate Brokers' Act, and was joined as a defendant in the action. A general demurrer filed by the corporation was sustained, and a judgment thereon was entered in its favor.

Upon the trial of the action upon the merits judgment was also entered in favor of the other defendants, and from both judgments the plaintiff has appealed.

The promissory note, which was originally for \$17,840 and interest, was executed by Carl and Mary White to Rose Johnson on

January 15, 1924, and was both as to principal and interest payable in monthly installments. As security therefor the makers executed to trustees a deed of trust to certain real property in San Francisco and also a chattel mortgage upon the furnishings in an apartment house situated upon the property. At the time of the execution of the trust deed there were two prior liens upon the property, aggregating \$32,000.

It was alleged that defendant Dempsey, acting on behalf of Malmgren, conducted the negotiations, in the course of which he falsely represented the amount unpaid on the note, the value of the security, the cost of conducting the apartment house, the income therefrom, and that the security for the note was sufficient. The complaint set forth these amounts as represented with those which plaintiff contended were true in fact; the latter with the exception of the cost of conducting the apartment house, which was more, being less than represented. It was further alleged that plaintiff believed and relied upon the representations in making the purchase, and also that he was compelled to foreclose the mortgage and enforce the deed of trust, with the result that insufficient was realized to satisfy the note, all to his damage in the sum of \$10,950.

The court found that the plaintiff was informed by the defendants that the balance unpaid on the note was \$16,100, when in truth the balance was \$16,000, but that both the plaintiff and the defendants were at the time informed by one of the debtors that the first amount was correct; that plaintiff personally examined the property, and after such examination reduced his offer for the note from \$12,000 to \$11,250, the latter being the amount paid therefor; that none of the misrepresentations averred were made, and that the plaintiff, who was experienced in the purchase and sale of property in San Francisco, relied upon no representations made by the defendants; that he was not misled, and suffered no damage by reason of any of the matters alleged in the complaint.

The appellant contends that the court erred in sustaining the demurrer of defendant corporation and in its rulings upon the admissibility of certain evidence, that the findings are unsupported, and that there was a failure to find on material issues.

[1] We find no merit in the first contention. A real estate broker as defined by the act "is a person * * * who, for a compensation, sells, or offers for sale, * * * or negotiates the purchase or sale or exchange of real estate, or who, for compensation, negotiates loans on real estate * * * for others as a whole or partial vocation." St. 1923, p. 93. It may be conceded that the acts alleged would if committed by one acting as a real estate broker constitute a breach of duty within the terms of the bond. Nittler v.

Continental Casualty Co. (Cal. App.) 271 P. 555. But the transaction in the present case, notwithstanding the owner of the note assigned to the plaintiff his rights as beneficiary under the deed of trust, did not constitute a sale or offer to sell or a negotiation for the purchase or sale of real estate, nor was it the negotiation of a loan thereon within the meaning of the act. *Guy v. Brennen*, 60 Cal. App. 452, 213 P. 265. The surety company was consequently not liable for the acts complained of, its obligation under the bond being confined to damage caused by its principal while acting as a real estate broker. Real Estate Brokers' Act, § 9a, St. 1923, pp. 93, 96.

[2, 3] Appellant sought to show by a witness who formerly owned a building in the vicinity of the apartment house in question, the value of the latter property. The witness' knowledge of values in the vicinity, so far as appears, was confined to the property owned by him, and it was further shown that he had never been upon the real estate in question or in the apartment house thereon. While it has been held that owners of property may be presumed to have sufficient knowledge of values in the neighborhood to testify to the value of that owned by them (*Spring Valley Water-Works v. Drinkhouse*, 92 Cal. 540, 28 P. 681), here the witness was not shown to be familiar with values in the neighborhood nor with the property itself sufficiently to form an intelligent or correct judgment as to its value, and his testimony was properly rejected, as was also the offered testimony of a witness as to the price for which the apartment house sold on one occasion.

[4, 5] Appellant also attempted to prove that in another transaction, to which the plaintiff was not a party, defendant Dempsey misrepresented the value of the property. Where fraud in the purchase and sale of property is an issue, evidence of other frauds or fraudulent representations at or near the same time has been held to be admissible (*Kornblum v. Arthurs*, 154 Cal. 246, 97 P. 420); but in view of the finding—which was fully supported—that none of the representations made by defendant Dempsey were relied upon by appellant, any error in excluding this testimony became immaterial; as was also for the same reason the failure of the court to find the value of the property, the income from or the expense of conducting the apartment house, or the amount expended by appellant in foreclosing the mortgage and enforcing the deed of trust. If the findings actually made are sufficient to support the judgment and are sustained by the evidence, the failure to find on additional issues which could not affect the result is immaterial. *Robinson v. Muir*, 151 Cal. 118, 90 P. 521.

[6] The evidence shows that appellant at different times for a considerable period previous to the transaction in question had in-

vested largely in real estate and securities in San Francisco; that he was unacquainted with the defendants before the negotiations commenced; that before purchasing the note he carefully investigated the value of the security and, based upon this investigation, reduced his first offer therefor. The testimony sufficiently shows that appellant was a shrewd business man too careful to rely, and that he did not rely, upon any representations by the agent; the latter testifying also that no misrepresentations were made. It further appears that the property, both real and personal, was purchased by appellant at the sales mentioned and that he is now the owner thereof.

We are satisfied, after a reading of the whole record, that the conclusions of the trial court are fully supported, and that no errors are shown which resulted in a miscarriage of justice. The judgment is accordingly affirmed.

100 Cal. App. 33

BOYD et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 6287.)

District Court of Appeal, Second District, Division 2, California. July 16, 1929.

As Modified Aug. 5 and Aug. 14, 1929.

1. Prohibition ☞5(1)—“Writ of prohibition” is not writ of error, and should not issue until court has had reasonable opportunity to correct error, if any.

“Writ of prohibition” is not writ of error, and should not issue until the fact finding court has had every reasonable opportunity to correct its error, if any, and statutory provisions for new trial or for appeal are for that purpose.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Writ of Prohibition.]

2. New trial ☞12—Trial court may stay proceedings pending motion for new trial.

Pending motion for new trial, the trial court has the power to stay proceedings.

3. Trial ☞400(1)—Proposed findings and judgment may be followed by proposed amendments thereto.

Proposed findings and judgment may be followed by proposed amendments to the findings and judgment.

4. Prohibition ☞5(3)—Petitioners for writ of prohibition to stay proceedings to prevent signing proposed findings and judgment, not asking new trial or awaiting signing of findings and judgment and then asking new trial or appealing, held not entitled to writ.

Where petitioners for writ of prohibition to restrain further proceedings so as to prevent signing proposed findings and judgment which

trial judge in reply to petition stated he did not intend to sign, did not ask for new trial or await signing of findings or judgment for plaintiff and then ask for new trial and stay of proceedings pending its determination and did not appeal or propose amendments to proposed findings and judgment which would reveal error, they were not in such peril that writ of prohibition was reasonably required.

5. Evidence ☞82—It is not presumed that trial judge will sign any proposed finding or judgment presented to him.

There is no presumption that trial judge will sign any proposed finding or judgment that is presented to him.

6. Evidence ☞82—Presumption is indulged that trial judge, before signing proposed finding or judgment, will await proposed amendments and then accept or reject such of both as he pleases.

Presumption will be indulged that trial judge before signing proposed finding or judgment presented to him will await proposed amendments as law contemplates he shall do, and then accept or reject such of both as he pleases.

Application by O. E. Boyd and others for a writ of prohibition prayed to be directed to the Superior Court of California in and for Los Angeles County and others, to restrain further proceedings in a certain action. Writ discharged, and the proceedings dismissed.

O'Melveny, Tuller & Myers, Haas & Dunigan, and Horace S. Wilson, all of Los Angeles, for petitioners.

Tompkins & Clark, D. L. Ault, and John A. Hewicker, all of San Diego, for respondents.

STEPHENS, Justice pro tem. An alternative writ of prohibition issued out of this court in the usual form, directing the defendants to desist and refrain from taking further proceedings in the case entitled W. F. Carpenter et al. v. O. E. Boyd et al. (No. 228593), pending in defendant court until a certain return date upon which defendants were directed to show cause why defendants herein “should not be restrained and prohibited absolutely from any further proceedings in said action.”

This writ was issued upon a petition which alleges that the judge who heard the case in superior court was about to sign findings of fact and conclusions of law, and a judgment based thereon wherein a valuation of certain corporate stock was made, notwithstanding the fact that the value of such stock was neither the subject of allegations, prayer, or proof in the case. The petition also alleges that the above referred to findings of fact and conclusions of law on their face support a personal money judgment against petitioners and in favor of two certain persons who are plaintiffs in the case for all of the stockholders and not as individuals, and that the referred to proposed judgment was to that

effect; that the issue of such stock had never been authorized by the corporation commissioner, and was therefore illegal and void; that the money judgment is so large that the petitioners can neither pay it nor stay execution thereon by giving a bond on appeal.

While it is not necessary here to go into detail of facts, it should be borne in mind that the superior court action was for an accounting against trustees of the affairs of a business enterprise and that the stock referred to was stock of the corporations owning the business and was also in the trust. The complaint in said action also asks that a return of the business and the capital stock be decreed, and, in the absence of defendants' ability to do so, that a money judgment be given for the value thereof. After submission of the case, the judge caused a minute order to be entered by the clerk, which is in words and figures as follows, to wit:

"It seems quite clear to me that a return of plaintiffs' stock to them and a restoration of their interests to Carpenters, Inc., and to Carpenter's Stationery Store, Inc., and also of the interests in and control of said two corporations to the said plaintiffs, is not only impracticable but also practically impossible, a money judgment is the only adequate remedy afforded plaintiffs. The judgment will be as contended for by plaintiffs, to wit: \$158,792.06. Defendants' compensation will be the ownership and the control of the business converted by them and the profits derived therefrom since December 31, 1928.

"J. O. Moncur, Judge."

The reply of the defendant judge to the petition states positively that he now realizes that an individual judgment would be beyond the issues of the case and that he has no intention of signing any findings or judgment in favor of any plaintiff as an individual, and in the oral argument all parties agree that this phase of the matter is out, and we shall so consider it.

Petitioners, however, contend that their allegations as regards the value and legality of the stock and the impossibility of petitioners to pay or stay the proposed judgment, having been denied in respondents' reply to the petition, these issues should be made the subject of a reference.

[1-3] It will be unnecessary to go further than merely mention that the writ prayed for here is a prerogative writ and its issue appeals to the sound discretion of the court; that the writ of prohibition is not a writ of error and should not be used as such; that as a general rule the writ should not issue until the fact finding court has had every reasonable opportunity to correct its error (assuming for present purposes there is error), and that the statutory provisions for a new trial and for appeal are for that purpose; that, pending a motion for a new trial, the trial court has the power to stay proceedings;

that proposed findings and judgment may be followed by proposed amendments thereto.

[4] Petitioners have the right to ask for a new trial, setting out to the trial court the alleged errors. They may await the signing of findings, etc., and a judgment, and then ask for a new trial and a stay of proceedings pending its determination. They may appeal. They may propose amendments to the proposed findings, etc. and judgment, which would reveal the alleged errors. Petitioners have done none of these things. It seems to us that the circumstances of this case do not place petitioners in such peril that the extraordinary assistance of the writ of prohibition is reasonably required.

[5, 6] The sworn reply of the respondent judge states: "That when plaintiffs' supplemental findings and final decree were received by respondent, respondent cursorily looked them over and then put them aside to await any proposed amendments which might be presented by defendants, and did direct counsel for plaintiffs to serve said proposed supplemental findings and final decree upon counsel for defendants." This is but a statement of the usual procedure of a trial judge, and there is no presumption that a trial judge will sign any proposed finding or judgment that is presented to him. The presumption will be indulged in that he will await proposed amendments as the law contemplates he shall do and then accept such and reject such of both as he pleases. In the end, the findings and judgment are the court's. While the petition alleges that the court will sign the proposed documents, both sides of this controversy accept the judge's return that he will not sign the proposed documents with the personal money judgment contained therein. There seems to be no good reason why they should not accept his statement, which is, in effect, that he was not about to sign the proposed documents, but was awaiting a proper time to consider them. If trial courts are not to be accorded this privilege or right, the reviewing courts of the state will be called upon to issue writs in innumerable cases where litigants think the court will go wrong.

Petitioners greatly rely upon the recent case of *Baar v. Smith*, 201 Cal. 87, 255 P. 827. In that case the trial court not only issued execution where execution was legally restrained by appeal, but included in the judgment orders and directions far outside of the pleadings, the proof, and admissions by the victorious parties to the action. Assistance through the writ of prohibition was urgently necessary to protect the rights of defendants. We do not read the *Baar* Case as affecting the general principles hereinabove mentioned or as overruling the principles applied in *Amos v. Superior Court*, 196 Cal. 677, 681, 239 P. 317; *Woodward v. Superior Court*, 95 Cal. 272, 276, 30 P. 535; *Wreden v. Superior Court*, 55 Cal. 504; *Lange v. Superior Court*,

11 Cal. App. 1, 103 P. 908; *Clark v. Superior Court*, 55 Cal. 199; and *George v. Beatty*, 85 Cal. App. 525, 260 P. 386—the later case being in mandamus.

The petition as it stands modified by concessions made after respondents' return does not appear to us to require any reference or to justify the issuance of the writ prayed for.

The writ is discharged, and the proceedings dismissed.

Neither of the parties to have judgment for costs against the other.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

100 Cal. App. 53

KEYES v. HAWLEY et al. (Civ. 6827.)★

District Court of Appeal, First District, Division 2, California. July 18, 1929.

Rehearing Denied Aug. 17, 1929. Hearing Denied by Supreme Court Sept. 10, 1929.

1. *Automobiles* ⇨171(4)—Motorist entering intersection at lawful speed when automobile approaching from right was several lengths away held not negligent in proceeding where collision resulted (Motor Vehicle Act, § 131, as amended by St. 1925, p. 412, § 15).

Evidence showing that driver of automobile in which plaintiff was riding as guest entered intersection at lawful speed when automobile approaching from right was two or three lengths away and proceeded through intersection within lawful rate held not to show negligence under Motor Vehicle Act, § 131 (St. 1923, p. 560), as amended by St. 1925, p. 412, § 15, relating to right of way, where collision resulted.

2. *Automobiles* ⇨171(4)—Automobiles did not "approach intersection at approximately same time" within right of way statute, where one was several car lengths from intersecting line when the other reached curb line (Motor Vehicle Act, § 131, as amended by St. 1925, p. 412, § 15).

Automobiles did not approach intersection at approximately the same time within meaning of Motor Vehicle Act, § 131 (St. 1923, p. 560), as amended by St. 1925, p. 412, § 15, relating to right of way, where one was from two to three automobile lengths back of intersecting line of streets when the other was at the corresponding curb line of the intersection.

3. *Automobiles* ⇨171(4)—Right of way statute applies only where two automobiles are like distance from given point at same time (Motor Vehicle Act, § 131, as amended by St. 1925, p. 412, § 15).

In order to put Motor Vehicle Act, § 131 (St. 1923, p. 560), as amended by St. 1925, p. 412, § 15, relating to right of way, into operation, the two automobiles must be approximately a like distance away from given point at same time.

4. *Automobiles* ⇨171(13)—Motorist actually entering intersection before another approaching from right may assume he will be given right of way (Motor Vehicle Act, § 131, as amended by St. 1925, p. 412, § 15).

Under Motor Vehicle Act, § 131 (St. 1923, p. 560), as amended by St. 1925, p. 412, § 15, when motorist has actually entered an intersection before another motorist approaching from his right approaches it, the former may assume that he will be given right of way and permitted to pass through intersection without danger of collision.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action for damages for personal injuries sustained in an automobile collision by Anne L. Dougan against J. B. Hawley and another. From a judgment for plaintiff, defendant named appeals. Pending the appeal plaintiff died and her administratrix was substituted in her stead. Judgment reversed.

J. Hampton Hoge, of San Francisco, for appellant.

Treadwell, Van Fleet & Laughlin, of San Francisco, for respondent.

NOURSE, J. This action was brought by Anne L. Dougan, now deceased, against the three defendants, Miller Automobile Company, Louis E. Bagwill, and J. B. Hawley, to recover damages alleged to have been sustained in an automobile accident. The cause was tried with a jury; the action was dismissed in open court as to the Miller Automobile Company, and the jury returned a verdict in favor of the plaintiff and against the defendants Bagwill and Hawley in the sum of \$10,000. The defendant Hawley alone appeals upon typewritten transcripts. Pending the appeal the plaintiff died and her administratrix has been substituted in her stead, but for the purpose of clarity we will continue to refer to the original plaintiff as the respondent herein.

At about 11 o'clock in the evening of February 27, 1926, in the city of Sacramento, the respondent was riding with appellant and the latter's wife as their guest in appellant's automobile. The three were seated together in the front seat, Mrs. Hawley riding in the center next to appellant and the respondent riding on the extreme right. The appellant operated a store, which was located on J street, about 150 feet from its intersection with Thirty-First street. He started from this place, going in a westerly direction to cross Thirty-First street, beginning in low gear and changing into second and then third as he reached the intersection, traveling at no time faster than 15 miles per hour. As he approached the intersection of J and Thirty-First streets the defendant Bagwill was seen approaching in his car at a point just

south of the intersection of Thirty-First and I streets. The Bagwill car was traveling at a speed of 25 miles per hour or greater. As the appellant reached the easterly curb line of the intersection and proceeded to cross, the Bagwill car was about three car lengths, or 45 feet, northerly from the northerly intersection of the same streets. At this point appellant sounded his horn and proceeded to cross the intersection, and when he reached the middle of the streets he again sounded his horn and speeded up to a rate of approximately 25 miles per hour. The Bagwill car continued on without slackening speed and without swerving to the right or left, and as the front of appellant's car reached a point approximately at the westerly curb line of Thirty-First street it was struck by the front right fender of the Bagwill car upon the rear right fender and rear bumper of appellant's car. The impact turned appellant's car so that it faced north on Thirty-First street abutting the northerly curb line of J street, while the Bagwill car was stopped at a point near the middle of the intersection. As a result of the impact the respondent suffered an injury to her right arm, which caused it to turn black and blue. None of the other parties in either car was injured and the cost of repair to appellant's car was about \$11, while the cost of the repair to the Bagwill car was \$27. It is the claim of respondent that, though the injury at the time of the accident was slight, complications resulted which brought about a more serious condition for which she sued and for which the jury rendered its verdict. On this appeal the appellant vigorously attacks the medical testimony which was offered to support this claim, but as we are satisfied from our examination of the record that the judgment must be reversed because of the want of negligence on the part of appellant, it is not necessary to consider this question.

[1] As to the cause of the accident the evidence is all one way. The only theory upon which the respondent attempts to support her claim of negligence on the part of appellant is that the Bagwill car had the right of way under her interpretation of section 131 of the Motor Vehicle Act. St. 1923, p. 517. That the evidence does not support the verdict against this appellant seems too clear for argument. Section 131 of the Motor Vehicle Act (amended by St. 1925, p. 412, § 15), as it stood at the time of the collision, provided that: "When two [automobiles] approach an intersection of public highways at *approximately the same time*, the vehicle approaching from the right shall have right of way, provided *such vehicle is traveling at a lawful speed.*" (Emphasis added.) The evidence of the respondent is that the appellant approached the intersection at a speed of 15 miles an hour (the lawful speed according to the statute); he sounded his horn and continued to cross at the same rate of

speed until he reached the middle of the intersection when he increased his speed in order to avoid a collision with the Bagwill car; that as they *entered* the intersection she noticed the Bagwill car approaching on the right about two or three car lengths back of the intersection; that Bagwill was traveling faster and at about 20 or 25 miles per hour and did not slow up for the crossing; and that appellant's car was struck in the rear after it had crossed the middle of the intersection and at a time when the front of the car was almost even with the westerly curb line of Thirty-First street. She testified that the Bagwill car did not change its course to the right or left; that the pavement was dry, both streets were well lighted, and both cars carried headlights, which were lighted at the time. The appellant testified to the same effect in all particulars, and added that he first witnessed the Bagwill car when he was approximately 100 feet from the intersection; that the Bagwill car had just then passed the intersection of Thirty-First and I streets, and that he had a clear view because the block forming the northeast corner of the intersection of Thirty-First and J streets was an open park. The appellant also added that when he was in the center of the intersection the Bagwill car was about 50 feet from the line of his car, or about 20 feet from the northerly line of the intersection, and that the Bagwill car was traveling at a rate of about 20 or 25 miles per hour. Mrs. Hawley testified to the facts stated in the testimony of the respondent, except that she said that she did not hear the appellant sound his horn as they approached the intersection, but that she heard this signal for the first time when they were out in the middle of the street, that she then looked up and saw the Bagwill car approaching on the right, and that the Bagwill car was then about two car lengths from the northerly curb of J street. Thus, as between the respondent and the appellant, there is not a shadow of conflict as to the circumstances preceding the collision. The testimony offered by them shows without a doubt that the appellant was not guilty of any negligence in the manner in which he operated the car at that time.

There is some conflict apparent in the testimony of the defendant Bagwill upon which the respondent relies. This witness testified that he first saw the appellant's car approaching when he (Bagwill) "got almost to the pedestrian line," that is, the sidewalk line on the northerly side of the intersection; that the appellant was then approaching at a rate of about 15 miles an hour and entered the intersection at about the same time that he did. He then testified that appellant was traveling at a rate of 25 miles per hour and struck his car, which was traveling at a rate of less than 4 miles an hour and practically standing still at the time of the collision. This witness was so completely discredited

in his own cross-examination and by all the other witnesses to the accident, as well as by all the physical facts present, that it is impossible to give his testimony any weight in any particular which might be claimed to be in conflict with the other evidence. However, in analyzing the testimony of this witness there is no material conflict, excepting in that portion of his testimony wherein he states that the appellant entered the intersection about the same time Bagwill did. Inasmuch as he had just testified that when he had reached the pedestrian crossing of the intersection he for the first time saw the appellant's car approaching, and as the admitted fact is Thirty-First street was 80 feet in width and appellant's car was struck on the rear right fender when the nose of the car was opposite the westerly curb, it is patent that appellant not only approached but entered the intersection long before Bagwill did, and that when Bagwill was at the pedestrian line and first saw appellant's car the latter was far across the intersection line. Thus his statement that the two entered the intersection at about the same time was a mere guess unsupported by any physical facts, the most convincing fact dispelling his conjecture being that the right front fender of his car struck the right rear fender and rear bumper of appellant's car, though Bagwill did not change his course.

Respondent also cites the testimony of Mrs. Hawley to the effect that when she heard her husband blow the horn the Bagwill car was about two lengths from the J street intersection. From this respondent argues that, as appellant blew the horn when he first came into the intersection, it must appear that both cars approached the intersection at about the same time, but respondent fails to note that Mrs. Hawley testified that she did not hear her husband sound the horn at the intersection, but that the first she did hear was when they were in the middle of the street. Reliance is also placed upon the testimony of the respondent that, when they reached the curb line of the intersection, she saw the Bagwill car approaching about two or three car lengths back from J street. From this it is argued that both cars approached the intersection at approximately the same time. But this testimony merely goes to corroborate that of the appellant that he was the first to approach the intersection, and that he had actually entered it and was crossing before the Bagwill car had approached the corresponding line of the intersection on J street. From the testimony outlined it is argued that both cars approached the intersection at *approximately* the same time and that under the provisions of the section of the Motor Vehicle Act the Bagwill car had the right of way. If this is true, of course respondent should not have taken her verdict and judgment against Bagwill, but all her evidence, by which she is bound on

this appeal, is to the contrary. What appears to be a conflict in the evidence arises from a confusion of terms in the statute. Section 23 of the Motor Vehicle Act (St. 1923, p. 520) defines an intersection as "the area embraced within the prolongation of the boundary or property lines of two or more public highways, etc." The respondent emphasized that when she was testifying as to the position of the appellant's car she was speaking of the *curb* line and not of the property line; that when appellant reached the *curb* line the Bagwill car was two or three car lengths from the intersection—the northerly property line of J street. Hence, the appellant's car was *within* the intersection, as the term is used in the statute, before the Bagwill car approached it. In the light of this evidence the respondent misconstrues the plain meaning of the section of the act. It was the evident purpose of the framers of the act to provide that, when two automobiles approach an intersection at approximately the same time so that one must stop in order to let another pass the intersection, then, if the one approaching on the right is proceeding at a lawful rate of speed, each shall have the right of way, but, when the car approaching from the left *has entered* the intersection and is proceeding across it when the other approaches from the right, it is manifest that the other has the right of way so long as he proceeds at a lawful rate of speed. A similar case arose in *Jackson v. Brown*, 106 Conn. 143, 137 A. 725, 726, where the plaintiff arrived at the intersection approaching on the left and the defendant approaching on the right was nearly 50 feet from the line of the intersection. The plaintiff's car entered the intersection and had proceeded some distance through it when the defendant's car entered it and the collision occurred. The Connecticut court held that the plaintiff had the right to assume that the defendant would accord him the right of way and that he would have his car under such control that the plaintiff while in the exercise of reasonable care could proceed through the intersection without danger of the defendant's car colliding with him. To the same effect is *Keller v. Waddington*, 142 Wash. 474, 253 P. 646, and *Weber v. Greenebaum*, 270 Pa. 382, 113 A. 413. In the latter case the Pennsylvania court, in defining the expression "approach an intersection," said: "It must be assumed that the framers of the statute and the legislature used the word 'approach' in a practical sense; for two vehicles to 'approach' an intersection 'at the same time,' they each, when about to arrive, must be approximately a like distance away from the given point, or this situation must exist at least to such an extent that one using reasonable judgment might anticipate their simultaneous arrival, otherwise they would not, in the words of the act 'approach the intersection * * * at the same time.'"

[2-4] The position of respondent in support of the verdict against this appellant is that, though the Bagwill machine was from two to three car lengths back of the intersecting line of the streets when the appellant's machine was at the corresponding curb line of the intersection, the two machines nevertheless approached the intersection at approximately the same time within the meaning of the vehicle act. To so hold would render the whole purpose of the section meaningless. If a point two or three car lengths from an intersecting line is approximately the same as the intersecting line, then why not five or six or more car lengths? The plain meaning of the section is, as stated by the Pennsylvania court, that to put it into operation the two cars must be approximately a like distance away from the given point at the same time. But when one car has actually entered an intersection before the other approaches it, the driver of the first car may assume that he will be given the right of way and permitted to pass through the intersection without danger of collision. He has the right to assume that the driver of the other car will obey the law, slow down, and yield the right of way if slowing down is necessary to prevent a collision. *Harris v. Johnson*, 174 Cal. 55, 58, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; *Wixon v. Raisch Improvement Co.* (Cal. App.) 266 P. 964.

As we read the evidence the appellant approached the intersection at a lawful speed; he reached and passed the intersection when the other car was two or three car lengths away; he proceeded through the intersection still within the lawful rate and did nothing in the operation of the car which was contrary to any provision of law or contrary to what an ordinarily prudent person would have done under the same circumstances.

Because of the want of any proof of negligence on the part of the appellant, the judgment as to him must be reversed on that ground, and this makes it unnecessary to consider the other points raised.

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

100 Cal. App. 24

BOYER v. CRICHTON. (Civ. 6766.)

District Court of Appeal, First District, Division 1, California. July 16, 1929.

1. Pleading Ⓒ225(1)—To sustain general demurrer to answer and at same time allow amendment thereto was contradictory.

To sustain a general demurrer to answer and at same time allow an amendment thereto was contradictory.

2. Judgment Ⓒ524—When judgment admits of two constructions, that one will be adopted which is consonant with judgment which should have been rendered.

In case of doubt regarding signification of judgment or any part thereof, whole record may be examined, and, when judgment admits of two constructions, that one will be adopted which is consonant with judgment that should have been rendered on facts and law of case.

3. Pleading Ⓒ225(1), 360(4)—Order sustaining demurrer to answer and granting permission to amend held merely direction to file amendment, and subsequent order striking out amended answer restored original pleading.

Where original answer in action to quiet title specifically denied material allegations of complaint and alleged facts showing prima facie title to property, with right to possession, to be in defendants, permission to file amendment to answer held intended merely to direct filing of amendment to answer, and, so construed, original answer was not superseded, and effect of subsequent order striking out amended answer was to restore original pleading.

4. Dismissal and nonsuit Ⓒ60(2)—More than five years having elapsed since filing of answer, dismissal for want of prosecution was proper, in absence of written stipulation extending time (Code Civ. Proc. § 583).

More than five years having elapsed since filing of original answer by defendants, and parties not having stipulated in writing that time be extended, dismissal for want of prosecution, as provided by Code Civ. Proc. § 583, was proper.

5. Dismissal and nonsuit Ⓒ60(2)—Trial court had discretion to dismiss for failure to exercise due diligence to prosecute action for five years after filing of answer.

More than five years having elapsed since filing of original answer, and parties not having stipulated in writing that time be extended, trial court had discretionary power to dismiss for plaintiff's failure to exercise due diligence in prosecution of the action.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Iona Boyer against Louisa Crichton. From a judgment dismissing the action for want of prosecution, plaintiff appeals. Affirmed.

H. M. Anthony, of San Francisco, for appellant.

R. T. Harding, of San Francisco, for respondent.

PER CURIAM. An appeal from a judgment dismissing the above action for want of prosecution. The action was one to quiet the title to certain real property situated in San Francisco, the complaint (which was filed on June 17, 1919) alleging title in the plaintiff with the right to possession. The original defendants were Louisa and William Crichton,

who, on September 3, 1919, filed an answer to the complaint, denying plaintiff's alleged title and right to possession, and averring title in themselves by virtue of a tax deed and that they were in possession of the property. To this answer the plaintiff filed a general demurrer, following which, on February 3, 1922, the court made the following order: "It is ordered demurrer to answer be sustained; defendants granted permission to file amendment to answer setting up items of reimbursement." Thereafter, on March 24, 1922, Louisa Crichton again answered, setting forth substantially the same denials and allegations as were contained in her original answer, and additional allegations as to the amounts paid to the tax collector of the city and county of San Francisco as the purchase price of the property and the amount subsequently disbursed in payment of taxes assessed thereon, with a further allegation that her codefendant, William Crichton, had, before the commencement of the action, conveyed his interest in the property to her. On March 31, 1922, the plaintiff moved the court to strike out the answer last mentioned, upon the ground that the same did not conform to the order permitting an amendment to the original answer, and on October 21, 1922, the motion was granted, the material portion of the order being as follows: "It is ordered by the court that the above motion be and the same is hereby granted with leave for defendant to file items for reimbursement." No other pleading by way of answer was filed by defendant or further proceedings had in the cause until May 6, 1927, when defendant moved to dismiss under section 583 of the Code of Civil Procedure, more than five years having elapsed since the above answers were filed. Thereupon the plaintiff moved for judgment on the pleadings, which the court denied, and entered its order dismissing the action for want of prosecution.

Appellant claims that, as the effect of the orders with respect to the pleadings of the defendant, no answer remained on file in the case, and no dismissal under the provisions of section 583, Code of Civil Procedure, could properly be made.

[1, 2] The intention of the court in making

the first order is doubtful, for, as contended by respondent, to sustain a general demurrer to the answer and at the same time allow an amendment to the same pleading was contradictory. As held in *Watson v. Lawson*, 166 Cal. 235, 135 P. 961, in case of doubt regarding the signification of a judgment, or any part thereof, the whole record may be examined, and, when the judgment admits of two constructions, that one will be adopted which is consonant with the judgment that should have been rendered on the facts and law of the case.

[3] In the present instance the original answer not only denied specifically the material allegations of the complaint, but also alleged facts showing *prima facie* the title to the property, with the right to possession to be in the defendants. In view of the facts, we are satisfied that no more was intended by the order than to direct the filing of an amendment to the answer setting up the items of disbursement in connection with the purchase of the property and taxes subsequently assessed against the same, and that such is the true construction to be given the order. So construed the original answer was not superseded; the effect of the subsequent order striking out the amended answer being to restore the original pleading. *Spooner v. Cady*, 4 Cal. Unrep. Cas. 539, 36 P. 104; *Wapello State Sav. Bank v. Colton*, 143 Iowa, 359, 122 N. W. 149; *Adams v. Webb*, 104 Okl. 180, 230 P. 878; *Hill v. Jamieson*, 16 Ind. 125, 79 Am. Dec. 414; *Bealle v. Day*, 28 Ga. 435.

[4, 5] More than five years having elapsed since the filing of the original answer by the defendants, and the parties not having stipulated in writing that the time be extended, a dismissal, as provided by section 583, Code of Civil Procedure, was proper. Moreover, the court, under the circumstances, which disclose a failure on the part of the plaintiff to exercise due diligence in the prosecution of the action, had discretionary power to dismiss (*Romero v. Snyder*, 167 Cal. 216, 138 P. 1002; *Overaa v. Keeney*, 169 Cal. 628, 147 P. 466; *Wutchumna Water Co. v. Stevenson* [Cal. Sup.] 267 P. 537), and no abuse of its discretion has been shown.

The judgment is affirmed.

100 Cal. App. 49

FARIA v. BETTENCOURT et al.*
(Civ. 6809.)

District Court of Appeal, First District, Division 2, California. July 18, 1929.

Rehearing Denied Aug. 16, 1929. Hearing Denied by Supreme Court Sept. 12, 1929.

1. Pleading ⚡79—Defense of laches must be pleaded and proved, unless it appears on face of complaint.

Laches is a defense which must be pleaded and proved, unless it appears on face of complaint.

2. Equity ⚡72(1)—In addition to mere lapse of time in bringing suit, it must appear that defendant has been prejudiced by delay, to sustain defense of laches.

To sustain defense of laches, it must appear, in addition to the mere lapse of time in bringing suit, that defendant has been prejudiced by the delay.

3. Quieting title ⚡29—No limitation would run to divest of title or possession plaintiff suing to quiet title in possession during entire period under claim of title.

Where plaintiff, suing to quiet title to realty and to require defendant to execute deed of conveyance in accordance with oral agreement to do so, was in possession during entire period involved under a claim of title, no statute of limitation would run to divest him of title or possession.

4. Husband and wife ⚡16—Wife could not obtain title as against husband by adverse possession during coverture, which continued until entry of divorce decree.

Wife could not obtain title to realty as against husband by adverse possession during coverture, which relation continued until entry of divorce decree.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Frank F. Faria against Manuel Brum Bettencourt and others. Judgment for plaintiff, and defendants appeal. Affirmed.

O. H. Speciale and Owen D. Richardson, both of San Jose, for appellants.

E. H. Christian, of Oakland, for respondent.

NOURSE, J. Plaintiff sued to quiet title to real property situated in Alameda county and to require the defendant Bettencourt to execute a deed of conveyance in accordance with an oral agreement so to do. The trial court found for the plaintiff, and entered judgment as prayed in the amended complaint. The defendants appeal on typewritten transcripts.

In the month of May, 1911, the plaintiff became engaged to Adeline Bettencourt, the daughter of the defendant Manuel. In consideration for the promise to marry the

daughter, to build a home upon the lands described, and to live upon and improve the same, the defendant Manuel promised to convey said lands to the plaintiff. A tract of land, .266 acres in extent, and of about \$250 in value, was measured off and marked by this defendant by a substantial fence, and the plaintiff erected on the premises a home at a cost of \$3,000, and expended \$125 in other improvements. Thereafter the plaintiff and Adeline were married (January 31, 1912), and continued in such relation until November 30, 1927, when a final decree of divorce was entered. The other defendants, Harold and Philip Faria, are the issue of this marriage. The plaintiff and his wife moved into the home constructed by him, and they continued to occupy the premises for about four years. The place was then rented by the plaintiff, who received the rents and paid all taxes and charges thereon.

The trial court found that since the month of May, 1911, and until the trial of the action, the plaintiff had been in the continuous, visible, notorious, and exclusive possession of the premises; that the rental value of the land, exclusive of the improvements made by the plaintiff, did not exceed \$10 a year; and that the improvements made by the plaintiff far exceeded the value of the bare land. The evidence is without substantial conflict, except that, on the part of the defendants, testimony was received to show that the promise of the defendant Manuel was to convey the land to the plaintiff's family rather than to the plaintiff alone, and the defendant Adeline testified that she received the rents from the premises after the family had moved, and that she paid the taxes. Evidence was also tendered of a deed executed by the defendant Manuel in 1915 conveying a life estate to Adeline, with remainder to the heirs of the plaintiff and Adeline.

On this appeal the appellants have not attacked the findings as not supported by the evidence, but they attack the evidence as not being sufficiently clear and convincing to establish a trust. If this were an action for that purpose, the cases cited by appellants would be in point, but this is an action to quiet title to one in possession, and the deed of conveyance is demanded merely as incidental relief in order that the legal title may rest with the equitable title.

[1, 2] The appellants argue that respondent is barred by his laches. This defense was not raised in the trial court, but it is presented for the first time on this appeal. Laches is a defense which must be pleaded and proved, unless it appears on the face of the complaint (Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243), and, in addition to the mere lapse of time in bringing the suit, it must appear that the defendant has been prejudiced by the delay (10 Cal. Jur., p. 530; Victor Oil Co.

v. Drum, *supra*). No prejudice to any of the appellants appears on the face of the complaint or from any testimony which might be applicable to this defense, if we were to consider the point properly before us.

[3,4] It is argued that respondent is barred by various statutes of limitation. But the respondent was found to have been in possession during the entire period under a claim of title, and, as to him, no statute of limitation would run to divest him of title or possession. As to the wife, she could not obtain title by adverse possession during coverture (*Madden v. Hall*, 21 Cal. App. 541, 550, 132 P. 291), and this relation continued until the entry of the decree of divorce on the same day this cause was tried. The appellant Betencourt made no claim of adverse possession, and, of course, no claim could be advanced on behalf of the minor children.

Respondent's case is planted upon the rule of *Peixouto v. Peixouto*, 40 Cal. App. 782, 789, 181 P. 830, 833, where, in a case of similar facts, it was said: "The owner of the equitable title is supposed, for the purposes of a court of equity, to have acquired and to hold the title, and the court will compel the conveyance of the legal title only because the equitable title is not recognized in a court of law; but, where it is recognized, it constitutes ownership, and it cannot be lost by the bar of the statute while the owner is in actual possession and enjoyment of his estate. * * * Since the [vendee] could not be divested of his title by the operation of the statute, it follows that, having the equitable title, he is entitled to enforce a conveyance of the naked legal title as an incident to such equitable ownership. As long as the equitable title exists, it must exist with all its incidents."

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

100 Cal. App. 43

**AMERICAN SODA FOUNTAIN CO. v.
MARTIN. (Civ. 6502.)**

District Court of Appeal, First District, Division 1, California. July 18, 1929.

1. Sales $\S$ 52(7)—Evidence, in action on notes given for soda fountain, held to support finding of fraud and misrepresentation in inducing buyer to purchase.

In action on notes given for purchase price of soda fountain, evidence *held* sufficient to support finding of fraud and misrepresentation as to refrigeration qualities of soda fountain which induced defendant, who, without knowledge of ice cream business, relied on seller's representations, to purchase

2. Sales $\S$ 38(7)—Purchaser may rely on seller's representations regarding facts not within his knowledge, and seller cannot escape liability by showing purchaser might have ascertained representations were untrue.

Purchaser has right to rely on representations of seller as to facts not within his knowledge, and seller cannot escape responsibility by showing that purchaser might have ascertained on inquiry that representations were untrue.

3. Sales $\S$ 41—Rule of caveat emptor does not apply, where seller makes false statements as of his own knowledge, falsity of which is not known.

Where honest dealing is departed from by seller making false statements as of his own knowledge, falsity of which is not known by purchaser, such purchaser has right to rely implicitly on statements, and general rule of caveat emptor does not apply.

4. Evidence $\S$ 434(11)—Parol evidence is admissible to impeach written sales contract for fraud.

Written sales contract may be impeached for fraud, and parol warranty actually made may be relied on rather than written one shown to be fraudulently imperfect; parol evidence always being admissible to prove fraud.

5. Sales $\S$ 272—Buyer having no knowledge of ice cream business, which seller knew, there was implied warranty of merchantability of soda fountain purchased on seller's recommendations (Civ. Code, $\S$ 1771).

Where purchaser intended to enter the ice cream business, which he was not familiar with, and had no knowledge of soda fountain equipment, which seller knew, and on advice of seller that soda fountain purchased would be adequate for purposes intended, seller under circumstances *held* to have given assurance that soda fountain was adequate or suitable to general purpose or ordinary work for which articles of the same kind are designed, under Civ. Code, $\S$ 1771.

6. Sales $\S$ 268(1)—Purchaser not knowing of fitness for purpose, and relying on vendor's judgment, there was warranty that seller had no knowledge of facts destroying inducement to buy (Civ. Code, $\S$ 1767).

Where purchaser had no knowledge as to fitness of soda fountain to be used in ice cream business, and relied on judgment of seller, Civ. Code, $\S$ 1767, providing that one who sells or agrees to sell personal property knowing that buyer relies on his advice or judgment, warrants that neither seller nor agent knows of any fact concerning thing sold which would destroy buyer's inducement to buy, was applicable.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by the American Soda Fountain Company against A. W. Martin. Judgment for defendant, and plaintiff appeals. Affirmed.

T. P. O'Brien and Whalen, Harzfeld & O'Brien, all of San Francisco, for appellant.

Alva S. Sherlock, of Concord, and Archibald B. Tinning and Tinning & Delap, all of Martinez, for respondent.

PER CURIAM. This is an action by the payee of three promissory notes to recover \$364.25 and interest alleged to be due from the maker of the notes, which notes represent a portion of the installments of the purchase price of a soda fountain sold by plaintiff to defendant under a conditional sales contract for the total price of \$2,217. Certain down payments were made, and the balance under the contract is payable by a number of promissory notes becoming due during the life of the contract, among which are the notes in suit. The defendant, finding that the machine did not function as plaintiff had asserted it would, failed to pay the first notes coming due, and plaintiff brought this action upon such notes, the defendant setting up the following defenses: (1) The fraud of plaintiff arising from the misrepresentation of its salesmen which induced defendant to enter into the contract; (2) total failure of consideration; (3) a breach of the implied warranty of merchantability under section 1771 of the Civil Code. The trial court found for the defendant on all three defenses, and rendered judgment accordingly, and plaintiff has appealed from such judgment, urging that the evidence does not support the findings.

From the record, it appears that the defendant was about to enter the ice cream business in conjunction with a gasoline service station he was operating in the town of Concord; that he had never been in the soda or ice cream business, but had been a telegraph operator before conducting a service station, and had no information at all concerning the ice cream business. He went to San Francisco to investigate equipment, and in the course of his shopping he went into plaintiff's salesroom, and was shown the machine which was afterwards delivered under the contract. It further appears from the record that the agents of plaintiff knew of defendant's ignorance of the ice cream business, as is evidenced by the testimony of plaintiff's manager, which shows that he explained to defendant the most elementary facts concerning ice cream storage. Also plaintiff's salesman, Hugh D. Cameron, told defendant the machine would keep ice cream at a uniform temperature, and laid particular stress on the advisability of buying a mechanical refrigerated fountain over an ice and salt fountain. Cameron went to Concord to look over the possible placing of the fountain in defendant's establishment, and spent several hours there discussing the fountain with defendant and explaining to him its construction and operation. It is apparent that the defendant was wholly ignorant of the ice cream business into which he was about to venture, and plaintiff's agents, skilled men in the business,

advised that the automatic refrigerating machine sold by them would keep ice cream at a uniform temperature, and was more suited to his business than a salt and ice pack fountain. It is further apparent that defendant relied upon them to advise him as to the proper equipment upon their knowledge of the purpose for which he intended to use the machine. In order to induce defendant to enter into the contract, plaintiff's agents represented to defendant that this machine would keep ice cream in proper condition; Mr. Dennis, plaintiff's sales-manager, testifying that he told defendant "it would keep his ice cream in a firm condition and that it wouldn't permit him to lose the swell of the ice cream," and according to the testimony of defendant: "He told me it would keep ice cream perfect. It was so insulated that there was no chance for the refrigeration to escape."

There is no question from the evidence but that the machine did not keep the ice cream in proper condition, and that there was continual difficulty due to the ice cream being soft on the top or frozen on the bottom of the containers, and that this condition of the ice cream rendered it valueless for sale. It is likewise clear that the agents of plaintiff led defendant to believe that the device he was purchasing would automatically keep ice cream firm under the conditions confronting him in his place of business. They unequivocally stated that the device would keep ice cream firm and would not permit him to lose the swell. The evidence further shows that under the best conditions a large part of the ice cream spoiled while defendant hopelessly asked for assistance from plaintiff. It further appears that before and at the time of the execution of the sales contract there were other machines on the market designed for the same purpose as the machine sold by plaintiff, which would and did store ice cream for weeks without softening or hardening; that the machine, although sold as having a capacity for storing six five-gallon ice cream containers, was unable to hold them at a temperature which would permit the ice cream to be dispensed therefrom; that approximately two-fifths of the capacity of the machine had to be sacrificed in order to operate the machine without loss of ice cream stored therein. It further appears that from the commencement of the operation of the machine in December until April continuous attempts were made by plaintiff to make the machine operate properly without success, and plaintiff's agent suggested to defendant that he procure other equipment, and finally promised to supply him with a new machine or return him his money. Nothing, however, was done, and plaintiff discarded the machine and purchased another, after which his troubles ceased.

The testimony shows that this defect in capacity was inherent to the machine sold to defendant. W. V. Dennis, plaintiff's manager, testified: "Q. Do I understand, then, that your testimony is, when you set it so it would freeze hard at the top, it was unsatisfactory to have the cabinet so he couldn't dispense below the top? A. It wouldn't be satisfactory, no, to get the best use out of the cabinet we manufactured at that time. It was necessary to get it at a temperature whereby he could dip his cream both at the top and bottom, but unfortunately we hadn't made a soda fountain at that time that would do it." Paul Overmahle, an expert, testified that the machine would not keep the ice cream in a five-gallon container because the brine level was too low and could not be raised; that the machine would have to be rebuilt to store the ice cream to the capacity to which it was designed.

[1] The foregoing testimony and the inferences properly drawn therefrom sufficiently support the finding of fraud and misrepresentation that the false statements and representations were willfully and knowingly made for the purpose of inducing the defendant to enter into the contract; that, at the time of making the representations, the plaintiff's agents and employees well knew that, because of the defective design of the machine, it would not keep ice cream stored therein for more than ten or twelve hours, and in the business of defendant he would require it to be stored therein from three days to a week, and that defendant, wholly relying upon the agents of plaintiff, was induced by reason thereof to enter into the contract and sign the promissory notes, and that plaintiff's agents were skilled in the installation and operation of refrigeration devices of the character of the one sold, and that defendant was wholly ignorant and unfamiliar in the handling and dispensing of ice cream to the retail trade, and relied upon the representations of plaintiff's agents.

[2, 3] There is no merit in appellant's contention "that defendant had ample opportunity to investigate the relative merits, and to inquire into the principles of construction and appearance of other soda fountains." Under analogous circumstances the Supreme Court, in the recent case of *Ferguson v. Koch*, 268 P. 342, 344, 58 A. L. R. 1176, held: "A purchaser has a right to rely on the representations of his vendor as to facts not within his knowledge, and the vendor cannot escape responsibility by showing that the purchaser might have ascertained upon inquiry that the representations were untrue"—and further: "The general rule is well established that, where parties deal fairly or at arm's length, the rule of caveat emptor applies, but, where honest dealing is departed from by the vendor making false statements

as of his own knowledge, the falsity of which is not known to the purchaser, such purchaser has the undoubted right to rely implicitly upon such statements, and the principle has no application. In other words, the vendor must stand mute, or at least refrain from making statements calculated to deceive."

[4] The facts of the present case seem to bring it under the rule announced in *Ferguson v. Koch*, supra, not only as to the vendee's right to rely upon the representations of the vendor as to facts within his knowledge, but also with respect to appellant's objection that "where there is a written contract of sale reciting the terms and conditions of sale, parol evidence is inadmissible to prove fraud," for in *Ferguson v. Koch* it is also said: "It is equally well settled, however, that a writing may be impeached for fraud, and a parol warranty really made may then be relied upon rather than the written one thus shown to be fraudulently imperfect." Furthermore, the rule is well established that parol evidence is always admissible to prove fraud. *Mooney v. Cyriacks*, 185 Cal. 70, 80, 195 P. 922, and cases cited.

[5, 6] Here, as was said in *Ferguson v. Koch*, supra, "the trial court having found that the false representations were made, and there being ample evidence in the record to support the conclusion, the judgment must stand," and it becomes unnecessary to discuss the other objections urged. It may, however, be said that the finding that there is a failure of consideration is supported; that "the seller is considered to have warranted that it would correspond with the description or exemplar; and from the circumstances he is deemed to have given an assurance that the chattel was adequate or suitable to the general purpose or ordinary work for which articles of the kind are designed." 22 Cal. Jur. 1002; *Hoult v. Baldwin*, 78 Cal. 410, 20 P. 864. And, as the vendee had no knowledge as to the fitness of the machine for the purpose for which he was intending using it, and relied upon the judgment of the vendor, section 1767 of the Civil Code applies: "One who sells or agrees to sell personal property, knowing that the buyer relies upon his advice or judgment, thereby warrants to the buyer that neither the seller, nor any agent employed by him in the transaction, knows the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy." Clearly, had plaintiff's agent told defendant, as he stated when testifying as a witness: "It was necessary to get it at a temperature whereby he could dip his cream both at the top and bottom, but unfortunately we didn't make a soda fountain at that time that would do it," defendant's inducement to buy would have been destroyed.

The judgment is affirmed.

refusal to do so for want of jurisdiction after judgment against applicant in an action by the California Pacific Realty Company against the California Pacific Title Insurance Company and applicant. Application denied.

James A. Keown, in pro. per.

Henry E. Monroe and Robert A. Woodyard,
both of San Francisco, for respondents.

207 Cal. 769

KEOWN v. CALIFORNIA PACIFIC REALTY CO. et al. (L. A. 11382)

Supreme Court of California. Aug. 14, 1929.

1. Exceptions, bill of $\S$ 55(1)—Statute authorizing application to Supreme Court to prove bill of exceptions is inapplicable, where trial court for any reason refused to settle exceptions (Code Civ. Proc. $\S$ 652).

Code Civ. Proc. $\S$ 652, providing that, if trial judge in any case refuses to allow bill of exceptions in accordance with facts, party desiring bill settled may apply by petition to Supreme Court to prove same, has no application to case where trial court has for any reason refused to settle bill of exceptions.

2. Exceptions, bill of $\S$ 51—Refusal to settle bill of exceptions filed too late, where ex parte orders extending time were void, was not error (Code Civ. Proc. $\S\S$ 953a, 1054).

Where ex parte orders extending time for settlement of proposed bill of exceptions were ineffectual and void, under Code Civ. Proc. $\S$ 1054, providing that time allowed by section 953a, for preparation and settlement of bills of exception, shall not be extended beyond 30 days without consent of adverse party, refusal to settle bill of exceptions was not error.

3. Exceptions, bill of $\S$ 55(1)—Refusal to settle bill of exceptions after time allowed therefor held not to furnish reason for Supreme Court to grant relief (Code Civ. Proc. $\S\S$ 473, 953a).

Where no sufficient showing before trial court was made, under Code Civ. Proc. $\S$ 473, authorizing court in furtherance of justice and on such terms as may be proper to allow additional time, to warrant allowance of application for settlement of bill of exceptions after time allowed by section 953a had expired, refusal of trial court to grant relief held not to furnish reason why Supreme Court should grant relief.

4. Exceptions, bill of $\S$ 53(3)—Mandamus is proper remedy on trial court's refusal to settle bill of exceptions as required.

Where trial court refused to settle bill of exceptions, proceeding in mandamus to compel trial court to proceed with settlement thereof was proper remedy.

In Bank.

Application by James A. Keown for settlement of bill of exceptions on the trial court's

RICHARDS, J. The petitioner has applied to this court for the settlement by it of a bill of exceptions in a certain action entitled California Pacific Realty Company, a Corporation, Plaintiff, v. California Pacific Title Insurance Company, a Corporation, and James A. Keown, Defendants, which action was commenced in the superior court in and for the city and county of San Francisco, state of California, on February 3, 1926, and which, after due service of process upon the defendants therein and after issue joined, came on for trial on January 16, 1928. Upon the trial and submission of the cause, the trial court rendered and entered its judgment on February 17, 1928, in favor of the plaintiff and against the defendant James A. Keown, the petitioner herein. Notice of the judgment and the entry thereof was duly served upon the petitioner on February 28, 1928. On March 14, 1928, the petitioner filed his notice with the clerk to prepare the transcript on appeal from such judgment under the provisions of section 953a of the Code of Civil Procedure and which, according to the admissions of his petition herein, was too late, as having been filed ten days beyond the time provided in said section. The trial court accordingly refused to permit the petitioner, as appellant therein, to have prepared a transcript upon his appeal under the provisions of said section of the Code; whereupon, and on April 13, 1928, the said defendant filed a second notice of appeal, and on April 20, 1928, moved the trial court ex parte to extend his time to perfect his appeal. The trial court denied his motion, but in doing so allowed the defendant 30 days' additional time to prepare a bill of exceptions upon said appeal. On May 2, 1928, the trial court made a further ex parte order, upon the defendant's application, allowing him an additional 30 days within which to prepare said bill of exceptions. On June 18, 1928, the said defendant presented and filed his bill of exceptions, and on July 9, 1928, applied to said court for the settlement thereof. On July 10, 1928, the respondent upon said appeal, California Pacific Title Insurance Company, presented and filed its objections to the settlement of the appellant's proposed bill of exceptions. The appellant's application for the settlement of said bill of exceptions and the respondent's opposition thereto came on for hearing before the trial court on September 28, 1928; whereupon the trial court refused to take any action thereon, for the as-

signed reason that it was without jurisdiction so to do. Thereupon the petitioner moved the trial court, upon notice, to extend his time for the settlement of said bill of exceptions, purporting so to do under the provisions of section 473 of the Code of Civil Procedure. He also, on November 28, 1928, gave notice of appeal from the order of the trial court refusing to settle said bill of exceptions. On January 4, 1929, the trial court denied the defendant's application for a further extension of time within which to have settled his aforesaid bill of exceptions. On January 5, 1929, the petitioner filed in this court his petition asking this tribunal to settle his bill of exceptions, and proffering as a part of his application a proposed draft of said bill of exceptions. The respondents herein have presented and filed their opposition to the granting of the petition, supporting the same by affidavits which do not materially controvert the averments of the petition, and with a certified copy of the entries upon the docket of the trial court more particularly identifying the dates upon which the various proceedings were taken to which the petition herein relates.

[1, 2] The only questions presented to this court for decision are, first, as to whether there exists any authority in law empowering this court to grant the petition herein or to make any such order looking to the settlement of appellant's bill of exceptions as is prayed for by his petition herein; second, whether the petitioner has not mistaken his remedy, which should have been by way of mandamus to compel the trial court to proceed with the settlement of his bill of exceptions. Upon the first of these questions we are satisfied that under the authorities this court has no power to settle the petitioner's proposed bill of exceptions. Section 652 of the Code of Civil Procedure, upon which he relied for such authority, has no application to a case where the trial court has for any reason refused to settle a bill of exceptions. See 2 Cal. Juris. § 305, p. 578, wherein this subject is fully discussed. See, also, *Estate of Dolbeer*, 147 Cal. 569, 82 P. 192. But, were it otherwise, upon the merits of the defendant's application to the trial court for the settlement of his bill of exceptions, it sufficiently appears from the averments of his own petition herein that the ex parte orders which he obtained extending the time for the settlement of his proposed bill of exceptions were ineffectual and void as in violation of the provisions of section 1054 of the Code of Civil Procedure, which expressly provide, with relation to the preparation and settlement of bills of exceptions, that the time allowed therefor by the Code shall not be extended beyond the period of 30 days without the consent of the adverse party.

[3] With respect to the petitioner's final

application, under section 473 of the Code of Civil Procedure, for relief from his default in preparing said bill of exceptions within the limited time allowed by law, no sufficient showing was made before the trial court to warrant the granting of such relief, nor would the refusal of the trial court to grant the same furnish any reason why this court should undertake to exercise any jurisdiction in the way of granting the relief prayed for by the petitioner herein.

[4] Upon the second question presented herein it would seem to be clear that the petitioner's only possible relief from the adverse action of the trial court in refusing to settle his said bill of exceptions would have been by way of an application for a writ of mandate, for which he has not applied and for which no sufficient showing has been made in his said petition, even if the same could by any stretch of interpretation be held to constitute an application for such a writ.

The petitioner's application is denied.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

207 Cal. 652

MERCED SECURITY SAV. BANK v. BENT BROS., Inc. (Sac. 4158.)

Supreme Court of California. July 23, 1929.

1. Evidence ☞595—Trial court must construe evidence in light of entire transaction involved and make necessary deductions therefrom.

Trial court has duty of construing evidence in light of entire transaction involved and making necessary deductions therefrom.

2. Bills and notes ☞525—Evidence held to support finding that indorsee accepted check in settlement of clearance in good faith, for value, without notice of maker's equities or payee's insolvency.

In action on check on which payment had been stopped, evidence held to support finding that check was taken by indorsee bank in settlement of clearance of business between it and payee bank, for a valuable consideration, in good faith, and without notice of equities existing in favor of maker or knowledge of insolvency of payee bank.

3. Banks and banking ☞286—Transaction transferring check in settlement of clearance business held not made to prevent application of assets, as prescribed by banking laws (National Banking Act; 12 USCA § 91).

Where indorsee bank accepted check from payee bank in settlement of clearance in usual course of business, without knowledge of payee bank's insolvency, though previous draft in settlement of clearance had been dishonored, after which indorsee made no investigation, transaction held not made with view to prevent application of assets, in manner prescribed by National Banking Act, 12 USCA § 91.

4. Bills and notes **337—Indorsee of check regular on face, not previously dishonored, taken in good faith and for value, did not have notice of defect in title (Civ. Code, § 3137).**

Under Civ. Code, § 3137, providing that, to constitute notice of infirmity in check or defect in title thereto, indorsee must have had actual knowledge of infirmity or defect, or knowledge of such facts that its action in taking instrument amounted to bad faith, where check was complete and regular on its face, and had not been previously dishonored, and was taken by indorsee in good faith in settlement of clearance business, indorsee held not to have had notice of any defect in title of payee bank.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Merced Security Savings Bank against Bent Bros., Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

Hill, Morgan & Bledsoe, of Los Angeles, and Hugh K. Landram, of Merced, for appellant.

Louis Ferrari, of San Francisco, F. W. Henderson, of Merced, and C. H. White, of San Francisco, for respondent.

WASTE, C. J. On the 17th day of September, 1926, at Los Angeles, Bent Bros., Inc., the appellant here, drew its check on the Merchants' National Bank of Los Angeles in the sum of \$5,000, payable to the order of the Farmers' & Merchants' National Bank of Merced. It mailed the check to the Merced bank for the purpose of depositing the amount of the check to its credit. The bank received the check by mail on the morning of September 18, and credited the sum of \$5,000 in the usual manner to the account of Bent Bros., Inc. Later in the day it indorsed and delivered the check to the Merced Security Savings Bank, the respondent, in settlement of a clearance of business for that day between the two institutions. At noon, the Farmers' & Merchants' National Bank of Merced closed its doors, and, under orders from the national bank examiner, was not thereafter permitted to resume business.

When the respondent presented the check of Bent Bros., Inc., to the Los Angeles bank on which it was drawn, payment had been stopped, and the check was accordingly dishonored. Respondent thereupon presented the check to Bent Bros., Inc., and its payment was again refused. The Merced Security Savings Bank thereupon brought this action against Bent Bros., Inc., to recover the amount of the check. The trial court found that the plaintiff took the check as an innocent purchaser, and in good faith for value, and without notice of any equities existing in favor of Bent Bros., Inc., and without any knowledge of the insolvency and consequent

inability of the Farmers' & Merchants' National Bank of Merced to meet its financial obligations. Judgment was accordingly entered for the plaintiff, and the defendant has appealed.

Appellant disputes the correctness of the findings of the trial court, and contends that the evidence not only fails to give them support, but, on the contrary, "conclusively demonstrates that the defendant had the legal right to stop payment of the check, and therefore cannot be held liable by reason of its nonpayment." The evidence upon which appellant relies for support of its contention that the respondent was not a holder in due course, but took the check in question with knowledge of its infirmity, relates to the transactions had between the two Merced banks during the forenoon of Saturday, September 18, in settlement of the balance shown by their clearances for the 17th and 18th. There appear to have been two independent settlements. A draft on the San Francisco correspondent of the Farmers' & Merchants' National Bank, which it had given to respondent in settlement for the balance due respondent following the clearances on Friday, the 17th, was dishonored. Respondent was notified of that fact by a telephone message from the San Francisco correspondent of the Farmers' & Merchants' National Bank at about 10 o'clock on Saturday morning. The officers of respondent immediately got in touch with the officers of the Farmers' & Merchants' National Bank for the purpose of getting "either the cash or satisfactory security" for the amount of its dishonored draft, in order to avoid the necessity of charging it back to the Farmers' & Merchants' National Bank or its San Francisco correspondent. It was agreed between them that respondent would accept "notes and any other securities" the Farmers' & Merchants' National Bank might have to cover the amount of the dishonored draft. This arrangement appears to have been carried out and adjusted just prior to the closing of the banks for the day; and the officers of the two banks thereupon entered upon the customary Saturday clearance for the business done between the banks on the morning of the 18th. The balance was found to be in favor of the respondent, and the Farmers' & Merchants' National Bank indorsed and delivered to respondent, in settlement, five checks which had been drawn in its favor, including the check for \$5,000 drawn by appellant, the aggregate amount of the checks being \$7,500. It does not appear that there was a clearing house in existence at Merced at this time. The banks seem to have settled their business transactions directly between themselves. At least, that was so in the case at bar, and according to the evidence the settlement on the

morning of September 18 was had in accordance with the usual and ordinary course of business between the two institutions. Thus far, the evidence fully sustains the finding of the trial court that the respondent bank took the check in the due course of business between itself and the Farmers' & Merchants' National Bank of Merced, and for a valuable consideration.

The Farmers' & Merchants' National Bank transacted business as usual until 12 o'clock noon on Saturday, September 18, when it closed its doors for the day. On Sunday, September 19, its directors met, and by resolution declared that, inasmuch as the bank was in an insolvent condition, its reserves exhausted, and its credit impaired, its doors would not be opened, but it would be placed in the hands of the national bank examiner, unless the officers of the bank were able to obtain cash from some source to enable it to carry on, before 10 o'clock on Monday, the 20th. Apparently the institution was unable to secure the needed cash, for, by direction of the national bank examiner, it did not thereafter do any banking business. From these facts, and because of the fact of notice of the dishonoring of the draft drawn in favor of respondent in settlement of Friday's clearings between the two institutions, the appellant argues that the respondent was fully cognizant of the insolvent condition of the Farmers' & Merchants' National Bank, and did not act in good faith in the transaction, in that it took the check after notice of the dishonor of the draft, and did not make, or cause to be made, any investigation for the purpose of ascertaining whether or not the funds of the Farmers' & Merchants' National Bank had been exhausted.

[1, 2] We are of the view that the testimony of the officers of the respondent bank sufficiently shows that the action taken by that bank was neither fraudulent nor taken in bad faith. There is evidence that one or more of the officers of the respondent bank may have had some knowledge at some time on Saturday, the 18th, that "the condition of the Farmers' & Merchants' National Bank was not altogether satisfactory"; but it falls short of demonstrating that the respondent was acting in bad faith and with a view to protect itself against loss, in the event the Farmers' & Merchants' National Bank was insolvent. We are not prepared to accept the construction that appellant advances of the testimony as to what, if any, knowledge the officers of the respondent bank had concerning the affairs of the other institution. The trial court was charged with the duty of construing the evidence, in the light of the entire transaction, and making the necessary deductions therefrom. We are not prepared to hold that it was wrong in reaching the result it did.

[3] Appellant contends that the transfer of the check of the appellant to the respondent bank was null and void, in that it was made after the commission of an act of insolvency, or in contemplation thereof, and made with a view to prevent the application of its assets in the manner prescribed by the National Bank Act (12 USCA § 91). It cites and relies upon *National Security Bank v. Butler*, 129 U. S. 223, 9 S. Ct. 281, 32 L. Ed. 682; but the facts there were different. We gather from the opinion that the transfer there in question was made after the directors had voted that the bank should go into liquidation, and should be closed to business, and it was made with a view, on the part of the Pacific Bank and of its cashier, who represented it and acted for it in this transfer of its assets, to prevent the application of its assets in the manner prescribed by the National Bank Act, and with intent to prefer the bank to which the transfer was made over other creditors. We are unable to discover in the transaction before us any such motive, either on the part of the Farmers' & Merchants' National Bank or the respondent, or their officers.

[4] To constitute notice of any infirmity in the check of the appellant, or defect in the title thereto of the Farmers' & Merchants' National Bank, the respondent must have had actual knowledge of the infirmity or defect, or knowledge of such facts that its action in taking the instrument amounted to bad faith. Civ. Code, § 3137. The check was complete and regular upon its face, and it had not been previously dishonored. It was taken by the respondent in good faith and for valuable consideration, passing by reason of the settlement for the balance due on the clearances on September 18, and respondent had no notice of any defect in the title of the negotiating bank.

The judgment is affirmed.

We concur: PRESTON, J.; SEAWELL, J.; CURTIS, J.; RICHARDS, J.

CITY OF FRESNO v. DILLON et al.
(S. F. 12298.)

207 Cal. 714

Supreme Court of California. July 31, 1929.

1. Municipal corporations §173(2)—Duty of commissioner of finance to collect license fees in city of Fresno held within his official bond; "official duties required of him by law" (Const. art. 11, § 8; Fresno City Charter).

Under Const. art. 11, § 8, an ordinance of the city of Fresno, imposing on the license collector the duty of collecting license fees, was superseded by the adoption of a new city charter (St. 1921, p. 1821), creating a department of finance, and imposing on the commissioner

of finance the duty of collecting such fees, notwithstanding such duty was not transferred by ordinance, and hence the commissioner's duty of making such collection was among the "official duties required of him by law" within his official bond.

2. Municipal corporations ⇒173(2)—Approval by commissioner of finance of municipal bonds for payment which had already been made rendered commissioner and surety liable on official bond; "official duties required of him by law" (Fresno City Charter).

Although Fresno City Charter (St. 1921, p. 1821) did not impose on commissioner of finance duty of approving municipal bonds for payment by city treasurer, but commissioner had nevertheless approved bonds according to a custom which had developed, where such bonds were presented to him for approval a second time, the duty of withholding his approval as of an unauthorized claim against the city was among the "official duties required of him by law" under his official bond, and therefore a second approval of bonds which had already been paid rendered him and his surety liable.

Waste, C. J., and Seawell, J., dissenting.

In Bank.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by the City of Fresno against Charles F. Dillon and another. Judgment for plaintiff, and defendants appeal. Affirmed.

For opinion of District Court of Appeal, see 273 P. 1106.

Lindsay & Gearhart, of Fresno, and Joe Crider, Jr., of Los Angeles, for appellants.

W. E. Simpson, City Atty., of Fresno, for respondent.

CURTIS, J. The city of Fresno brought an action against Charles F. Dillon and the Massachusetts Bonding & Insurance Company, surety upon Dillon's official bond, as commissioner of finance of the city, to recover license fees alleged to have been collected by Dillon and not accounted for, and the amount of certain illegal payments on municipal bonds authorized by Dillon during his term of office. Judgment was entered in favor of the city, and the defendants have appealed.

The District Court of Appeal of the First Appellate District, Division 1, to which the cause was transferred for hearing and determination, affirmed the judgment in toto. On petition for hearing by this court, the appellants do not stress, in fact, we may assume that they concede, the correctness of the judgment in the lower court, as affirmed by the District Court of Appeal, in so far as it relates to the shortage in the license fees collected by Dillon. We are of the view that the judgment as a whole should be affirmed, and we therefore adopt the decision of the District Court of Appeal, written by Mr. Justice SPENCE, pro tem., and concurred in by Mr. Presiding

Justice TYLER and Mr. Justice KNIGHT, as follows:

Dillon was elected to the office of commissioner of finance of the city of Fresno under the new charter which became operative in 1921. His official bond provided: "Now, if the said Charles F. Dillon shall well, truly and faithfully perform all official duties required of him by law, and all such additional duties as may hereafter be imposed on him as such officer by any law hereafter enacted, then the above obligation to be void, otherwise to remain in full force and virtue."

There was a shortage of \$5,533.32 in the license fees collected. Dillon approved claims or demands and caused warrants to be drawn for the payment of certain municipal bonds totaling \$6,000, and thereafter, when these bonds in some manner were again presented, Dillon approved claims or demands and caused warrants to be drawn for a second payment of the same bonds.

The liability of Dillon individually for his irregularities is not questioned, but counsel for appellants contends that neither Dillon nor his surety is liable on his official bond as it was not the official duty of Dillon to collect the license fees nor to pay municipal bonds involved. No other question is raised on this appeal.

[1] We will first consider the situation with respect to the license fees above referred to. These license fees were collected under the provisions of Ordinance No. 846, which ordinance became effective several years prior to the adoption of the new charter. At that time Fresno was functioning under its previous charter, which created the office of license collector. The ordinance by its terms made it the duty of the license collector to collect the license fees imposed upon various trades, professions, and businesses. The new charter of 1921 (Stats. 1921, p. 1821) made no mention of the office of license collector. It created a department of finance headed by a commissioner of finance. Section 1 expressly authorized the city to "license for purposes of revenue and regulation, * * * all businesses, occupations, trades, professions, enterprises and projects and persons engaged therein, and for said purposes to assess, levy and collect license fees. * * *" By section 145 it provided that "All * * * city ordinances, * * * now in force and not inconsistent herewith, shall be and remain in force after this charter takes effect until changed or repealed by the proper authority. * * *" Section 38 provided that "the Commissioner of Finance shall have control and jurisdiction over the keeping of accounts and financial records; the auditing of accounts and claims; the levy, assessment and collection of taxes, special assessments, license fees and other revenues. * * *" In section 55 it provided that "All taxes, special assessments and

license fees accruing to the city shall be collected by officers and ex-officio officers of the Department of Finance. All moneys received by any officer or employee of the city for or in connection with the business of the city shall be paid promptly into the treasury."

Prior to the adoption of the charter of 1921, a certain Harry Erickson was serving as license collector. Upon the adoption of the charter and the qualification of Dillon, Erickson was appointed by Dillon as a deputy commissioner of finance. The license fees were thereafter paid into the office of the commissioner of finance; it appearing that Erickson was actually placed in charge of the collection of these fees.

Counsel for appellants takes the position that Ordinance 846 remained in force and effect in its entirety after the adoption of the charter of 1921, and that, as the duty of collecting these fees was never transferred by ordinance from the license collector to the commissioner of finance, it was not the official duty of the latter to collect and account for the fees.

With these conclusions we cannot agree. By article 11, § 8, of the Constitution, it is provided that, upon the approval of a charter, by the Legislature, "it shall become the organic law of such city or city and county, and supersede any existing charter and all laws inconsistent therewith." The general provisions of Ordinance 846 imposing the license fees were entirely consistent with the new charter, and the provisions thereof imposing the duty of collecting the license fees were inconsistent but separable. The new charter of 1921 by express terms gave the "control and jurisdiction over * * * the collection of * * * license fees" to the commissioner of finance. Section 38. The effect of this provision was to transfer to the commissioner of finance all duties with respect to the collection of license fees previously imposed by charter or ordinance upon the license collector. It thereupon became the official duty of the commissioner of finance to collect the license fees in question, and further legislation by ordinance was unnecessary for this purpose.

[2] With respect to the unauthorized approval by Dillon of double payments on certain municipal bonds, counsel urges that no liability exists on Dillon's official bond, as Dillon could not legally make payment of these bonds. The bonds in question were issued in 1916 and were "payable at the office of City Treasurer. * * *" Under section 58 of the charter of 1921 it was provided that "Payment by the city shall be made only upon vouchers certified by the commissioner of the appropriate department, or by the presiding officer of the appropriate board or other division of the city government, and by means of warrants on the city treasury, issued by the Commissioner of Finance. The Commissioner of Finance shall examine all payrolls, bills

and other claims and demands against the city; and shall issue no warrant for payment unless he finds that the claim is in proper form, correctly computed and duly certified that it is justly and legally due and payable, that an appropriation has been made therefor which has not been exhausted or that the payment has been otherwise legally authorized, and that there is money in the city treasury to make payment. He may require any claimant to make oath to the validity of a claim. He may investigate any claim and for such purposes may examine witnesses under oath, and if he finds it is fraudulent, erroneous or otherwise invalid, shall not issue a warrant therefor, and, if the situation warrants, shall call the matter to the attention of the City Commission for appropriate action."

By virtue of the broad powers and duties of the commissioner of finance under this section and of section 38 of the charter, a custom developed whereby all claims and demands, including those for payments on bonds, were presented to the commissioner of finance for allowance and approval, and the commissioner would then in the case of bonds retain the bonds and issue warrants in favor of the bondholders upon the city treasurer. That this procedure was unnecessary with respect to city bonds, and that the bondholder was entitled to payment by the treasurer without the approval, allowance, or the issuing of a warrant by the commissioner of finance was ultimately determined in a case involving one of these same bonds of the City of Fresno. *Commercial & Savings Bank v. Ewing*, 66 Cal. App. 231, 225 P. 476. However, during the time the above-mentioned custom was in vogue, Dillon did approve, allow and cause his deputy to issue a warrant for the payment of a group of these bonds to the Pacific Southwest Trust & Savings Bank, which warrant was paid by the treasurer. The face of the warrant did not show what bond payments were covered thereby, but the records in the office of the commissioner of finance did so show. The above bonds mysteriously disappeared from the office of the commissioner of finance, and several of them were again presented to the commissioner by various persons for approval and allowance within 30 days after their original presentation. In each instance Dillon again approved, allowed, and caused his deputy to issue warrants for a second payment of these identical bonds. These warrants were also paid by the treasurer, resulting in the double payment by the city of the bonds in question.

There is no doubt, under the authority of *Commercial Savings Bank v. Ewing*, supra, that it was the duty of the treasurer to pay these municipal bonds upon presentation without the approval, allowing, or drawing of a warrant by the commissioner of finance, and that it was no part of the official duty of the commissioner of finance to pay said bonds or authorize their payment. This does not,

however, foreclose the inquiry in the present case regarding the nature and extent of the official duties of the commissioner of finance.

Sections 38 and 58 of the charter of 1921 gave to the commissioner of finance very broad and general powers with respect to the finances of the city, including the auditing and approving of claims and demands and the issuing of warrants therefor upon the city treasury. Upon the issuing of a warrant by the commissioner of finance, payment by the treasurer apparently followed as a matter of course. Section 130 of the charter of 1921 provided: "Every officer who shall approve, allow or pay any demand on the treasury not authorized by law, ordinance or this charter, shall be liable to the city individually and on his official bond for the amount of the demand so illegally approved, allowed or paid." It is from the above-mentioned sections that the nature and extent of the official duties of the commissioner of finance must be here determined. No case construing similar provisions has been called to our attention. A reading of these sections leads to the conclusion that it was the official duty of the commissioner generally to approve and issue warrants for the payment of authorized claims, and that it was likewise his official duty to withhold approval of and refrain from issuing warrants for the payment of unauthorized claims. The fact that it was not his official duty to pay or approve the payment of these municipal bonds in the first instance does not change the situation in the present case so far as the subsequent unauthorized approval is concerned. These bonds and a record of their approval were retained in Dillon's office. Dillon knew, and the records of his office disclosed, that these bonds had been covered by the warrant previously issued by him. When these bonds disappeared from the office and were presented with new demands shortly thereafter, his action in approving their payment a second time and issuing warrants therefor constituted the approval by Dillon of unauthorized demands against the city in violation of his official duty, for which he and his surety are liable on his official bond as provided in section 130 of the charter.

In the case of *County of San Luis Obispo v. Farnum*, 108 Cal. 562, 41 P. 445, which case is relied upon by appellants, the court, on page 564 (41 P. 446), in discussing whether it was the official duty of the auditor to pay over to the county certain county funds received by him and which it admittedly was no part of his official duty to receive, pointed out that such duty as existed to pay over these funds "did not arise out of his office, nor was it at all different from the duty which would have rested upon him to pay it over had he been a plain citizen not holding any county office." In the present case the duty of withholding approval of any unauthorized claim or demand was a duty imposed

upon Dillon officially and not as a private citizen. Dillon's actions here in approving these unauthorized claims and demands and issuing warrants for their payment constituted the wrongful exercise of the general powers conferred upon him in his official capacity as commissioner of finance by the charter.

Counsel also quotes at length from *City of San Jose v. Welch*, 65 Cal. 358, 4 P. 207, contending that the situation there is analogous to the present case so far as the collection of license fees is concerned. In that case, however, the bond was conditioned upon the faithful performance of the duties of "city assessor and city clerk, according to the laws and ordinances and regulations passed and approved by the mayor and common council of the city of San Jose." By ordinance the duty to collect the taxes was not placed upon this official but upon the collector, and it was there held that the bond was limited in its terms to the duties cast upon the principal by the mayor and common council, and that the liability of the sureties could not be extended. Here the duty to collect the license fees was imposed by charter upon the commissioner of finance, and no further legislation was necessary to create the liability upon the principal and sureties under the terms of the bond, which covered all duties required by law.

The authorities cited by counsel on the general proposition that the liabilities of sureties are to be strictly construed are entirely in accord with our conclusions here.

We conclude that the charter which created the office of commissioner of finance imposed upon that official, as part of his official duties, the duty of collecting license fees, and the duty of withholding approval of and refraining from issuing warrants upon unauthorized claims or demands against the city, and that these duties were "official duties required of him by law" as provided in his official bond.

The judgment is affirmed.

We concur: LANGDON, J.; SHENK, J.; RICHARDS, J.

WASTE, C. J. I dissent. The gist of this action is the breach of official duty and not fraud. *Norton v. Title Guaranty & Surety Co.*, 176 Cal. 212, 215, 168 P. 16. The bonds here in question were legal and outstanding obligations against the city, and, by virtue of the ordinance which directed their issue, both principal and interest were made payable at the office of the city treasurer "upon presentation and surrender," and the provisions of the charter relating to payment of unliquidated claims against the city "do not pretend to supplant these provisions of the ordinance." *Commercial & Savings Bank v. Ewing*, cited in the majority opinion. When, therefore, Dillon as commissioner of finance, interjected himself into the matter of the payment of the bonds, he was not acting officially but offi-

ciously. The loss to the city was as much the result of the second and wrongful payment as it was the result of the unofficial or officious audit and certification by Dillon. It does not seem to me to present a proper case for holding the sureties liable.

I concur: SEAWELL, J.

207 Cal. 648

**CALHOMA OIL CORPORATION et al. v.
CONNIFF et ux. (S. F. 13053.)**

Supreme Court of California. July 22, 1929.

1. Mines and minerals ☞52—Lessors' notice held not waiver of past breaches, so as to render admissible evidence of prior violations.

Lessors' notice that, unless lessees strictly complied with their part of lease, lessors would take legal action necessary to terminate lease, did not constitute waiver of past breaches of covenants of lease, requiring continuous drilling, so as to render inadmissible any and all evidence of prior violations.

2. Mines and minerals ☞78(3)—Strict compliance with statute is not required, where lessors, seeking to terminate mining lease, are not directly proceeding under unlawful detainer statute (Code Civ. Proc. § 1159 et seq.).

Strict and rigid compliance with Code Civ. Proc. § 1159 et seq., permitting action for unlawful detainer, is not required, where lessors, seeking to terminate mining lease, are not directly proceeding under such statute.

3. Mines and minerals ☞78(3)—That lessors instituted suit to quiet title one day after serving notice forfeiting mining lease cannot avail lessee, where judgment of forfeiture was entered in action commenced by lessee several weeks after service of notice (Code Civ. Proc. § 1161).

That lessors instituted suit to quiet title within one day after service of notice canceling and forfeiting mining lease could not avail lessee, under Code Civ. Proc. § 1161, requiring three days' notice, where judgment of forfeiture was entered in action commenced by lessee itself several weeks after service of notice of forfeiture.

4. Mines and minerals ☞78(3)—Lessee, by contesting right of lessors to claim possession, waived defects in notice of forfeiture.

Where lessee all along contested right of lessors to claim possession, any defect in or failure of demand or notice of forfeiture was waived by lessee.

5. Mines and minerals ☞52—Lessees could not dismiss suit to enjoin lessors from interfering with drilling operations, where lessors asked for cancellation of lease (Code Civ. Proc. § 581).

Where lessee instituted action to restrain lessors from interfering with its drilling opera-

tions under mining lease, and lessors by their answer asked for cancellation of lease and for restitution of demised premises, court properly refused to permit lessee to dismiss action, since answer asked for such affirmative relief as, under Code Civ. Proc. § 581, would preclude dismissal without lessor's consent.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action to enjoin interference with oil-drilling operations by the Calhoma Oil Corporation and another against James E. Conniff and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

Gilman & Harnden, of Oakland, for appellants.

Collins & Roan, of Oakland, for respondents.

WASTE, C. J. The plaintiff corporation instituted this action to permanently enjoin and restrain the defendants from interfering with its asserted endeavor to continue drilling operations on a tract of land situate in Alameda county, which tract, by written lease bearing date March 19, 1925, had been demised to it for a term of five years by the defendants. The lessors, by way of affirmative defense, alleged in their answer that the lessee had violated a provision of the lease requiring continuous drilling, which violation, it was alleged, caused the lessors, on September 29, 1926, to serve the lessee with written notice of cancellation of the lease. The court below, on sufficient evidence, found the allegations of the affirmative defense to be true, and entered judgment denying the injunctive relief prayed for by the plaintiff. It also declared plaintiff's lease forfeited because of breach of covenant, and ordered restitution of the premises to the lessors. Plaintiff appealed.

[1] As a first contention, appellant urges that the notice of forfeiture served by the lessors was insufficient and defective, and failed to work a forfeiture of the lease and leasehold estate, for the reason that such notice did not comply with the provisions of section 1161 of the Code of Civil Procedure, in that it did not demand possession of the demised premises. Two notices were served on the lessee in this case. Two months before giving the final notice, the owners served a preliminary notice or demand, viz.: "This is to notify you and each of you that the lessors under said lease expect to and do rely upon the strict terms and provisions of this lease, and unless the lessee, Calhoma Oil Corporation, strictly complies with its part thereof, that said lessors will take such legal action as may be necessary to terminate said lease and the right of said lessee thereunder." Appellant contended upon the trial,

and the point is reiterated upon the appeal, that this constituted a waiver of all past breaches of the covenant of the lease requiring continuous drilling, so as to render inadmissible any and all evidence of such prior violations. We do not so interpret the notice. Rather than constituting a waiver of any of their rights under the lease, the notice served to inform the appellant that the lessors stood upon its strict terms and provisions.

[2-4] The final notice, given immediately preceding the filing by the owners of a suit to quiet title against the lessee, after quoting the continuous drilling clause of the lease, reads: "Ever since the drilling was commenced you have failed to comply with said provision. We therefore wish to advise you that we have declared and do hereby declare said lease forfeited and hereby notify you that you have no further interest under said lease or in or to said property." If this were a summary proceeding for obtaining possession of real property under section 1159 et seq. of the Code of Civil Procedure, there might be some merit in the contention of the appellant that it had not been served with a sufficient notice and demand of possession to entitle the respondents to proceed. We are not prepared to say that insufficient notice was given; but this is not such a proceeding, and a strict and rigid compliance with those sections of the Code is not required, where the lessors are not directly proceeding under the statute permitting an action for unlawful detainer, with its accompanying penalties. *Williams v. Edge*, 192 Cal. 254, 255, 219 P. 747.

Neither does the three-day period prescribed in section 1161, *supra*, offer an obstacle to the relief herein sought by and granted to the lessors. The fact that the lessors instituted a quiet title action within one day after service of the notice canceling and forfeiting the lease cannot avail the appellant, for the judgment of forfeiture now complained of was entered in this action—a separate and distinct proceeding—commenced by the lessee itself several weeks subsequent to the service of the notice of forfeiture. Assuming, only, that the owners of the land should have given some other or further notice, the lessee has all along contested, and now contests, the right of the lessors to claim possession. Therefore any defect in or failure of demand or notice may be regarded as having been waived by the appellant. *Williams v. Edge*, *supra*.

[5] The court below did not err, as urged by the appellant, in refusing to permit it to dismiss this action. The answer of the respondents asked for such affirmative relief as, under the provisions of section 581 of the Code of Civil Procedure, would preclude a dismissal by the plaintiff and appellant without the respondents' consent. The appellant,

by its complaint, sought to enjoin interference with its drilling operations, while the respondents, by their answer, asked for cancellation of the lease under which appellant claims, and for restitution of the demised premises.

The finding, "That the actual drilling on said well was commenced on October 1, 1925, and that said drilling was not continuous, as provided for in said lease; that there were many delays during which times no drilling or work was done on said well, and that during said time when no work was being done on said well it was not occasioned from unavoidable delays, nor from causes commonly known as the acts of God; that plaintiff, Calhoma Oil Corporation, made no effort to drill said well, as in said lease provided, or to a depth to ascertain if oil could be produced, * * *" finds ample support in the record. What we have already said sufficiently disposes of the remaining contentions urged by the appellant.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.; RICHARDS, J.

207 Cal. 643

KEIPER v. DUNN et al. (Sac. 4162.)

Supreme Court of California. July 22, 1929.

1. Boundaries ⇨25—Filing official maps of later survey did not change boundaries established by original official survey.

Boundaries established by an original official survey, with reference to which titles had vested, were not changed by filing of official map of later survey delineating differently located boundaries.

2. Boundaries ⇨37(1)—In action to establish boundary of adjoining lots, evidence held to sustain judgment for defendants.

In action to quiet title, where defendants claimed title to strip of land in question under official survey and plaintiff claimed under subsequent official survey and there had been fence for over 40 years on line claimed by defendants, evidence held sufficient to sustain judgment decreeing defendants to be owners.

3. Evidence ⇨460(6)—Deed conveying lot 8 and 2 feet of lot 7 did not preclude grantee from showing that true description of lot 8 included all land which deed purported to convey.

Deed conveying lot 8 and quitclaiming 2 feet of lot 7, made with reference to a certain survey, did not constitute binding admission that such survey was correct or preclude grantee from showing that true boundary of lot 8 included 2 feet of lot 7, as shown by such survey.

4. Costs $\Rightarrow$ 32(4)—Plaintiff was properly denied costs, where adjudged only to be owner of land to which defendants made no claim (Code Civ. Proc. § 739).

In action to quiet title, where plaintiff was adjudged only to be the owner of land to which defendants admitted plaintiff's ownership, he was properly denied costs, under Code Civ. Proc. § 739.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by John S. Keiper against Winifred B. Dunn and others, as executrix and executors of the will of Chauncey H. Dunn, deceased, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

John C. March and R. Platnauer, both of Sacramento, for appellant.

Chauncey H. Dunn and Downey, Brand, Seymour & Dunn, all of Sacramento, for respondents.

SEAWELL, J. Plaintiff appeals from a judgment for defendants in an action to quiet title. Plaintiff, John S. Keiper, and one Chauncey H. Dunn, at the time of his death, were the owners of adjoining lots in the city of Sacramento. Defendants are the executrix and executors of the will of said Dunn and other persons who assert an interest in the property under him. The action involves a dispute as to the location of the boundary line between said two lots.

The block in which said lots are located is bounded on the west by Fourteenth street, on the north by J street, on the east by Fifteenth street and on the south by K street. Said block is cut by an alley, which runs approximately through the center of the block from Fourteenth to Fifteenth street. The sections of the block on each side of the alley were originally divided into four lots, with an approximate frontage of 80 feet each. Lot 8, which constitutes a portion of the estate of said Chauncey H. Dunn, deceased, is situate at the southwest corner of said block, and lot 7, the western portion of which is owned by plaintiff, adjoins it on the east side. Both lots extend back to the alley.

Plaintiff claims that the boundary line delineated on the map prepared by one Bassett from a survey made by him as city surveyor in 1878 is the true division line between said lots 7 and 8. For many years a board fence lay to the east of said division line indicated on the Bassett map, distant therefrom, according to the testimony of the witness Rooney, 1.97 feet at the line of K Street and 1.4 feet at the alley. The contention of defendants, upheld by the court below, is that the line established by an official survey of 1854, with reference to which sections of the city were laid out, is controlling and that the

line of said fence, rather than the line indicated on the Bassett map, is the boundary established by said survey of 1854. The dispute concerns the strip of land between the boundary line of lots 7 and 8 as indicated on the Bassett map and the line to the east thereof, which for many years was marked by said wooden fence.

A three-story building, occupied by defendant Heald's Business College under lease, is situate on lot 8, and extends beyond the boundary line indicated on the Bassett map to the fence line at the alley and to within a few inches thereof at K street. It does not appear that plaintiff or his predecessors ever occupied said strip of land in any manner.

Defendants further alleged that between 1870 and 1880, the boundary line between said lots 7 and 8 being uncertain, the respective owners erected said fence and agreed that it marked the division or boundary line. Defendants also claimed title to said strip of land by adverse possession.

[1, 2] Defendants declare the rule to be that boundaries established by an original official survey, with reference to which titles are vested, are not changed by the filing of an official map of a later survey delineating differently located boundaries. *Winchester v. Payne*, 10 Cal. App. 501, 102 P. 531; *Perich v. Maurer*, 29 Cal. App. 293, 155 P. 471. The difficulty in the instant case was to locate the line of the earlier survey. We think the view of the court below that the division line appearing on the Bassett map was not the line of the survey of 1854, but that the fence marked said ancient line, is sufficiently supported by the evidence to sustain the judgment decreeing defendants to be the owners of the parcel of land in dispute.

The map of the early survey, adopted as the official map of the city in 1854, was characterized by witnesses as being fragmentary, inaccurate, and lacking in data and measurements which would enable it to be used as a basis for subsequently locating lots upon the ground. The surveyor preparing it either placed no permanent monuments in the streets, or the monuments became obliterated. The map of said survey showed blocks of uniform size, each divided into eight lots of equal size, with intersecting streets or alleys of uniform width at right angles. The streets as actually developed and used presented a different appearance. Bassett, as city surveyor in 1878, prepared the Bassett maps to supply plats from which property could be located with a greater degree of accuracy. The Bassett maps and the Bassett street intersection monuments are now commonly used in making surveys of lots within the city, and descriptions are generally prepared with reference to said maps and monuments. J. C. Boyd, a licensed surveyor, who was city engineer at one time, testified that Bassett took

the physical conditions found on the ground and co-ordinated the system of streets in reference to the physical monuments, or buildings, or occupied positions, placing permanent monuments in the street intersections to serve as future reference points.

It appears, however, from the testimony of said Boyd, that the Bassett survey in a number of instances did not conform to the boundary lines indicated by the physical existence of streets, buildings, concrete walks, and other indices of property lines. Boyd's testimony would indicate that the preponderance of evidence was that the Bassett monuments and maps marking and delineating the block in which said lots are situate did not conform to the original survey. Two plats or maps prepared by Boyd were introduced in evidence as defendants' exhibits. Said plats show that not only does the line of the fence above referred to lie to the east of the Bassett line dividing lots 7 and 8, and also that the building upon lot 8 extends beyond said Bassett line, but also that there exists an old wooden fence commencing on K street, .09 feet east of the Bassett boundary line between lots 6 and 7. The probable inaccuracy of the Bassett line is made more evident by the fact that the fence dividing lots 5 and 6 is 1.55 feet east of the Bassett line at the point where it intersects the alley. The builders of an old shed constructed upon said lot 5 accepted said ancient wooden fence as the division line. Boyd testified that the sidewalks on the block were made at different times by different persons and that the joints were practically even with the fence lines. He estimated the fences as having been built between 40 and 60 years ago, and stated that in his opinion said old fences more correctly represented the lines of the survey of 1854 than did the Bassett intersection monuments and lines.

Ella McCleery, one of the joint grantors from whom defendants' intestate received title, testified that her parents acquired ownership of lot 8 in 1886, and that she became and continued to be familiar with the property from that date until 1912, in which year she and her sisters conveyed it to defendants' intestate. In 1886 an old fence marked the east line of the lot. Said fence existed at the time they disposed of the lot. They claimed up to the fence line. Charles H. King, who lived on the southeast corner of the block, at Fifteenth and K streets, from 1866 to 1880 or 1883, testified that there was a board fence approximately 80 feet from the east side of Fourteenth street, and a residence upon lot 8, but lot 7 was unoccupied and used by children as a playground. J. C. Rooney, a civil engineer, testified that he made a survey in 1911 and found a fence east of the Bassett boundary and along the line to which defendants claim to own.

We think it clearly appears that the fence

referred to by the witnesses Rooney, McCleery, and King, and claimed to mark the boundary line, was placed upon the property some time prior to 1873, when the witness King first remembered to have seen it as a young child. In *Perich v. Maurer*, 29 Cal. App. 293, 155 P. 471, it was asserted, as in the instant case, that there was a discrepancy between the lines of the original survey and the Bassett lines. The law as announced by the District Court of Appeal in that case may appropriately be quoted in sustaining the judgment declaring the fence line as the true boundary in the instant case. In that case, as here, the question was the location of a division line in the city of Sacramento, dependent upon the same surveys and similar facts presented by the instant case. The court said:

"The fence itself is a monument, visible and obtrusive, which has existed for forty years or more, that under the peculiar circumstances of this case is quite persuasive in favor of the claim of defendants. It is a fair presumption that this fence was originally placed upon the true line as then recognized and understood, and it is proper to assume, in the absence of evidence to the contrary, that when the fence was built, either that the contiguous owners had knowledge and information of the lines of the Sutter survey and acted accordingly, or that the true line was uncertain and by agreement it was fixed and marked by said fence. It is not surprising that this fence seemed so important to Boyd and to the trial judge. Its existence for so many years, the recognition accorded it as the true boundary, the acquiescence of the respective owners in the location and the improvements made accordingly, were rightfully regarded as important, if not decisive, considerations in the determination of a line otherwise obscure and uncertain."

[3] The deed to Dunn conveying to him lot 8 and quitclaiming to him the west 2 feet of lot 7, and Dunn's description of the property as lot 8 and the west 2 feet of lot 7 in the notice of completion filed by him under the Mechanics' Lien Law, which descriptions were obviously made with reference to the Bassett map, did not constitute binding admissions that the Bassett survey was correct in the degree that would preclude defendants from showing that the true boundary included approximately 2 feet of the west portion of lot 7 as indicated on the Bassett map. The metes and bounds description of lot 7 prepared by Boyd and adopted by plaintiff in his complaint was a description of lot 7 as delineated on the Bassett map, and the survey of said lot made by him for plaintiff was according to the Bassett lines, and did not purport to be a representation that the Bassett line coincided with the lines of the early survey.

[4] Plaintiff was properly denied his costs. The only portion of the land described in the

complaint of which plaintiff was adjudged to be the owner was the land east of the fence but admitted plaintiff's ownership in fee, line, to which defendants asserted no claim, Section 739, Code Civ. Proc.

Judgment affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.

In Bank.

Appeal from Superior Court, Sacramento County; George F. Buck, Judge.

Action by the California National Bank against the El Dorado Lime & Minerals Company and others. From the judgment, defendants George Bonnefoy and others appeal. Affirmed.

Arthur C. Huston, of Woodland, and Thomas B. Leeper, of Sacramento, for appellants.

Devlin & Devlin and Hinsdale & Pigott, all of Sacramento, for respondent.

207 Cal. 676

CALIFORNIA NAT. BANK v. EL DORADO LIME & MINERALS CO. et al.
(Sac. 4174.)★

Supreme Court of California. July 29, 1929.

Rehearing Denied Aug. 26, 1929.

1. Joint-stock companies and business trusts
☞17—In action for accounting under trust agreement to operate partnership property, evidence established account as rendered.

In action for an accounting under trust agreement to operate business of partnership for one year in an effort to satisfy its indebtedness, evidence held sufficient to justify account as rendered.

2. Appeal and error ☞882(3)—Appellants cannot complain that action for accounting was tried on inconsistent theories, in view of appellants' request and acquiescence in enlarging issues.

Appellants held not entitled to complain that action for an accounting was tried on inconsistent theories, where at their own request and acquiescence the case took a form not wholly measured by or consistent with the allegations of the complaint.

3. Joint-stock companies and business trusts
☞17—In action for accounting under trust agreement, evidence held not to show doubling of credits by trustee, to detriment of beneficiary.

In action for accounting under trust agreement to operate partnership property in an effort to satisfy its indebtedness, evidence held not to show that there was a doubling of credits by trustee, to the detriment of beneficiary of the trust agreement.

4. Joint-stock companies and business trusts
☞17—In action for accounting under trust agreement, evidence sustained findings that trustee acted honestly and that accounts were kept correctly.

In action for accounting under trust agreement to operate partnership property in an effort to satisfy its indebtedness, evidence held to sustain finding that trustee acted honestly, that accounts were kept correctly, and that trustee was guilty of neither fraud nor bad faith, and that, although trustee mingled some accounts of personal business with trust account, they were severable and could be segregated.

PRESTON, J. We think it impossible to find a prototype for the situation presented by the above-entitled appeal. The assignments of error consist of attacks upon the findings of the court below in the settlement of the accounts of a trustee. Counsel writing the brief on appeal suggests at the outset that we call for the services of an accountant to aid our deliberations, and at the same time presents in addition to the voluminous record, a large suitcase full of original documents, which he asks us to examine. In these requests may be found the germ of the error into which the appellants have fallen, for we are asked, in disregard of our established rules of appellate practice, to sit as a trial court to pass upon objections and exceptions to literally a score of items of this account allowed by the court below. No single assignment of error is based upon the contention that no evidence may be found in the record to support the item attacked, and, indeed, no such assignment could be truthfully made. Notwithstanding this failure to conform to our rules of procedure, we have spent considerable time in trying to find a substantial item to which criticism could properly be made by an appellate court, and we have not found one. Counsel has presented his points in an incomplete, piecemeal, and partisan manner. Moreover, his criticisms are promiscuous and without definite object. In fact, his brief is an unrestrained criticism of any and every ruling of importance made by the court below. We are firmly convinced that no good purpose can be served by a prolonged discussion of the much-involved transactions from which this action resulted. Even a short statement of all of the facts would add undue length to this opinion. However, enough will be recited to show the correctness of the observations we have made.

Prior to June 1, 1917, appellants George Bonnefoy and Herbert Shear and defendant F. R. M. Bloomer were a copartnership operating two unrelated business enterprises, one a lime business under the fictitious name of El Dorado Lime Company, and the other a wood and coal business under the fictitious name of Pioneer Wood & Coal Company. The business in both branches was in bad financial condition. Dissension among the partners

also existed. The lime business was indebted to plaintiff bank in an aggregate sum of over \$34,000, besides accrued interest. The wood business was also indebted to the same institution in the sum of about \$25,000. The partnership applied for additional loans from plaintiff. This resulted in an investigation of the properties and a demand by the bank for the payment of all of said indebtedness. To promote payment thereof, and to better secure plaintiff, the copartnership agreed with plaintiff that one George A. Starkweather should be put in exclusive management and control of both enterprises as joint agent of the parties interested.

Said agent took charge of said business and managed and operated the same for a short time. Then on June 13, 1917, said agent, acting on his own account and not for plaintiff, at the solicitation of said copartners, entered into an agreement in writing which had for its object the transfer of both said enterprises and all properties in connection therewith to the said Starkweather as trustee, said trust to last for a period of one year, at the end of which time the trustee might, by the payment of all the indebtedness to plaintiff, cause to be formed two separate corporations, one to take over each of said enterprises; but if said indebtedness was not paid, or if said trustee did not care to proceed further, the property was to be returned to the former partners. In this agreement said trustee was given the fullest power of exclusive management and control of said enterprises, including expressly full power and authority to borrow money, make contracts, and buy for and sell the products of said concerns.

There followed, immediately after the making of this contract, proper transfers to said trustee of all said properties. Thereupon he immediately set about to rehabilitate said concerns, and to that end he began to incur additional indebtedness to plaintiff bank. Among other things, he established the existence of new deposits of lime, built a new plant in connection therewith, including two miles of railroad, together with new and up-to-date equipment for the operation thereof. Said copartners all knew of these efforts being made by the trustee. One of said copartners remained in charge of the said wood business, and his brother was for a time in charge of said lime business under said trustee. The old bookkeeper was continued in the same service under the trustee as had theretofore been performed by him. The agreement of June 13, 1917, was extended for a period of six months, following the expiration of the first year. Said trustee evidently misinterpreted the covenants thereof respecting the exercise of the option to take over said properties by the formation of two corporations for in February, 1918, and before the expiration of one year he caused to be incorporated the defendant, El Dorado Lime & Minerals Com-

pany, a corporation, and in December, 1918, he caused the wood and coal to be likewise incorporated under the name of Pioneer Wood & Coal Company, a corporation.

Following the incorporation of the lime business, he caused a bond issue of the corporation, in the sum of \$100,000, to be floated and secured by the execution of a deed of trust to the defendant California Trust & Savings Bank. This issue of bonds was used in refunding a certain amount of the old indebtedness of the copartnership held by plaintiff, and in payment of some of the subsequent indebtedness incurred by said trustee. In addition to the bond issue, the lime company, through said trustee, incurred still more indebtedness at plaintiff bank, represented by the issuing of many promissory notes in small amounts. Finally a note for some \$40,000, the then total of this last indebtedness, was given and secured by the making of a mortgage by said lime company to plaintiff, which mortgage also covered future advances. The indebtedness against the wood business was also increased by said trustee, and the old indebtedness refunded and carried into new obligations signed by the trustee.

Efforts to rehabilitate both enterprises failed, and on April 15, 1921, the present action was begun. This action took on a peculiar form. Ostensibly it was to foreclose liens held by plaintiff on the properties formerly belonging to said copartnership, but the complaint in addition undertook to set forth all the many transactions that had occurred between the said copartnership and said Starkweather, setting out at length the various contracts and agreements that passed between them, and, in short, it was really a suit for an accounting of the full stewardship of said trustee, in order to ascertain what sums had been advanced by him for the benefit of said trust estate, and to have plaintiff and other creditors subrogated to the rights of said trustee as against the trust estate; also to have a sale of the trust properties and to have personal judgment against said copartners for any deficiency. In this connection, it should be noted, however, that the complaint contained allegations which, if true, would have upheld Starkweather in his contention that he had exercised his option and was entitled to organize the corporations above mentioned, and to have issued to him the quota of stock mentioned in said agreement of June 13, 1917.

The various defendants answered the complaint, and interveners were allowed to appear, the ramifications of which matters are not involved upon this appeal. Appellants by their answer denied that Starkweather had any right to form said corporations, or to issue to himself any stock or shares thereof, and claimed that he had breached his contract or option, in that he had neither paid the original indebtedness of the copartners, nor had he returned the properties, nor had

he in other respects carried out the trust agreement, and likewise they demanded an accounting.

The trial of the action started on May 10, 1922, and the first 14 days thereof were consumed in ascertaining whether Starkweather had properly exercised the said option to take over the properties formerly belonging to said copartnership and convert them into said corporations, as provided in the plan set forth in said written agreement of June 13, 1917, and also whether Starkweather, as such trustee, had the right to incur the subsequent indebtedness so incurred by him in the management, control, and operation of said trust property. At the end of this period the court ruled that Starkweather had not done the things that would have given him the right to exercise the option contained in said contract, and that, although these corporations had been organized, they were nevertheless but extensions of the acts of said Starkweather, as trustee, and not in his own right; that Starkweather, as well as the corporations, continued to be but the manifestation of the trusteeship created by said contract; and that it was the duty of said trustee upon a proper accounting and reimbursement of the funds advanced to said trust estate to retransfer the property to its original owners in the specified proportions. The court also held, however, that Starkweather had the right, and had the power and authority under his trusteeship, to incur all indebtedness that had been incurred in his own name and that of the corporations, not only to plaintiff but to certain other specified creditors. The court then ordered Starkweather to file his account, supported by proper vouchers. He did so, but his account was unsatisfactory to the court in some respects, and to appellants, and a further order was made, requiring him to furnish other details in connection with said account. During all this period appellants were insisting that the action be converted into one for an accounting by the trustee to the beneficiaries of said trust.

At this juncture, on April 21, 1923, and with the consent of all the parties, the court appointed a referee with power to administer oaths and examine witnesses, receive oral and documentary evidence, examine into the accounts of said trustee, and segregate the matters pertaining to the trust estate from the matters pertaining to his personal enterprises other than said trust estate, take an account of all moneys and properties expended or used upon the trust property, and in general to make specific findings upon certain questions of fact relating to said account. Later and on May 9, 1923, the order of reference was amended, so as to require a report and findings upon still further details in connection with said account, and provided that the disbursements of said trustee should be segregated under the heads of labor in extraction of products and in develop-

ment of properties, railroad, railroad rolling stock, machinery, and other equipment, buildings and other improvements, office expense, with discretion in the referee to make still further segregation, if found in order, and directing him to report to the court within the time specified.

The taking of evidence in connection with the reference ended on December 1, 1923. On January 10, 1924, the referee submitted his report and findings to the court. These findings were later, except as modified in one or two particulars, made a part of the findings of fact of the court herein. Ten days were allowed for filing objections. Appellants filed certain objections, covering practically the same grounds asserted in their brief. A hearing in open court was had upon this report of the referee, and additional evidence was received by the court. The court then made an order modifying said account to the extent of about \$22,000, and in other respects adopted the referee's report. Unsatisfied with this, appellants were allowed permission to attack said report by affidavits of expert accountants. Counter affidavits were filed, and the court again overruled the attempts to impeach the account. When the findings were made by the court, appellants again filed affidavits attacking the account. The court then gave the matter still further consideration and denied the motion for a retrial.

The testimony heard by the referee was not reported and is not in the record. In addition to the findings of the referee, and disregarding the fact that the evidence heard by him is not before us, and disregarding any presumptions that attend the findings of the referee, it may be observed that the correctness of the report was testified to by the trustee himself, also by the bookkeeper, who had formerly been in the employ of said copartnership, and the correctness of a great deal of it was vouched for by appellant George Bonnefoy himself, as well as by his brother, Victor Bonnefoy, and proper vouchers were filed to support it. Judgment passed establishing the trust indebtedness to plaintiff and fixing the priorities between the parties; it also fixed the trust indebtedness to said trustee, provided for the subrogation of the creditors to the rights of the trustee, and provided, in case of a failure to redeem, for sale of the properties and distribution of the proceeds thereof, and for a deficiency if the sale did not provide for the payment of the total claims.

[1] Under this situation appellants insist that there is ground for this court to interfere and restate this account. The mere recital of the above facts is a sufficient answer to any such request. It is not and cannot be contended that substantial evidence was not received in support of said account as it is rendered. This fact appears over and over throughout the record, and there is no as-

sertion by appellants that substantial evidence is entirely wanting to support it.

Appellants seem to contend that authority was wanting in the trustee to incur this indebtedness subsequent to the execution of the contract of June 13, 1917; but, as above pointed out, said agreement gave said trustee the widest and fullest power of management and control of said enterprises and expressly authorized the incurring of indebtedness in connection therewith. Moreover, appellants stood by during a large part of the period while same was going on and either expressly or tacitly approved it.

[2] Appellants also seem to contend that, inasmuch as the court found that the trustee had not lawfully organized the corporations and taken over the properties of the trust estate, and the complaint alleged that this had been legally done by him, for this reason the case was tried on inconsistent theories, and the judgment should be reversed. The evident answer to this is that at appellants' own request the issues of the case were enlarged, and by consent the action took the form of an accounting between the trustee and appellants, together with the ascertainment of the amount of indebtedness incurred by him on behalf of the trust estate at plaintiff bank and other places. In other words, at their own request and acquiescence, the case took a form not wholly measured by or consistent with the allegations of the complaint. An appreciation of this situation is a complete answer to a great number of criticisms indulged by appellants in their brief. For example, they urge that the complaint only claimed \$244,000, whereas the court allowed them 255 odd thousand dollars and that the trustee was credited with a note of some \$27,000, which was not mentioned in the complaint or due at the time of filing thereof. The above observation also answers the contention that the notes of the lime corporation were not the indebtedness of the trustee, because not alleged in the complaint.

[3] Another contention stressed by appellants is the claim that Starkweather, as trustee, borrowed money from plaintiff bank, which was charged as advancements to the trust estate by him, and that these moneys were spent upon the trust estate and were charged against the beneficiaries a second time; in other words, that the amounts the trustee credited himself with were doubled as against them. This point was urged many times, and was answered repeatedly by the referee, both in his report and by affidavit. Respondent in its brief has correctly pointed out that the system employed in the accounting was first to ascertain whether the indebtedness claimed by plaintiff and other creditors was indebtedness incurred by Starkweather as trustee. This issue was found in favor of the creditors, but, when the account was taken between Starkweather and the trust

estate, these debts were not considered. The true amounts spent by him on the trust estate were calculated independent of these obligations of creditors, and, when the total thereof was ascertained, the decree of the court was that these creditors should be subrogated to the rights of the trustee as against said trust estate, and that the beneficiaries under the law of agency were personally liable for any deficiency. There was no doubling of credits by said trustee. A failure to appreciate this situation brings appellants into error about the item where they contend they were "short-changed."

[4] The court found that the trustee had acted honestly; that the accounts were kept correctly; that, although he mingled some accounts of personal business with the trust account, they were severable, and could be and were segregated; and that said trustee was neither guilty of fraud nor of bad faith. A great many of appellants' statements are predicated upon the assumption of fraud, but in the face of this finding no merit can be accorded them. These and the other findings made have ample support in the evidence. We do not deem further discussion required.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

207 Cal. 772
CRANDALL v. SCHNOUSER. (L. A. 11259.)

Supreme Court of California. Aug. 15, 1929.

1. Pleading $\S$ 291(2)—Plaintiff admitted genuineness and due execution of instruments by which he conveyed property to defendant, where not filing affidavit required by statute (Code Civ. Proc. $\S$ 448).

In action to establish partnership for an accounting and division of property, plaintiff admitted genuineness and due execution of deeds and other documents by which plaintiff allegedly conveyed property to defendant, which copies were attached to and made a part of the amended answer, where plaintiff failed to file affidavit in writing denying same, as required by Code Civ. Proc. $\S$ 448.

2. Partnership $\S$ 77—Transfer of property may be made to another partner for partnership purposes consistent with existence of partnership.

It is consistent with existence of partnership that a transfer of property be made by one or more partners to another partner for partnership purposes.

3. Partnership $\S$ 53—Evidence held insufficient to establish existence of partnership between parties.

Evidence held insufficient to show existence of a partnership between parties who lived together as husband and wife.

4. Evidence ☞151(2)—Testimony as to plaintiff's intention in executing and delivering documents conveying property to defendant held properly excluded.

In action to establish partnership for an accounting and division of property, testimony as to plaintiff's intention in executing and delivering various documents conveying property to defendant *held* properly excluded.

5. Pleading ☞291(2)—Testimony that plaintiff conveyed property to defendant to save it from foreclosure and loss, due to demand of plaintiff's creditors, held properly admitted, notwithstanding failure to file statutory affidavit (Code Civ. Proc. § 448).

In action to establish partnership for an accounting and division of property, testimony that plaintiff conveyed property to defendant to protect property from foreclosure and loss, due to demands of plaintiff's creditors, *held* properly admitted, notwithstanding plaintiff's failure to deny genuineness and due execution of the various instruments conveying the property, because not filing affidavit required by Code Civ. Proc. § 448.

6. Partnership ☞328(3)—Evidence held not to establish that transfer of property was for partnership purposes.

Evidence *held* not to establish that transfer of property by plaintiff to defendant was for partnership purposes.

7. Trial ☞165—On motion for nonsuit, evidence must be construed favorably to plaintiff's claim.

On motion for nonsuit, evidence and every inference that may be fairly deducible therefrom must be received in light most favorable to plaintiff's claim.

In Bank.

Appeal from Superior Court, Ventura County; Marshall F. McComb, Judge.

Action by Rexford D. Crandall against Mabel Schnouser, sometimes known as and called Mabel Crandall. From a judgment, plaintiff appeals. Affirmed.

Walter E. Barry and Clarke & Bowker, all of Los Angeles, for appellant.

C. M. Booth, of Los Angeles, for respondent.

WASTE, C. J. Plaintiff brought an action to establish a partnership between himself and the defendant, relating back to the month of February, 1918. He prayed for an accounting and for a division of properties. The defendant denied the existence of any partnership, and alleged that all the property involved in the action belonged to her in "her sole and separate right." According to the averments of her amended answer, she and the plaintiff were married in Mexico in June, 1914, after which time they resided and cohabited together as husband and wife. During that period she alleged they purchased and

acquired the real and personal property mentioned in the complaint, the consideration therefor having been paid from and out of their joint earnings. She then alleged that on or about the 10th of May, 1927, marital differences arose between herself and the plaintiff, and a dispute ensued as to the right of the plaintiff to expend the income from the real property involved for his own personal recreation and amusement; whereupon, desiring the cease to live and cohabit with the defendant, and intending to live separate and apart from her, plaintiff, in full settlement of their differences and disputes, and for the purpose of providing for the future support and maintenance of defendant, by certain instruments in writing assigned, transferred, conveyed, and set over to the defendant all his right, title, and interest in and to the joint bank accounts of the parties and in and to the personal and real property described in the complaint, all "as her [defendant's] sole and separate property."

By way of a further and separate defense to the action, the defendant alleged that "for some technical reason or law of the state of Baja California [where the marriage ceremony of the parties was performed], the nature of which is not known to this defendant," the marriage of the parties "is and was void," which fact was not known to the defendant, but was known to the plaintiff, who fraudulently concealed the situation from the defendant, in order that he would "not become or be bound by the said ceremony of marriage, * * * while this defendant should and would at all times believe that by reason of the said ceremony she became and thereafter continued to be the lawful wife of the plaintiff, and would, by reason of such belief, cohabit with the plaintiff as his wife, and to the end that any property acquired by the said plaintiff and this defendant, by their joint earnings or the earnings of either of them, after the said ceremony of marriage, would not in fact be or become the community property of the plaintiff and this defendant, and so as to enable said plaintiff to desert and abandon and cease to cohabit with this defendant whenever plaintiff at his pleasure should so select, and without committing any breach of any legal marital obligation to this defendant." It was further alleged that, after the ceremony of marriage performed in Mexico, the parties returned to California, where the plaintiff had at all times lived and cohabited with defendant, and plaintiff, in furtherance of his said fraudulent intent, represented to defendant that she was his wife, and so stated and represented to numerous other persons in the community where plaintiff and defendant maintained their common home and abode. On the strength of this separate defense, defendant alleges that plaintiff "has been guilty of conduct in violation

of the fundamental conception of equity, and does not come into court with clean hands."

[1] Copies of the deeds and other documents, by which it was alleged the plaintiff transferred and conveyed the property in question to the defendant, were attached to and made a part of the amended answer. Plaintiff admitted the genuineness and due execution of these instruments by failing to file the affidavit denying the same, which is required by section 448 of the Code of Civil Procedure. The trial of the cause resulted in the nonsuit of plaintiff and judgment for the defendant, from which the plaintiff has appealed.

[2, 3] Appellant argues that this is not an action to set aside the conveyances executed and delivered by him to the respondent, but that he is acquiescing in the conveyances to the extent that he admits their genuineness and due execution. But he is, he contends, only seeking to have property which was put in the name of one partner subjected to the uses and purposes for which it was so transferred. It is, of course, entirely consistent with the existence of a partnership that a transfer of property be made by one or more partners to another partner for partnership purposes. *Haight v. Haight*, 151 Cal. 90, 90 P. 197. The main question, and the important one, to be first determined in this case, is therefore: Was a partnership established by the evidence in the court below? We do not think the evidence here, as a whole, has that effect.

The appellant testified, in his own behalf, that he and the defendant had lived together as husband and wife, and cohabited as such, since June, 1914, and that at all times after that date, and until in 1927, he had held the defendant out to the public and to the world as his wife. In 1918, at which time plaintiff contemplated engaging in the grocery business with his father, he testified, he and the defendant "made an oral agreement as to [a] partnership," under the terms of which all property (other than that relating to the grocery business) accumulated by their joint efforts by work and buying and deals in property was to be partnership property, "to divide the money and the losses and her living, and so on and so forth, * * * everything we had or accumulated was to be divided on an equal basis." There was no partnership name or style under which the parties did business. No partnership books were kept, no partnership dividends were paid, and there was never any distribution of funds between the parties on a partnership basis. The appellant admitted that he never told anybody there was a partnership between himself and the defendant, and never mentioned copartnership in connection with the transaction until the complaint in this action was filed. "I could not," he testified, "because we [plaintiff and defendant] were living as man and wife," Plaintiff did not

repudiate or "denounce" the existence of the marital relation between himself and the defendant until he filed the complaint in the action in 1928. Before that time, on May 10, 1927, on June 28, 1927, and on January 5, 1928, the appellant executed the three instruments set out in the amended answer of the respondent, in each of which he designated the respondent *as his wife*, and in each of which there is an apt recital that the property so transferred and conveyed is to be *the sole and separate property* of the respondent.

[4, 5] The appellant sought to testify as to his "intention" in executing and delivering the various documents to the respondent; but the trial court properly sustained the objection of the defendant to any such evidence. Plaintiff was, however, permitted to testify to, and to submit other evidence of, the circumstances under which the instruments were executed and delivered. The substance of such testimony is that in 1927 the appellant and respondent "started to have arguments" in regard to the handling of the property; the respondent charging the appellant was improperly spending money and not taking care of the property. It also appears that appellant was in straitened financial circumstances, and banks and other creditors were demanding security for their claims. The respondent refused to join with the appellant in executing such security, unless the appellant "turned the property over to her to take care of and put in her name." Appellant's testimony in that regard is: "I was forced to make these deeds to protect the property from foreclosure and loss. The bank and creditors were demanding protection, and I was forced to execute them to protect the property from foreclosure and losing it. There were other reasons. The reasons were to provide an income and give her [the respondent] the property to manage, to collect the rents and look after the property the same as I had before I turned it over to her." The conveyances were executed, and respondent thereupon executed the proper instruments to secure the notes and evidences of indebtedness signed by the appellant and delivered to his creditors.

This evidence was properly admitted. The failure to deny the genuineness and due execution of the various instruments conveying the property to respondent, by not filing the affidavit required by section 448, *supra*, did not estop the appellant on the trial, without further pleading, to introduce any legitimate defense he might have to the instruments, except the defense of want of genuineness and lack of due execution. *Garcia v. California Truck Co.*, 183 Cal. 767, 192 P. 703.

[6] But we share the estimate of the trial court as to the evidence introduced by the plaintiff below. Even admitting, for the purpose of the decision, that a partnership between the parties was established, the evidence falls short of proving that the conveyances in question were executed as partner-

ship transactions. An otherwise manifest intention of the parties clearly appears from the plain and unambiguous recitals of the various instruments executed by the appellant. He has not sought to reform the instruments, and they stand unchallenged as to their recitals and their effect. While it was not inconsistent with the theory of a partnership between the parties that the respondent should assume the obligations which she did in the transaction (*Haight v. Haight*, supra), by way of securing the various items of indebtedness of the appellant, we are of the view that the evidence does not establish that the transfer of the property was for partnership purposes.

[7] While, upon a motion for a nonsuit, the evidence and every inference that may be fairly deducible from it must be received in the light most favorable to the plaintiff's claim, it cannot be said in this case that there is an inference "reasonably and fairly deducible therefrom" that is "most favorable to the plaintiff."

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.



207 Cal. 747

ELMS v. MERRYMAN FRUIT, LAND & LUMBER CO. (S. F. 13021.)

Supreme Court of California. July 31, 1929.

1. Brokers §86(1)—Evidence held to show that broker failed to fulfill contract to secure buyer for timber lands, so as to authorize recovery of commissions.

Evidence held to show that broker failed to fulfill contract to name buyer and conclude sale of timber lands, so as to entitle him to commissions.

2. Brokers §44—Revocation to defeat broker's right to commission must be made in good faith.

Revocation to defeat broker's right to commission must be made in good faith, and not for purpose of defeating his rights.

3. Brokers §88(2)—Evidence of bad faith or fraud on part of defendant in revoking broker's authority to proceed with contract of sale of timber lands held insufficient for jury.

In action by broker for commission for sale of timber lands, evidence of bad faith or fraud on part of defendant in revoking broker's authority to proceed held insufficient for jury.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Charles S. Elms against the Merryman Fruit, Land & Lumber Company.

From the judgment, plaintiff appeals. Affirmed.

Treadwell, Van Fleet & Laughlin, Resleure & Hill, and Young & Hudson, all of San Francisco, for appellant.

John L. McNab, of San Francisco, and D. E. Perkins, of Visalia, for respondent.

SHENK, J. This is an appeal from a judgment in favor of the defendant in an action to recover a commission of \$75,000 on the sale of approximately 12,600 acres of timber land in Humboldt county. The cause was tried with a jury. When the evidence was all in, the court granted the motion of the defendant for a directed verdict. The plaintiff appeals from the judgment entered on the verdict so directed.

The defendant is a family corporation having its office in Los Angeles county. R. C. Merryman is the principal directing officer of the corporation. Other members of the family are nonresidents of this state. The father, A. C. Merryman, since deceased, has been an extensive lumber operator in the state of Wisconsin. He acquired the property in Humboldt county many years prior to the transactions here involved.

The plaintiff was, and had been for twenty-five years or more, engaged in the business of selling, as a broker, sawmills, timber lands, and timber in numerous localities from New York to Kansas City and Minneapolis and in the Southern states. Prior to August, 1922, his residence and place of business was in New Orleans. About that time he moved to San Francisco. When in New Orleans, and some time prior to September, 1921, he addressed a letter to the Holmes Eureka Lumber Company, of which Thomas W. Hine was general manager, inquiring about timber lands in California. Hine is a distant relative of the Merrymans, but his company has no connection with the defendant company. In September, 1921, the plaintiff and Hine had a conference in the St. Francis Hotel in San Francisco, at which time Hine informed the plaintiff that the defendant owned a large acreage of timber lands in Humboldt county and was anxious to sell the same. The next day the plaintiff met R. C. Merryman and in the presence of Hine talked over the situation fully. As a result of the conference Merryman requested the plaintiff to work on the sale of the land.

The plaintiff was not given an exclusive agency. Hine and others were given similar authority. From the testimony of the plaintiff it appeared that his engagement was to work upon the sale of the lands, and if he "could produce a buyer" he would be paid a commission of 5 per cent. on the sale price. By letter of August 9, 1922, to the defendant, the plaintiff defined his contract as one under which he was to recover the commission in

consideration of his "naming the buyer and concluding the sale." Thereafter he sought to interest possible purchasers, some in this state, and others in various sections of the United States. From time to time he suggested to the defendant numerous plans of financing the purchase and sale, and the possibility of furthering the transaction by obtaining rights of way over the adjoining lands of another lumber company in order to provide a means of access to tide water. The plans did not meet with the approval of the defendant, and especially following his suggestion of obtaining rights of way the plaintiff was notified by letter of July 5, 1923, that the plaintiff's plans did not meet with the defendant's approval, and that the parties hereto "might just as well call our negotiations off until our minds run in a closer channel."

Being further dissatisfied with the plaintiff's subsequent efforts and methods, the defendant, by letter dated September 3, 1923, revoked the authority of the plaintiff to represent it. That the plaintiff acquiesced in the revocation, or at least received the same without objection, cannot be seriously doubted, for he later requested the permission of the defendant to submit the sale of the lands to a certain Michigan lumber dealer. On December 21, 1923, the plaintiff wrote to Mr. Hine to the effect that a friend of the plaintiff's in Chicago was in touch with certain people who were desirous of starting redwood operations, or of taking over a mill in operation, and that said friend had requested the plaintiff to submit something that could be recommended, and that would be available by January 20th. In this letter the plaintiff stated to Mr. Hine that the defendant's lands might be acceptable, if the rights of way could be offered simultaneously with the lands. The letter concluded: "I would greatly appreciate your assistance in the matter, and, if you would consent to join me in the commission, this would be very agreeable." Mr. Hine replied: "The Merryman timber, as you know, is for sale, but the matter of terms and price would have to be taken up with Mr. Merryman."

The lands were sold to the Charles Nelson Company under an option taken in February, 1924. The transaction was concluded in the following April for the purchase price of \$1,500,000. Mr. Hine was paid the commission of \$75,000, and divided it equally with Mr. H. W. Jackson, who was president of the Northern Redwood Lumber Company, a subsidiary of the Charles Nelson Company, and who accepted the \$37,500 on condition that it be applied as a credit on the purchase price to the Charles Nelson Company, which was done.

At all times mentioned in this controversy, James Tyson was the president and directing officer of the Charles Nelson Company. Mr. Merryman was first introduced to Mr. Tyson

by Mr. Charles R. McCormick on October 19, 1923. Mr. Merryman asked Mr. Tyson if he would be interested in the defendant's property. Mr. Tyson replied that he was not interested, and gave as his reason that the defendant's lands were not adjacent to his company's properties. Later on Mr. Hine was requested by Mr. Olmstead, a brother-in-law of Mr. Merryman, to find some way of getting logs from the Merryman lands to Humboldt Bay or to tidewater. On November 15th Mr. Hine approached Mr. Jackson, and inquired of him if it were possible to have logs hauled from the Merryman lands to tidewater over the new road Mr. Jackson was then constructing up Mad river. Mr. Hine was informed that it would be necessary for him to see Mr. Tyson about it. About the middle of January, 1924, Mr. Hine called on Mr. Tyson in San Francisco, for the particular purpose of making arrangements for hauling logs from the Merryman lands over the new road. Mr. Tyson rejected the proposition, on the ground that his road was not a common carrier and he did not wish it to become such. During this conversation Mr. Hine first suggested to Mr. Tyson that the Merryman timber might be made available to the mills of the Northern Redwood Lumber Company. Mr. Tyson replied: "You convince Mr. Jackson; he is the operator of the concern. If you convince him it is, we will take the matter up and talk it over; but, until you do, I am not interested in it at all." Mr. Hine then began to work on Mr. Jackson, and convinced him of the availability of the Merryman timber to his mills. The plaintiff never met Mr. Jackson, nor had any correspondence with him, and Mr. Jackson had never heard of the plaintiff until this action was brought.

[1] It is not disputed that the plaintiff first submitted the proposed sale of said lands to the Charles Nelson Company. This was preceded by an interview with Carl Bachen, an employee of the Charles Nelson Company, serving that company as a contact man in the outer office of the president of the company in San Francisco, at which time Mr. Bachen suggested that the plaintiff submit his proposition in writing. Thereupon the plaintiff, under date of April 26, 1923, addressed a letter to the Charles Nelson Company, submitting the sale of said land to said company on terms subject to confirmation by the defendant. The terms of sale were disapproved by the defendant, and thereafter on May 12, 1923, the plaintiff submitted said lands to the Charles Nelson Company, with accompanying maps, on the authorized terms of \$2,500,000, one-fifth in cash and the balance in nine equal payments. Four days later the maps were returned to the plaintiff by Mr. Tyson by mail. It cannot be questioned that the plaintiff earnestly endeavored to arouse the interest of the Charles Nelson Company in

the purchase of said lands. However, but one conclusion can be drawn from the evidence as to the result of his efforts and that is, that he failed in his purpose. He therefore failed to fulfill the contract, which he himself defined, to name the buyer and conclude the sale.

In *Sessions v. Pac. Imp. Co.*, 57 Cal. App. 1, 206 P. 653, 660, relied upon by the plaintiff, it was said: "To constitute himself the causa causans, the predominating effective cause, it is not enough that the broker contributes indirectly or incidentally to the sale by imparting information which tends to arouse interest. He must set in motion a chain of events which, without break in their continuity, cause the buyer and seller to come to terms as the proximate result of his peculiar activities." This the plaintiff has not shown by the record before us.

[2, 3] The plaintiff contends that, assuming his authority to have been revoked by the letter of September 3, 1923, such revocation was not made in good faith, but was made in fraud of his rights, citing *Breen v. Roy*, 8 Cal. App. 475, 97 P. 170, *Sessions v. Pac. Imp. Co.*, 57 Cal. App. 1, 26, 206 P. 653, *Blumenthal v. Goodall*, 89 Cal. 251, 255, 26 P. 906, and *Merkeley v. Fisk*, 179 Cal. 748, 178 P. 945. The rule is that the revocation must be made in good faith and not for the purpose of defeating the agent's rights, and it is insisted that under the rule the question as to whether the revocation was in good faith or for the purpose of defeating the agent's commission is, in all cases, a matter for the jury and not for the court. The defendant concedes the existence of the rule, but contends that cases may arise where the question of the existence of good faith or fraud is one for the court, and that the present case is such a one.

We think that the defendant's position is the correct one; otherwise, a nonsuit, or a directed verdict could never occur. The question is: Do the facts permit of any other rational conclusion than that the revocation was in good faith? We find no evidence in the record upon which a jury would be justified in finding bad faith or fraud on the part of the defendant in revoking the plaintiff's authority to proceed. Furthermore, we find nothing in the record which would justify a finding that the sale to the Charles Nelson Company was evidently and plainly approaching success when the authority of the plaintiff was revoked. On the contrary, the evidence discloses, without reasonable inferences to the contrary, that the efforts of the plaintiff to arouse any interest in the sale on the part of the Charles Nelson Company had not met with success.

It would serve no useful purpose further to review the record, consisting of 217 exhibits and much oral testimony, in order to demonstrate that the motion for a directed verdict

was properly granted. It is enough to say that the record, as well as the arguments and authorities presented by counsel, have been considered with care, and we find no error in the ruling of the trial court.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; RICHARDS, J.

207 Cal. 685

MAYER v. MAYER. (S. F. 13078.)

Supreme Court of California. July 31, 1929.

1. Marriage $\S$ 58(7)—Marriage annulment on ground of fraud may be had for going through ceremony with intent not to consummate marriage and persistence in such intention.

Where one of parties to marriage goes through ceremony with an intention not to consummate marriage by marital intercourse and persists in such intention, annulment will be granted upon application of other party on ground of fraud.

2. Marriage $\S$ 60(7)—Evidence held to show that husband sued for annulment did not go through marriage with intention not to consummate marriage.

In action to annul marriage on ground of fraud, evidence held as matter of law to impel finding that defendant husband did not go through marriage ceremony with fraudulent intention not to consummate marriage by marital intercourse.

3. Marriage $\S$ 60(7)—Evidence held to sustain conclusion that wife's real reasons for desiring marriage annulment were not husband's fraudulent representations.

In wife's action to annul marriage, evidence held as matter of law to sustain conclusion that wife desired annulment because of husband's inability to support her as she had been accustomed to in past and not because of any fraudulent representations made by husband.

4. Marriage $\S$ 60(6)—Fraudulent representations relied on for marriage annulment must generally be pleaded.

Generally fraudulent representations relied on in action to annul marriage must be pleaded.

5. Marriage $\S$ 58(7)—Fraud necessary to avoid marriage must be such as is deemed vital to marriage relationship.

Fraud necessary to avoid marriage must be such as is deemed vital to marriage relationship and fraud which would afford grounds for rescinding ordinary contract will not justify annulment of marriage.

6. Marriage $\S$ 58(7)—Moral turpitude seriously affecting character of impostor furnishes sufficient grounds for annulment of marriage.

Moral turpitude which seriously affects character of impostor furnishes sufficient grounds for annulment of marriage.

7. Marriage $\S$ 58(7)—Fraudulent representations, if made, regarding age, employment, and war record, held insufficient to constitute fraud required to annul marriage.

Fraudulent representations, if made, by husband before marriage, that he was merchant and owner of shoe store business, 28 years of age, and had seen service in France while in army, when in fact he did not own shoe store, but was merely a shoe salesman employed on salary basis, 22 years of age, and had not seen service in France, held insufficient to constitute fraud required to annul marriage.

8. Marriage $\S$ 58(1)—Law should not be required to annul marriage to which there is no legal objection, entered into voluntarily, unadvisedly, and lightly.

Where husband and wife voluntarily entered into marriage state unadvisedly and lightly, law should not be required to give aid in annulling marriage to existence of which there is no legal objection.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Adrienne Mayer against Jack Mayer for annulment of marriage. Judgment for plaintiff, and defendant appeals. Reversed.

Morgan V. Spicer and Goldman, Nye & Spicer, all of San Francisco, and Julius C. Shapiro, of Kansas City, Mo., for appellant.

George M. Lipman and Harold L. Levin, both of San Francisco, for respondent.

SEAWELL, J. Defendant, Jack Mayer, appeals from a decree of the superior court of the city and county of San Francisco annulling his marriage with plaintiff, Adrienne Mayer, on the ground that plaintiff's consent thereto was procured by the fraud of defendant.

The parties were married on June 4, 1926, in the city of San Francisco. Plaintiff was 20 years of age and defendant was 22. Plaintiff resided in the state of New York, with her father and stepmother, and with her stepmother was visiting in San Francisco, having arrived during the first week of May. Said stepmother was then 26 years of age. The parties to the marriage met at a dinner given by a distant relative of plaintiff on May 15, 1926, and thereafter saw each other every evening preceding their marriage. On the evening of June 3d, when they had known each other a little more than two weeks, they agreed to marry on the following day. Defendant was employed as a salesman in a downtown shoe store. The marriage took place during his lunch hour at the city hall, a justice of the peace officiating, and was witnessed by plaintiff's stepmother and a friend of defendant. The defendant left plaintiff a few minutes after the ceremony to return to

his employment. On the evening of their wedding day, the newly married couple, together with the stepmother and defendant's friend who witnessed the ceremony, had dinner at the States Restaurant upon the invitation of defendant's friend. After dining, the four talked together until 11:30 p. m., according to plaintiff, and until 1:30 a. m., according to defendant, in the lobby of the Stewart Hotel, where plaintiff and her stepmother were staying while in San Francisco. Plaintiff and her stepmother then went to their room in said hotel and defendant and his friend, who were roommates, repaired to the hotel where they resided. On the following day plaintiff and her stepmother left San Francisco for their New York home on a 4 o'clock p. m. train, in accordance with plans made before plaintiff and defendant agreed to marry. It was understood that defendant should follow plaintiff to New York in about six weeks. They did not see each other on the day of plaintiff's departure and did not meet again until the trial of the action herein. Both parties testified that they never lived together as husband and wife.

After an exchange of letters and telegrams, the contents of which will be more fully referred to hereafter, plaintiff, on June 19th, just fifteen days after the marriage, sent defendant a telegram in which she stated that, after having had time to think the matter over, she had concluded that she was "too hasty in getting married," and asked of defendant permission to have the marriage annulled. Defendant replied by telegram: "Don't know what it's about. Will not give my consent."

The amended complaint for annulment was filed August 22, 1927. All allegations of fraud therein contained were denied by defendant, who contends upon this appeal from the decree of annulment that the evidence does not support the findings of fraud, and, further, that the fraudulent representations found by the court to have been made are not such as the law recognizes as grounds for the annulment of marriage.

The court below decreed an annulment on the basis of findings that defendant falsely and fraudulently represented to plaintiff that he was a merchant and the owner of a shoe store business in the city of San Francisco and of the merchant class, and that he was 28 years of age and had seen service in France while in the army, when in fact he did not own a shoe store, but was merely a shoe salesman employed on a salary basis, and was only 22 years of age, and had not seen service in France during the World War.

[1, 2] In her complaint, plaintiff alleged as a further ground of fraud that "at the time of said marriage defendant had no intention of consummating said marriage." The court did not squarely find on this allegation, but it

did find that defendant represented to plaintiff that he would enter into the marriage relation with her, and plaintiff believed, trusted, and relied upon such representations, and was thereby induced to consent to said marriage, and that defendant had not asked plaintiff to live with him as man and wife and at no time had they lived together or cohabited as man and wife.

This court held, in *Millar v. Millar*, 175 Cal. 797, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184, in line with the weight of authority, that if one of the parties to a marriage goes through the ceremony with an intention not to consummate the marriage by marital intercourse, and persists in such intention, an annulment will be granted upon the application of the other party on the ground of fraud. *Anders v. Anders*, 224 Mass. 438, 113 N. E. 203, L. R. A. 1916E, 1273. But the findings of the court in the instant case do not either expressly or by clear implication state that defendant went through the marriage ceremony with the intention never to consummate the relationship, and, in view of the facts and circumstances of the case, we are of the view that the evidence, as a matter of law, impels a finding that defendant did not go through the ceremony with such a fraudulent intention.

In support of the contention that said defendant married plaintiff with the design in some way to profit financially from the wealth of her father without consummating the marriage, counsel for plaintiff rely upon his conduct, as testified to by plaintiff, on the day of the marriage and on the following day, when plaintiff left for the East. Plaintiff testified that defendant did not ask her to go with him on the night of June 4th, or to postpone her return to New York. Defendant testified that he asked plaintiff to come with him on said night and to remain in California, but that plaintiff said she disliked San Francisco, and she and her stepmother urged the lateness of the hour and the fact that they had much packing to do as reasons why plaintiff should not go with him on the night of June 4th. The court below found against defendant on this point. Defendant further stated that he called the hotel on the telephone the next day and was informed that plaintiff was not in, whereupon he sent her a corsage of gardenias; that he asked at his place of employment to have the afternoon off, but, as the day was Saturday and the store short-handed, permission was refused him. Plaintiff denied having received the gardenias, and asserted that she and her stepmother were in the hotel throughout the day. Defendant further stated that, upon calling for plaintiff on June 3d, the night before their marriage, plaintiff herself brought up the subject of matrimony by asking him if he still felt about their getting married as he had on the previous night, and he replied that he did.

According to plaintiff, defendant first asked her to marry him on the third night they were together, and thereafter proposed to her every night until she accepted him on June 3d. Defendant admitted having proposed to plaintiff several times. Plaintiff testified that defendant gave as his reason for not going to New York with her his inability to immediately terminate his employment.

After plaintiff reached her home in New York on June 11th, she and defendant exchanged telegrams and letters, which will be briefly noticed here for the insight which they afford into the defendant's intentions in marrying plaintiff and her reasons for desiring an annulment of her marriage to him. The attitude of the parties toward each other, as indicated in said messages, furnishes an irrefutable answer to any claim that defendant married plaintiff with a preconceived intention not to consummate the marriage.

On the day of her arrival home, plaintiff sent two telegrams to defendant. In one she said: "Arrived cannot understand why you don't write love Adrienne." In the other she asked defendant to send "loads of letters and pictures," and said that it seemed an eternity since they had parted. Plaintiff's father also sent a telegram of congratulations to defendant on June 11th, and a second telegram on June 14th asking him when he could come to New York. Defendant testified to having called plaintiff on the telephone from San Francisco on the night of June 11th. Plaintiff denies such a telephone call. A letter written by defendant on June 11th appears in the record. Defendant testified to writing a letter to plaintiff prior to June 11th, but such a letter does not appear in the record. The letter of June 11th was written in an endearing tone. Defendant addressed plaintiff as "Dearest of all," signed himself, "Yours for life," and expressed appreciation of her father's congratulations. In a letter written on June 17th defendant expressed concern over plaintiff's not having written to him, and said he did not think it would be over six weeks before he would be on his way to plaintiff, and then they would "be parted never again." And on June 19th he telegraphed to plaintiff: "No mail since you left. Worried. Wire day letter tonight."

On June 17th plaintiff wrote her first letter to her husband since their marriage on June 4th and posted it for air mail delivery on June 18th. In it she says: "But getting down to brass tacks, old timer, when are you going to let us breathe a sigh of relief and hang up our 'Welcome Home' sign to the 'Prodigal Son'? * * * It is always hard for me to become serious, Jack, dear, haven't said one word that would make you know how lonesome or in love with you I am, but you do read between the lines don't you, old sweetheart, for that's what I've been meaning right along."

On June 19th, just two weeks after their

marriage, she sent defendant a telegram in which she said: "After having had time to think matter over have concluded that I was too hasty in getting married. Will you send me your permission to have it annulled. Wire at once."

In response to a telegram from defendant in which he said that he did not know what it was about and would not give his consent, plaintiff sent another telegram and, on June 23d, wrote a letter to her husband in which she said:

"Jack, dear, please don't be a big bear; just say 'Adrienne go out and get all the annulments your little heart desires, and be happy,' while to yourself you can say, 'Well, Jack, my boy, consider yourself well rid of a typical New York flapper—fickle, irresponsible, and untamed,'"

"It's all true, Jack. After turning matters over in my mind, I've decided that I can't really settle down seriously and give up all the pretty things and luxuries and theatre parties and wanderings that I have indulged in so promiscuously. With Daddy, it was always merely to express a desire to go here, to wish to buy this, a desire to do that, with never a thought to money or anything. It is next to impossible for me to become serious or settled down. * * * No, Jack, I can't give up my freedom, my own way, and pretty clothes for anybody."

On June 25th, after she had expressed her desire to obtain an annulment, plaintiff sent defendant a small gift, inclosing a card as follows: "June 25th, To husband Jack. Here's a smoke with Addie's love."

Defendant's reply expressed a lack of ability to understand plaintiff's attitude, and suggested that she come to California, as he would never consent to an annulment in New York. In a telegram of June 28th plaintiff's father requested defendant to come to New York, offering to pay his expenses, if necessary, and on June 29th defendant replied that it would be impossible for him to leave San Francisco. On August 7th plaintiff's father wrote a letter to defendant in which he gave as his daughter's reasons for desiring an annulment the same reasons she had given defendant in her letter of June 23d. On November 9th defendant sent plaintiff birthday congratulations, and on December 16th he wrote asking her if she would approve of his coming to New York. He also testified that he sent her a remembrance for Christmas, which was returned to him unopened. Defendant gave no reason upon the trial for not going to New York other than that he thought it was the place of plaintiff and her father to come to him, rather than for him to go to them, in view of the attitude of plaintiff, and that he was short of funds and did not wish to go at his father-in-law's expense. He left San Francisco February 22, 1927, for Kansas City, Mo., where his father resided, and did not return until shortly before the trial.

It appears that prior to the trial of the action herein defendant had filed suit in New York against plaintiff's father to recover \$100,000 as damages for alienation of plaintiff's affections. Plaintiff testified that defendant's attorney had made an offer to her and her father on behalf of defendant to withdraw opposition to an annulment suit upon payment of a sum of money. Defendant denied having authorized his attorney to make any such offer.

In urging a purpose on the part of defendant to realize a financial advantage from his marriage with plaintiff without consummating said marriage, plaintiff does not suggest the precise manner in which defendant intended to thus profit. That he married her with the preconceived intention of making it appear that her father had deprived him of her love and affection and thereafter recovering monetary damages in an alienation of affections suit against said father, or with the idea of so conducting himself that plaintiff would desire to file a suit for annulment, to which he would agree to make no opposition only upon payment of a sum of money, is to attribute a degree of knavery to defendant which does not find support in the record. The letters and telegrams noticed above possess a ring of sincerity. The messages of both are such as are written by young people who are, or imagine themselves to be, much in love. We cannot regard defendant's expressions of love for his bride as simulated and part of a cleverly conceived scheme to mulct her father of money. Said messages reveal a regard and affection for plaintiff utterly inconsistent with a marriage entered into by defendant with a design never to live with plaintiff as husband and wife.

[3] Said communications are also important in consideration of plaintiff's claim to have the marriage annulled on account of the alleged fraudulent representations made by defendant as to his financial standing.

Although plaintiff claims to have sent the telegram of June 19th, in which she stated her purpose to obtain an annulment, because she learned that defendant had falsely represented his financial position and ability to support her, she sent said telegram before she could possibly have learned of the alleged fraud practiced upon her through the only channel from which she claims to have acquired the information. She testified that after she wrote to defendant on June 17th she wrote to the distant relative in San Francisco at whose home she had met defendant, and that it was in a reply letter written by said relative that she first learned of defendant's deception. A reply to a letter written in New York on June 17th, or shortly thereafter, and addressed to San Francisco, could not have been received by mail on or before June 19th, at the time plaintiff sent her telegram, and it is quite unlikely that a reply would have been received on June 23d, the

day on which plaintiff wrote to defendant, making plain her desire to obtain an annulment for the insufficient reasons stated by her. At least plaintiff made no reference thereto in the letter of June 23d, nor did her father, in the letter he subsequently wrote in regard to the matter of annulment, charge defendant with practicing a fraud upon his daughter. Plaintiff did not produce the letter written by said relative upon the trial. One of the attorneys for defendant, in an affidavit presented upon motion for a new trial, offered to prove by the testimony of said relative to whom plaintiff claims to have written that said relative had neither received a letter of inquiry from, nor had she written to, plaintiff concerning defendant. Plaintiff's explanation that, although she desired an annulment because of defendant's fraud, she withheld from him the true reason through a desire to be "polite" to him, appears inherently improbable. Likewise lacking in credibility is her explanation that her father failed to charge defendant with fraud in the letter he wrote in attempting to obtain defendant's agreement not to oppose an annulment because plaintiff had not informed her father of said fraud, for the reason that she did not wish him to know the truth. We are therefore of the view that the record, as a matter of law, will sustain no other conclusion than that plaintiff desired an annulment for the reasons stated by her and her father in their letters to defendant, which had nothing to do with any fraudulent representations made by defendant to her.

[4] Plaintiff testified that defendant represented to her that he owned a shoe store, was manager of the store in which he was then employed, and was able to support her in the manner in which she was accustomed to live, and that he told her he was 27 years of age and had seen service in the World War in France. In fact, he was only 22, which was the age he gave in his application for a marriage license, and was employed as a clerk and assistant manager in a shoe store, earning between \$45 to \$50 a week, and, although he had been in the army in 1919-20, he had never seen service in France. In her complaint, plaintiff makes no reference to fraudulent representations as to age and service in the World War as grounds for annulment. It is the general rule that fraudulent representations, to be relied on, must be pleaded. Defendant denied making the representations set forth in the complaint.

Plaintiff does not claim that defendant represented himself as owning the shoe store in San Francisco in which he was in fact an employee at the time of his marriage. In one instance she stated that he told her he *had* owned a shoe store, the implication following that he did not then own such a store. Plaintiff did not state that any representations as to the location, size, or other facts

concerning said store were made, or explanation offered as to why, if he was the owner of a shoe store, he was not engaged in managing it, rather than in working on a salary basis for another. The alleged representation that he was able to support her in the manner in which she was accustomed to live is very indefinite. Defendant denied absolutely making the representations charged against him, but the court below found in plaintiff's favor on this issue. The indefinite character of the representations alleged to have been made, as well as the circumstance that neither plaintiff nor her father in their negotiations with defendant in regard to the annulment make any reference thereto, tends to strongly corroborate defendant's denial. The business and social standing of defendant could have been easily determined by plaintiff had she made the slightest investigation. Undue haste can only account for a failure to make reasonable inquiry. Plaintiff's statements in her letter of June 23d, probably written before she had received the information as to defendant's alleged misrepresentations, that she could not give up all the luxuries she had indulged in, nor her freedom, her own way, and pretty clothes for anybody, and that with her father she had merely to express a desire, with never a thought for money, furnish strong and convincing evidence that she was aware that defendant did not possess the means to support her in the manner in which she claims to have been living.

[5-7] But, even though said representations were in fact made, they fall short of constituting fraud sufficient to annul a marriage. By reason of the interest of the state and society in the preservation and integrity of the marriage relation, it has been declared that fraud which would afford grounds for rescinding an ordinary contract will not justify an annulment of marriage, and that the fraud necessary to avoid a marriage must be such as is deemed vital to the marriage relationship. *Barnes v. Barnes*, 110 Cal. 418, 42 P. 904; *Wilcox v. Wilcox*, 171 Cal. 770, 155 P. 95; *Franke v. Franke*, 3 Cal. Unrep. 656, 31 P. 571, 18 L. R. A. 375. In the application of this rule it has been held that misrepresentations as to social and financial position are insufficient. More recent cases show a proper tendency to depart from the rigidity of the early decisions. The more modern trend is indicated by such cases as *Brown v. Scott*, 140 Md. 258, 117 A. 114, 22 A. L. R. 810, where it was held that grossly false representations of an ex-convict and fugitive from justice as to his moral, social, and financial standing constituted ground for annulment at the suit of the young girl whom he had duped into marriage with him. Moral turpitude which seriously affects the character of the impositor would, of course, furnish sufficient grounds for annulment.

The circumstances of the instant case fall

far short of presenting the aggravated situation of *Brown v. Scott*. No charge is made against defendant's morals other than that he made the false representations testified to by plaintiff. He testified that it was his custom to work for a time as a clerk in a shoe store and then to join a ship's orchestra, receiving his passage and board for his services playing the violin. No wide discrepancy appears in the standards of living of the parties. They were married in haste and with little thought of the responsibilities they were assuming.

Since we have held that upon the merits plaintiff is not entitled to an annulment, it is unnecessary to determine the claim of defendant that the court below was without jurisdiction of the action, although the marriage was solemnized in California, for the reason that neither plaintiff nor defendant was domiciled in, or a resident of, California at the time suit was commenced. It is the contention of defendant that in annulment proceedings, as in divorce actions, jurisdiction is dependent upon domicile at the time of commencement of the action. There are essential differences between the two proceedings in nature and effect. Since the validity of marriages is generally determined by the law of the state where the marriage took place, there are cogent reasons why annulment should be sought in the tribunals of that state. In *Millar v. Millar*, 175 Cal. 797, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184, this court did not decide the precise point argued by defendant, but did hold that section 128, Civil Code, requiring a year's residence in the state and a three month's residence in the county, in divorce actions, was not applicable to annulment proceedings. See, also, *McCormack v. McCormack*, 175 Cal. 292, 165 P. 930. The citations of opposing counsel in the instant case indicate a divergence of authority on the question here raised. Since it is not essential to the decision of the instant case to decide this issue, and the question is one requiring a more thorough and painstaking research than we feel we would be justified in giving to it at this time, we pursue it no further.

[8] The evidence shows that the parties to this action voluntarily entered into the marriage state unadvisedly and lightly. Under such circumstances the law should not be required to give aid in disentangling a situation to the existence of which there is no legal objection. That a marriage should not be annulled upon the ground of fraud except in an extreme case, where the particular fraud goes to the very essence of the marriage relation, see 16 Cal. Jur. 937; *Millar v. Millar*, 175 Cal. 797, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; *Richardson v. Richardson*, 246 Mass. 353, 140 N. E. 73, 31 A. L. R. 146; *Wells v. Talham*, 180 Wis. 654, 194 N. W. 36,

33 A. L. R. 827; *Robertson v. Roth*, 163 Minn. 501, 204 N. W. 329, 39 A. L. R. 1342; *Bannon v. Bannon*, 50 Wash. Law Rep. 22, 23 A. L. R. 178.

Judgment reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.

207 Cal. 753

KOSTER et al. v. SOUTHERN PAC. CO.
et al.★ (S. F. 13043.)

Supreme Court of California. Aug. 2, 1929.

Rehearing Denied Aug. 29, 1929.

1. Railroads ⇨328(1,7)—Motorist held not relieved of duty of stopping, looking, and listening for approaching train by obstructions and noise at intersection.

Notwithstanding obstructions existed at railroad crossing, and that noise at intersection was so great as to overcome noise made by oncoming train, such circumstances would not relieve motorist struck by train of duty of stopping, looking, and listening.

2. Railroads ⇨328(3)—Motorist having insufficient view was required to alight from automobile and take advantage of views afforded.

If motorist, on stopping at place of safety near railroad track, did not have sufficient view of situation looking both ways, he was required to alight from his automobile, go forward a few steps, and take advantage of the views so afforded.

3. Railroads ⇨327(1)—Person approaching railroad track must take advantage of every reasonable opportunity to look and listen.

A person approaching a railroad track, which is itself a warning of danger, must take advantage of every reasonable opportunity to look and listen.

4. Railroads ⇨330(3)—Traveler may not depend on engineer's custom to give appropriate signals, even though such duties are enjoined by law.

Traveler about to cross railway track at place where engineer gives appropriate signals of approach of train may not depend on such custom, or even on a duty enjoined by law, to give such signals.

5. Death ⇨58(1)—Jury may infer ordinary care and diligence of decedent only in absence of direct proof of the fact.

Jury may infer ordinary care and diligence on part of decedent from his character and habits and natural instincts of self-preservation only in absence of direct proof of the fact.

6. Railroads ⇨328(1,7)—Motorist struck by train at intersection held contributorily negligent as matter of law, notwithstanding view was obstructed or that signals could not be heard.

Motorist whose car was struck by train at intersection held guilty of contributory negli-

gence as matter of law, notwithstanding that noise at intersection was so great as to prevent a person seated in an inclosed car, as was decedent, from hearing signals of a steam locomotive, since decedent was required in such event to stop his motor and open the door or windows of his car and listen, or, if view was obstructed, not to attempt to cross until he was assured it was safe to do so.

7. Railroads ☞330(2)—Ignorance of fact that watchman was not on duty at intersection would not excuse exercise of due care on part of deceased motorist in crossing track.

Ignorance of fact that no watchman was on duty between 11 p. m. and 7 a. m. at intersection where motorist was struck by train would not excuse exercise of due care on part of decedent in crossing the track.

Langdon, J., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Sadie Koster and another against the Southern Pacific Company and another. From the judgment, defendants appeal. Reversed.

Rehearing denied; Langdon, J., dissenting.

Louis Oneal, Wm. F. James, and A. G. Shoup, all of San Jose, for appellants.

Rea & Caldwell and E. M. Rea, all of San Jose, for respondents.

SEAWELL, J. This appeal is taken from a judgment entered by the superior court of the county of Santa Clara upon the verdict of a jury awarding the plaintiffs \$50,000 as and on account of damages alleged to have been sustained by them by reason of the death of Frank E. Koster, caused by a steam locomotive drawing a passenger train of eight cars, consisting of three diners, two coaches, and three baggage cars, owned and operated by the Southern Pacific Company, negligently colliding with the automobile driven and operated by said Frank E. Koster at a point on said company's railroad track where the same crosses Keyes street, at right angles, in the city of San Jose. The road is operated as a commercial steam railroad. Judgment went against both defendants, Southern Pacific Company and its locomotive engineer in charge, Arthur R. Bullard. Sadie Koster is the widow, and June and Alice Beverly Koster are minor children of said marriage, the latter being a posthumous child. The deceased at the time of his death was 29 years of age, enjoying good health, and was engaged in the bakery business in the city of San Jose, which earned him \$8,000 annually.

The collision occurred at about 4:29 a. m., June 18, 1926. Decedent died from injuries received in said collision some 30 or 40 minutes thereafter. His brother, John Koster, a resident of the city of Oakland, whom decedent was attempting to convey to the Market

street station, where the former intended to take passage homeward on a Southern Pacific train departing from said station at 4:45 a. m., was also killed. Said Market street station is about 25 blocks distant from the Keyes street crossing, the place where the accident occurred.

The important question in this case is whether the decedent violated the rule of caution commonly known as the stop, look, and listen rule, which is approved by a long line of decisions of this court, as well as by numerous courts of the land, both state and federal, in the light of all the facts and circumstances of the case presented, and thereby barred his heirs of the right to recover damages on account of his death. Other questions of importance affecting the conduct of decedent and the parties defendant are also present, but they are either subsidiary or relative to the main question, first above stated. Whether the judgment may be sustained depends upon the conclusion which the law directs should be made upon a consideration of the facts which account for the injuries which were the proximate cause of Frank E. Koster's death. Some of the important facts are admitted, and the others are so self-evident as to place their existence beyond the realm of serious doubt.

The general course of appellant's main tracks through the section of the city of San Jose where they cross Keyes street is southerly and northerly, and the course of said street is easterly and westerly. The train in question was the regular passenger train moving southerly.

Decedent, Frank E. Koster, resided with his family on Seventh street, between Keyes and Bestor streets, approximately 3 city blocks from the place of collision. It was the rule of decedent to leave his residence each morning between 4 and 5 o'clock for his place of business, which was located on Second street. There is uncontradicted evidence in the record that he was seen to cross the railroad track at Keyes street at the hour of 4 and 5 o'clock a. m. upon a number of occasions, and from its location with reference to his home and business, from which he made daily trips in his Nash sedan, and the nearness of his residence to said Keyes street crossing, it must be assumed that he was quite familiar with said crossing and was aware that a passenger train, traveling southerly, crossed said street at about 4:22 o'clock a. m. each morning. The general course of appellant's main track through the section of the city of San Jose in which Keyes street crossing is situated is on a straight line extending in a northerly and southerly direction.

So far as natural obstacles are concerned, there is nothing to obstruct the view of a person standing at a safe distance from the railroad track at said crossing from seeing a

train of cars approaching from the north at a distance of at least 2,000 feet. The morning was clear, and the atmospheric conditions for visibility were good. Although the sun rose at 4:48 a. m. on June 18, 1926, and it was practically daylight at 4:29 a. m., it was nevertheless the rule of the company defendant not to extinguish the headlight on the engine until the train arrived at a station some distance south of said crossing. Said company's roadbed is built upon its private right of way on either side of said crossing, and no limitation is fixed by law as to the rate of speed said company's trains may travel, except when crossing streets within the limits of the city of San Jose. By an ordinance of said city it is provided that it shall be unlawful for any person, firm, or corporation to operate a railroad train across the intersection of any streets within the city limits of said city at a greater speed than 12 miles per hour, provided said ordinance shall not apply at the intersection of any streets where the person, firm, or corporation operating or running trains or cars shall "regularly maintain flagmen, gates or other mechanical devices for the protection of the public." The company maintained a flagman at said intersection from 7 o'clock a. m. until 11 o'clock p. m. of each day. A notice to that effect was displayed upon the flag station building, which occupied a small space upon the company's right of way near the westerly line of entry upon said company's tracks. The usual standard cross-arm signal gave notice to the traveling public of a railroad crossing at a little distance beyond. The locus quo is near the city limits of said city of San Jose. No high buildings are constructed at said intersection, nor along the railroad company's right of way, in the section of the city we are here considering. By reason of the four corners of said intersection being occupied by factories or industrial plants, the traffic is reasonably extensive. Two of said plants at least, a brick manufacturing plant and the American Can Company, operate at night during the summer season, and were operating at the time the accident in question occurred. It is also in evidence that the boilers of the Ransome-Crummey Paving Company emitted steam, which added to the noise produced by the other two. Indeed, it is the claim of respondents that the noise at said intersection is always so great in the months of June, July, August, and September as to prevent a person in a closed car from hearing an approaching train, or even its bell or whistle. Keyes street is 60 feet in width, and the railroad right of way is approximately the same width at said point of intersection. The grade of the railroad approaching the intersection is slightly ascending.

The northerly view of one proceeding westerly on Keyes street, as was decedent, is continuously obstructed by the American Can

Company's building and a high board fence for the full distance of the block extending to the line of said railroad company's right of way. The watchman's shanty, so called, is a small building 8 feet high and $6\frac{1}{4} \times 6\frac{1}{4}$ feet. Said shanty is about 1 foot westerly from said board fence, and sits back 10 feet from the northerly property line of Keyes street. The small space between the shanty and fence was closed with boards. Accepting the contention of respondents, a continuous wall obstructs a northerly view of the main railroad track practically the whole distance of the block, abutting on Keyes street and extending to the westerly line of the shanty. The shanty has a glass door facing southerly, which is on a line with a glass window looking northerly. While a person may see through said glass door and window, a very limited opportunity was afforded thereby for observing an approaching train at any point. At said intersection three tracks cross said Keyes street, to wit, the main or central track, and two side tracks, one on either side of the main track. All tracks are standard gauge, 4 feet $8\frac{1}{2}$ inches between rails. The westerly side track does not materially enter into the case. From the easterly side track, looking northerly after it passes the northerly property line of Keyes street, a spur track bears easterly. It is the claim of respondents that a box car was spotted at a point on the side track 10 feet north of the flagman's station in such a position with relation to the situation already described as to prolong the line of obstruction to the extent that no room was left for a person to sit in a car at a safe distance from the main track and make observation as to whether a train from the north was approaching on the main line. The overhang of a box car is $2\frac{1}{2}$ feet. The distance from the flagman's shanty to the side track is 8 feet $3\frac{3}{4}$ inches. Said track is 4 feet $8\frac{1}{2}$ inches in width. The distance from the westerly rail of the side track to the first rail of the main track is 8 feet 6 inches. Eliminating the box car from the side track, a traveler would have an open space of approximately 21 feet 6 inches in which to make observation for an approaching train. That a single box car, 36 feet 10 inches in length and 9 feet 7 inches in width, should have obstructed the view of an approaching train, consisting of a steam locomotive, three diners, two passenger coaches, and three baggage cars, throughout the entire open space of 21 feet 6 inches, seems improbable.

A serious question is presented as to whether the box car was in the position in which respondents would place it. If its position be changed from said position but a few feet either way, the avenue of vision beyond the car is materially widened or narrowed. The claim as to its position being near the flagman's station may be seriously questioned, there being testimony from a number of ap-

parently disinterested witnesses, whose attention was directed to the matter, that the box car was from 80 to more than 100 feet north of Keyes street. One of these witnesses, F. W. Reiff, the night watchman of the Pacific Coast Cannery plant, situated on the southwesterly corner of the intersection of said Keyes street and the railroad crossing, testified that he made observation of the situation before and shortly after the collision, and the tracks were clear, except a box car stood on the spur track near the gate at the point where said track enters the American Can Company's property. This was a considerable distance north of the point where Police Officers Schwandt and Farley, who, in patrolling their beats, had occasion to pass over the tracks at 2:30 on the morning of the accident, placed the box car. Both police officers testified that a box car was spotted at a point beginning about 10 feet north of the flagman's shanty. Mr. Farley, who was the driver of the machine, stated on direct examination that no view of the track northerly was obtainable until the front wheels of the automobile had passed the east rail of the main track. On cross-examination he stated that, with the front wheels on the west rail of the side track from the position the box car was placed, as he saw the situation, he would say that one could have seen up the main track for half the distance to the next crossing north, approximately 600 feet. This would indicate that the box car was some considerable distance north of the flagman's shanty.

James B. Cushing, a street sweeper employed by the city of San Jose, crossed the intersection at 3:30 on the morning in question. He crossed the track going westerly very slowly operating the street-sweeping machine, and, when upon the side track, he was of the opinion that he was able to see 2,000 feet up the main track. His view before reaching the main track was unobstructed. He saw lights at a northerly street intersection. The car, which is asserted to have been near the flagman's station, was placed much further up the siding by the witness. Otherwise the tracks were clear.

Three witnesses, besides the members of the train crew, testified to hearing the whistle blown before the crossing was reached. Engineer Bullard testified that the bell was started ringing when the train pulled out of the main station at San Jose and was stopped by him after the engine had toppled to its side upon being derailed. The bell operated automatically by air pressure or power. The fireman set the bell in motion at the main San Jose station, and it rang continuously through the suburbs of San Jose until it was turned off by the engineer, as above noted. Two whistle blasts, two long and two short, were given before crossing Martha station, the station immediately north of the crossing at Keyes street. As to the blowing of the

whistle at the several crossings, the engineer and fireman David were corroborated by the positive testimony of the train conductor, Conrad, brakeman Dabbs and Bell, and dining car chef McEllant of the train crew. These witnesses, being inside the train, did not notice that the bell was ringing, although one or two testified that it was set in motion at the main station. R. S. Risdon, foreman of the tin plate department of the American Can Company, testified that he was expecting a shipment of tin plate, and was listening for the arrival of the freight train conveying the shipment. He heard the blasts of the passenger engine, which he located at the crossing first above Keyes street. Very soon thereafter he heard a crash or unusual noise, and went to the Keyes street intersection. He testified that there was no car on the siding near the flagman's station, but there was a single car some distance up the track near the gate that leads into the American Can Company's property, as described by other witnesses. Frederick W. Reiff, the watchman heretofore mentioned, testified that he was upon the platform of the Pacific Coast Cannery Company at said crossing in the discharge of his duties and he saw the headlight of the engine when the train in question was at Reed street crossing, some 3,000 feet up the track, and distinctly heard the blasts of the whistle at that distance. John Otto, the engineer for the Vernon-Clay plant, resided on Martha street near the main track of the defendant company's railway. Martha street crosses the track approximately 1,300 feet north of Keyes street. Otto testified that he was awakened on the morning of the accident by whistle blasts before the train reached Martha street, and heard the train afterwards pass. He did not learn of the accident until about 6 o'clock that morning. The box car at that time was about half way between Martha and Keyes streets.

We have made references to the testimony of the several witnesses offered by defendant as to whether or not the bell was rung and whistle blown, for the reason that said testimony is affirmative or positive in character as to the actual occurrence of an event in question in contrast with the negative testimony of persons whose attention was not by reason of some special circumstance drawn to a commonplace event associated with the management of trains.

[1, 2] In an effort to demonstrate that a view of an approaching train was completely shut off by intervening obstacles to a person occupying the front seat of an automobile at any safe distance from the east rail of the main track, respondents had reckoned with all possible elements that would tend to sustain their conclusion, such as widths of tracks, distances separating tracks, dimensions and overhang of box cars, and the position of physical objects and their relation to each other. The physical facts speak for

themselves, and there is very small doubt that, had decedent *stopped, looked, and listened*, as the law required him to do, he would have been warned at a safe distance from the main track of the approach of said train and the hazard he would assume in attempting to cross the railroad crossing ahead of the train. The obstruction complained against consisted of a box car approximately 30 feet in length by 6 feet in width at a point 10 feet northerly from a flagman's station house 8 feet high and 6 feet by 6 feet square. The train was moving up a slight grade under power, and there were no other intervening objects except those in dispute to interfere with the usual warnings that a fuel-burning, steam-propelled train moving rapidly over its rails on a clear morning ordinarily gives of its approach. Assuming that the obstructions existed as claimed by respondents, and that the noise at the intersection was so great as to overcome the noise made by the oncoming train, these circumstances would not relieve him of the duty of stopping, looking, and listening, which, from the evidence, he undoubtedly failed to do. If upon stopping at a place of safety near the railroad track he did not have a sufficient view of the situation looking both ways, it has been held by this court and other courts that the rule of caution required that he should alight from his automobile, go forward a few steps, and take advantage of the view that would thus be afforded. *Murray v. Southern Pacific Co.*, 177 Cal. 1, 169 P. 675; *Thompson v. Southern Pacific Co.*, 31 Cal. App. 567, 161 P. 21; *Baltimore & Ohio Railway Co. v. Goodman*, 275 U. S. 66, 48 S. Ct. 24, 72 L. Ed. 167, 56 A. L. R. 645.

The rule prescribing the quantum of caution that should be observed by persons crossing railroad tracks has been many times stated by this court without material deviation from the standard laid down in the case last above cited, written by Mr. Justice Holmes of the United States Supreme Court. The principle of law which governs that case is, in some respects, peculiarly applicable to the instant case. It is there said:

"Goodman was driving an automobile truck in an easterly direction and was killed by a train running southwesterly across the road at a rate of not less than 60 miles an hour. The line was straight but it is said by the respondent that Goodman 'had no practical view' beyond a section house 243 feet north of the crossing until he was about 20 feet from the first rail, or, as the respondent argues, 12 feet from danger, and that then the engine was still obscured by the section house. He had been driving at the rate of 10 or 12 miles an hour but had cut down his rates to 5 or 6 miles at about 40 feet from the crossing. It is thought that there was an emergency in which, so far as appears, Goodman did all that he could.

"We do not go into further details as to Goodman's precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true as said in *Flannelly v. Delaware & H. Co.*, 225 U. S. 597, 603, 32 S. Ct. 783, 56 L. Ed. 1221, 1222, 44 L. R. A. (N. S.) 154, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts. See *Southern P. Co. v. Berkshire*, 254 U. S. 415, 417, 419, 41 S. Ct. 162, 65 L. Ed. 335, 337, 338."

The rule which was established in this state a number of years ago, and which has been uniformly followed to and including the most recent decisions of this court and the District Court of Appeal, is clearly stated in the familiar case of *Griffin v. San Pedro, Los Angeles & Salt Lake Railroad Co.*, 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842. We quote freely from that case, for the reason that it distinguishes the cases usually cited, many of which respondents in the instant case rely upon, as holding that the question of negligence in cases of this class is practically in every case a question for the jury. A reasonable regard for time and space would not justify us in reproducing the review therein made of *Cooper v. Los Angeles Terminal Ry. Co.*, 137 Cal. 229, 70 P. 11; *Bilton v. Southern Pacific Co.*, 148 Cal. 445, 83 P. 440; *Antonian v. Southern Pacific Co.*, 9 Cal. App. 718, 100 P. 877; *Eaton v. Southern Pacific Co.*, 22 Cal. App. 461, 134 P. 801; *Martin v. Southern Pacific Co.*, 150 Cal. 124, 88 P. 701, and others. To this list might be added the more recent cases, *Green v. Southern Pacific Co.*, 53 Cal. App. 194, 190 P. 1059, *Gregg v. Western Pacific R. R.*, 193 Cal. 212, 223 P. 553, and other cases decided since *Griffin v. San Pedro, Los Angeles & Salt Lake Railroad Co.*, *supra*. In all cases in which judgments have been upheld, either the injured party stopped, looked, and listened, or took every opportunity to learn of the approach of the train that

a cautious person should have taken in the circumstances of the situation. In practically all of said cases the stop, look, and listen rule is expressly recognized. In restating the general rule in the Griffin Case it is said:

[3, 4] "A person approaching a railway track, which is itself a warning of danger, must take advantage of every reasonable opportunity to look and listen. *Holmes v. South Pacific Coast Ry. Co.*, 97 Cal. 167, 31 P. 834; *Green v. Los Angeles, etc., R. R. Co.*, 143 Cal. 37, 76 P. 719, 101 Am. St. Rep. 68; *Hutson v. Southern Cal. Ry. Co.*, 150 Cal. 704, 89 P. 1093. A traveler who is about to cross a railway track at a place where ordinarily the engineer gives appropriate signals of the approach of the train may not depend upon such custom, or even upon a duty enjoined by law, to give such signals. 'He has no right not to look or listen because he has heard no such signals.' *Erie Ry. Co. v. Kane*, 55 C. C. A. 129, 118 F. 234, cited in *Hutson v. Southern Cal. Ry. Co.*, 150 Cal. 704 [89 P. 1093]. The same doctrine is announced in *Herbert v. Southern Pacific Co.*, 121 Cal. 232, 53 P. 651, a case in which the negligence of the railroad company's servants in omitting the usual signals was admitted, and in *Koch v. Southern Cal. Ry. Co.*, 148 Cal. 680, 84 P. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795, one in which the negligence of the defendant in leaving open the safety gates at a crossing was not held to excuse plaintiff's failure to take any precautions in his attempt to cross the track. See, also, *Heitman v. Pacific Electric Ry. Co.*, 10 Cal. App. 398, 102 P. 15; *Wilkinson v. Oregon Short Line R. Co.*, 35 Utah, 110, 99 P. 466; *Bates v. San Pedro, L. A. & S. L. R. Co.*, 38 Utah, 569, 114 P. 527."

The standard of conduct applicable to all persons upon approaching steam railroad crossings, as laid down in *Larrabee v. Western Pacific Railway Co.*, 173 Cal. 743, 161 P. 750, 752, is applicable to the instant case, in that it disposes of a number of points pressed by respondents. It is there said:

"Nor is it true, as respondent argues, that the deceased's conduct, otherwise clearly negligent is relieved from this reproach by virtue of his right to presume that the defendant would not run its train at an excessive rate of speed in approaching this crossing. Nor does the added circumstance that this was a special train in the slightest change the deceased's legal responsibilities. Railroads are entitled to operate special trains and to operate them at high rates of speed. Their regular trains cannot be and no one expects them to be always on schedule. With all this the deceased was, of course, familiar. The statements in *Strong v. Sacramento & Placerville R. R. Co.*, 61 Cal. 326, and in *Whalen v. Arcata & Mad River R. Co.*, 92 Cal. 669, 28 P. 833, to the effect that the deceased had the right to rely upon the 'performance by

those on the locomotive of every act imposed by law upon them when approaching a crossing,' cannot be considered to be the law of this state as affecting the rights and duties of one about to venture to make a railroad crossing. Such a one is not entitled to rely upon such a performance of duty so as to relieve him from the necessity of looking if he does not hear, and of stopping if he cannot see. Suffice it upon this to cite the later case of *Koch v. Southern Cal. Ry. Co.*, 148 Cal. 677, 680 (113 Am. St. Rep. 332, 7 Ann. Cas. 795, 4 L. R. A. [N. S.] 521, 84 P. 176); *Griffin v. San Pedro, L. A. & Salt Lake R. R. Co.*, 170 Cal. 772 (L. R. A. 1916A, 842, 151 P. 282)."

It is conceded by appellants that the defendant company was guilty of negligence in running its train across said crossing at a greater rate of speed than 12 miles per hour, as limited by city ordinance. On the other hand, it is claimed by appellants that decedent was guilty of negligence in attempting to drive across said crossing at a rate of speed in excess of the provisions of the Motor Vehicle Act (St. 1923, p. 517), which provides that the speed of motorists at railroad crossings shall not exceed 15 miles per hour.

The only surviving eyewitness to the accident was the fireman, John H. David, who was occupying a position on the left-hand side of the cab. The testimony of the train crew was that the train was traveling at a speed of 20 or 25 miles per hour. Respondents' contention is that the train, being seven minutes late, and the speed limit commencing at Valbrick station and onward, calling for a schedule of 50 miles per hour, the probabilities that this train was traveling at a much faster rate of speed than testified to by the train crew was strong. It is also argued that the distance the train ran before it was brought to a stop strongly supports their claim that the train was moving at the rate of 60 miles per hour at the time the collision occurred.

Fireman David testified that, when the pilot of the engine was within 10 feet of the north property line of Keyes street, decedent's automobile suddenly appeared coming from the east. The engine bell was automatically working. When he first saw the decedent, he was back of the flagman's shanty. It was his judgment that the engine was nearer to the point where the automobile and engine struck than was the automobile, and from this circumstance he estimated the speed of the automobile at 30 or 40 miles per hour. The whole affair seemed like a flash. Upon first sight of decedent, he called to the engineer to hold the train. The automobile became wedged in beneath the pilot, and was carried, an entangled mass, the entire distance the engine and train traveled after the impact, which was 582 feet. The engine and first car became derailed at a distance of 358 feet, and both traveled on the

ties and ground for a distance of 224 feet, when the engine toppled partially to its side. The brakes and mechanism of the engine and train were in good condition, but the brakes failed to operate on the engine and first car after they became derailed.

A physician in the employ of the defendant company who called to attend the decedent at the hospital soon after the accident testified that the decedent, in response to an inquiry as to his name, replied, "It doesn't make any difference, it was all my fault; just give me something to put me out of my misery." Assuming that he made the statement and was conscious as to its effect, it was but a conclusion, and we would not be bound by it, if the facts and circumstances showed that he was not guilty of contributory negligence.

[5] The respondent relies largely upon an indulgence of the presumption that the jury was at liberty to infer ordinary care and diligence on the part of the decedent from all of the circumstances of the case—his character and habits and the natural instincts of self-preservation—to hold the verdict. This can only be done in the absence of direct proof of the fact. The circumstances of the case alone are sufficient to rebut the presumption invoked. In *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 P. 651, as to this issue it was said:

"But the cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case had been precisely defined; and, if any element is wanting, the courts will hold, as matter of law, that the plaintiff has been guilty of negligence. And, when injury results which might have been avoided by the use of proper care, the plaintiff cannot recover, although the defendant has also been guilty of negligence. In this special case the amount of care as well as the nature of it has been settled.

"The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and to listen for approaching trains. What he must do in such a case will depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions."

Again, in the case of *Pepper v. Southern Pacific Co.*, 105 Cal. 389, 38 P. 974, 976, it was said:

"If he could not see an approaching train because his vision was obstructed, ordinary care for his own safety required him to stop in order that his hearing should not also be obstructed, and, in any event, to make his

approach so slowly as to give him complete control," enabling "him to stop instantly if occasion required."

[6] If, as contended by respondents, the noise was so great at said crossing as to prevent a person seated in an inclosed car, as decedent was, from hearing the bell or whistle of a steam locomotive, it was negligence on the part of decedent, who had full knowledge of existing conditions, not to have stopped his motor and opened the door or windows of his car and listened, and if then, granting, for the sake of the illustration, his view was obstructed, he should not have, as a prudent person, attempted to cross unless he was well assured that it was safe to do so. As the court properly instructed the jury, it was incumbent upon him to use the care and caution commensurate with the apparent danger surrounding him when he approached a railroad crossing. If the unfortunate man had observed the rule of conduct which the law prescribed, he would not, in all human probability, have met an untimely death. There can be no question that he did not exercise the care and caution required of him by the law of this state, and which was correctly stated in the following instruction:

"When such a one goes upon a railroad track, he knows he goes to a place where he may be killed, if the train comes upon him before he is clear of the track. He knows that he must stop for the train and not the train stop for him. In such circumstances, if a driver cannot be reasonably sure otherwise whether a train is dangerously near, he must stop, and get out of his automobile, and go forward on foot, to ascertain if a train is approaching."

[7] Had he done so, there can be no doubt that he could have observed the approaching train for a long way up the open track. The decedent was accustomed to cross the intersection in question, and undoubtedly was familiar with the fact that no watchman was on duty between 11 o'clock p. m. and 7 a. m. Ignorance of such fact, however, would not excuse the exercise of due care on his part in crossing the track. *Gregg v. Western Pacific R. R. Co.*, 193 Cal. 212, 223 P. 553, presents a case widely different from the instant case on the facts.

From what we have said, it becomes unnecessary to discuss the other instructions or the other points made by appellants. We are satisfied that the failure of decedent to observe the standard of care plainly laid down in numerous decisions of this court and other courts of the land bars the right of respondents to recover in the circumstances of the collision.

Judgment reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.

I dissent: LANGDON, J.

207 Cal. 727

ENGELBERG v. SEBASTIANI.
(S. F. 12446.)

Supreme Court of California. July 31, 1929.

I. Interest $\Rightarrow$ 19(2)—Where amount sued for on breach of contract was capable of being made certain plaintiff was entitled to interest as matter of law (Civ. Code $\S$ 3287).

In action for breach of contract to purchase grapes, where defendant accepted only part of property purchased, and plaintiff, suing for entire contract price, prayed for interest, but court gave no instruction in regard thereto, plaintiff was entitled to interest as matter of law by virtue of Civ. Code, $\S$ 3287, where amount of recovery was capable of being made certain by calculation.

2. Trial $\Rightarrow$ 340(5)—Interest due as matter of law may be added to verdict by court (Code Civ. Proc. $\S\S$ 626, 664):

Where plaintiff was entitled to interest in amount allowed by court as matter of law on pleadings and proof, there was no issue of fact to be submitted to jury, and court's action in adding interest to amount of verdict was not improper under Code Civ. Proc. $\S\S$ 626, 664.

In Bank.

Appeal from Superior Court, Sonoma County; H. L. Preston, Judge.

Action by Louis Engelberg against Sam Sebastiani. From a judgment for plaintiff, defendant appeals. Affirmed.

For opinion of District Court of Appeal, see 273 P. 161.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for appellant.

Barrett & McConnell, of Santa Rosa, and Samuel M. Samter, of San Francisco, for respondent.

SEAWELL, J. On hearing after decision by the District Court of Appeal, First District, Division 2 (273 P. 161). Defendant, Sam Sebastiani, appealed from a judgment entered against him by the trial court in favor of plaintiff, Louis Engelberg, for the sum of \$8,122.75. The jury brought in its verdict for the sum of \$7,003.39, and the court, upon motion of plaintiff, directed the clerk of said court to add to the amount of the verdict interest at the rate of 7 per cent. per annum from the respective dates the several claims comprising the verdict became due to the date of the entry of judgment, and to enter judgment for the amount of said verdict plus interest thus computed. In accordance with the court's direction, the clerk entered judgment for \$8,122.75, which included interest. The trial court had given no instruction to the jury regarding the plaintiff's right to interest upon the demands in suit. The defendant contends that said court exceeded its power in directing an allowance of interest to plaintiff.

The action is upon a contract whereby plaintiff agreed to sell, and defendant to buy, the entire crop of grapes growing upon plaintiff's ranch in Sonoma county at the price of \$76 a ton. In the first count of the complaint plaintiff sued to recover \$3,065.70; the balance of the purchase price remaining unpaid for 85 tons and 150 pounds of grapes actually delivered to, and received by, defendant. In counts 2 and 3 plaintiff sought to recover at the contract rate of \$76 a ton for two lots of grapes tendered to defendant, and which defendant refused to accept. Plaintiff alleged that he had sold said lots of grapes on defendant's account, and from the sale of the first lot which defendant refused to accept he had realized \$271.55, which he had paid to defendant. As to the second lot, plaintiff alleged that the expenses of sale exceeded the proceeds by \$26.05, and this sum he sought to recover, in addition to the price of the grapes computed at \$76 a ton.

The jury verdict of \$7,003.39 for plaintiff was for the full amount prayed for, but made no allowance of interest, in regard to which the court had given no instruction. In the prayer of his complaint plaintiff asked for interest.

[1] Upon the pleadings and proof, plaintiff was entitled to interest by virtue of the provisions of section 3287, Civ. Code, from the dates his right to receive the several sums sued for became vested in him. There is no merit in defendant's claim that plaintiff was not entitled to interest as a matter of law, for the reason that the recovery sought was not for sums certain or capable of being made certain by calculation. The price of the grapes was fixed by the contract, and the amount that plaintiff should recover was capable of being made certain by calculation. Ryland v. Heney, 130 Cal. 426, 62 P. 616; Brazil v. Azevedo, 32 Cal. App. 364, 162 P. 1049. The amount which plaintiff sought to recover on account of expenses incurred by him in selling on behalf of defendant the grapes involved in count 3 was a sum certain. The contention of defendant that the proof as a matter of law does not show that there was due plaintiff as interest the amount directed to be added to the verdict by the court, for the reason that there exists uncertainty as to the dates when the plaintiff's right to recover the several sums sued for became vested, from which dates interest is to be computed by the terms of section 3287, Civ. Code, is also lacking in merit.

[2] Since plaintiff was entitled to interest in the amount allowed by the trial court as a matter of law, neither section 664 nor section 626, Code of Civil Procedure, renders improper the action of the court in adding interest to the amount of the verdict. Section 664, Code Civ. Proc. provides: "When trial by jury has been had, judgment must be entered

by the clerk, in conformity to the verdict. * * *

Section 626 is as follows: "When a verdict is found for plaintiff in an action for the recovery of money * * * the jury must also find the amount of the recovery." Plaintiff being entitled to interest in the amount allowed by the court as a matter of law upon the pleadings and proof, there was no issue of fact as to interest to be submitted to the jury. Although it is the right of the parties litigant in an action where a trial by jury is had as a matter of right to have every triable issue of fact submitted to the jury, in the instant case, had the court instructed the jury as to the matter of interest, plaintiff was entitled as a matter of law to an instruction directing the jury that if they should find for plaintiff to allow interest upon the demands in suit. Since the jury would be without right to disregard the court's direction, which would leave them no discretion in the matter, it can make no substantial difference to defendant whether interest is added to the judgment by the verdict of the jury rendered pursuant to the direction of the court, or by the court instructing the clerk to enter judgment for the amount of the verdict plus interest. In adopting the latter procedure, the court is usurping no function of the jury, for there is no issue of fact involved as to said interest.

In *McAfee v. Dix*, 101 App. Div. 69, 91 N. Y. S. 464, where the verdict did not include interest to which plaintiff was entitled as a matter of law, the court said:

"Interest was incident to the award of the contract price. * * * The court rightly declared (and, indeed, there was no exception) that interest was the plaintiff's due in event of such a verdict. The jury gave that verdict, and yet for some reason ignored the law as to a matter where it had neither discretion nor—the rate and period being certain—latitude for calculation. It seems absurd that the court is powerless to correct the judgment so as to award that sum which legally belongs to him who has gained the verdict, but that it must recognize this erroneous omission or commission of the jury by depriving the successful suitor either of the benefit of the trial, or by mulcting him of a part of his rightful judgment."

In support of the rule here announced, see 27 R. C. L. 888; *Minot v. Boston*, 201 Mass. 10, 86 N. E. 783, 25 L. R. A. (N. S.) 311; 10 Ann. Cas. 753; *Lowenstein v. Lombard*, 2

App. Div. 610, 38 N. Y. S. 33; *St. Louis, etc., Railway Co. v. Oliver*, 17 Okl. 589, 87 P. 423, 10 Ann. Cas. 748. In *Alpers v. Schammel*, 75 Cal. 595, 17 P. 708, relied upon by defendant, the court expressly states that the allowance of interest was not sustained by the record. In so far as said case purports to lay down a rule contrary to the decision herein, it is not the law. Sections 664 and 626, Code of Civil Procedure, are designed to assure to litigants the right to have the determination of the jury on issues of fact.

The jury, in bringing in a verdict where the court grants a motion for a directed verdict, acts in a ministerial capacity. *Estate of Sharon*, 179 Cal. 447, 177 P. 283; *Gaskill v. Pac. Elec. Ry. Co.*, 30 Cal. App. 593, 159 P. 200; 24 Cal. Jur. p. 918. It has been held, therefore, that a judgment entered by the court upon the basis of a special finding made by it where the state of the evidence is such that only one judgment can lawfully be rendered is to be given the same effect as a judgment entered upon a directed verdict. Without regard to the procedure followed, the determination is, in law, the act of the court. *Umsted v. Scofield Engineering Const. Co.*, 203 Cal. 224, 263 P. 799. The same reasoning may be applied to sustain the judgment for interest in the instant case.

By the appeal taken by defendant, a number of objections were made to the judgment besides the question of the right of the court to incorporate in the judgment interest upon the sums found to be due. Those questions were sufficiently considered and correctly determined against defendant's contentions by the District Court of Appeal. The plaintiff petitioned this court for a hearing, urging as erroneous that portion of the decision which held that the trial court was without power to incorporate an allowance of interest in the judgment. Defendant did not petition for a hearing. Making no objection upon petition for a hearing to that portion of the decision which was against him, it must be assumed that he was convinced of its legal soundness, and did not feel justified in further urging said other points. Upon examination of said other points, we find no such merit therein as would require or justify a reversal.

Judgment affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; CURTIS, J.; RICHARDS, J.

207 Cal. 779

WITTY v. CLINCH et al. (L. A. 10021.)

Supreme Court of California. Aug. 15, 1929.

1. Principal and agent ⇨180—Agent's knowledge is not imputed to principal, where agent in particular transaction is acting adversely to principal's interest.

Rule imputing agent's knowledge to principal is inapplicable, where facts are such that presumption of communication does not exist as where agent in particular transaction in question is acting adversely to principal's interest.

2. Principal and agent ⇨180—Knowledge possessed by agent adversely interested that property mortgaged was conveyed on condition could not be imputed to assignee of mortgage.

Where assignee of note and mortgage negotiated for assignment through agent who was interested with mortgagee in plot to defraud mortgagor's grantor out of property, assignee was not bound by knowledge of agent that property was conveyed on condition that grantee erect dwelling house on lot.

3. Bills and notes ⇨339—Purchaser of negotiable paper before maturity is not bound to inquire regarding consideration and circumstances leading up to execution.

Purchaser of negotiable paper before maturity is not required to make inquiry of makers as to consideration and circumstances leading up to its execution.

4. Bills and notes ⇨525—Inadequacy of price paid for negotiable paper before maturity is not sufficient of itself to raise inference that instrument was tainted.

Inadequacy of price paid for negotiable paper before maturity is not of itself sufficient to raise inference or suspicion that purchaser was buying a tainted instrument.

5. Bills and notes ⇨509—Purchase of note before maturity for grossly inadequate price with knowledge on inquiry of maker's solvency without inquiry as to consideration is circumstances to be considered in determining good faith.

Purchase of note before maturity for grossly inadequate price with knowledge on inquiry previously made of maker's solvency, but without inquiry as to consideration, is a circumstance to be considered in determining whether purchase was made in good faith, and is of itself sufficient to arouse suspicion of prudent person and put him on inquiry.

6. Bills and notes ⇨525—Mortgages ⇨270—Evidence supported finding that assignee of note and mortgage was innocent purchaser for value.

Evidence held to support finding that assignee of note and mortgage was an innocent purchaser for value.

7. Bills and notes ⇨167—Fact that note is secured by mortgage or trust deed does not render it nonnegotiable (Civ. Code, § 3265).

Under Civ. Code, § 3265, promissory note is not rendered nonnegotiable by fact that payment is secured by mortgage or trust deed.

In Bank.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action to foreclose a mortgage by E. B. Witty against Colin N. Clinch and others. Judgment for plaintiff, and defendants Anna M. Parsons and another appeal. Affirmed.

Page, Nolan, Rohe & Freston and Rohe & Freston, all of Los Angeles, for appellants.

Adair & Adair, of Los Angeles, for respondents.

CURTIS, J. The defendant Anna M. Parsons was on the 21st day of April, 1924, the owner of lot 61 of Hollywood Heights Tract in the county of Los Angeles. On or about said date she conveyed said lot to defendant Nan K. Clinch, wife of defendant Colin N. Clinch. It was agreed by said parties at the time of said conveyance that the purchase price of said lot was to be the sum of \$3,000, and that in payment thereof Colin N. Clinch and wife should execute to Anna M. Parsons four promissory notes for \$750 each, secured by a trust deed to said lot. It was further agreed that Clinch and wife should execute their note for \$5,000, secured by a mortgage upon said lot, and that said mortgage should take precedence over said trust deed when filed for record in the office of the county recorder of said county. In consideration of the execution and delivery to the Clinches of said deed with the right to mortgage said lot to secure said note of \$5,000, said Colin N. Clinch agreed to erect upon said lot a dwelling house to cost not less than \$5,000. In pursuance of said agreement, Colin N. Clinch and wife executed their promissory note for \$5,000 in favor of W. A. Prole, together with a mortgage on said lot to secure the same. They also executed four promissory notes for \$750 each in favor of Anna M. Parsons, together with a trust deed of said lot to secure said notes, and said trust deed was made subject to said \$5,000 mortgage of W. A. Prole. Clinch failed to comply with his contract to construct a dwelling house on said lot. He did not build or commence the building of any house thereon. Prole, through the efforts of Clinch, sold said note of \$5,000 secured by said mortgage to the plaintiff herein for \$1,500, which sum was actually paid by plaintiff for said note and mortgage. Default was made in the payment of said note, and this action was instituted to foreclose said mortgage. Anna M. Parsons and the Hellman Trust & Savings Bank, the trustee named in said trust deed, appeared in said action and filed an answer to plaintiff's complaint, in which they set up the agreement under which said mortgage was executed and delivered, and the violation of said agreement by Clinch, and further alleged that plaintiff paid no consideration for the said note and mortgage, and that she took said note and mortgage with full knowledge of the terms of

the agreement under which it was given. The trial court found that plaintiff paid to said W. A. Prole the sum of \$1,500 for said note and mortgage, and that at the time of the purchase by her of said note and mortgage she had no knowledge of any of the transactions between Clinch and wife on the one hand and Anna M. Parsons and the Hellman bank on the other, and that she was an innocent purchaser before maturity of said note and mortgage, and for a valuable consideration, to wit, for said sum of \$1,500. It accordingly rendered judgment in favor of the plaintiff for the sum of \$1,500, besides interest, attorney's fees, and costs. From this judgment Anna M. Parsons and the Hellman bank, now known as the Merchants National Trust & Savings Bank, have appealed.

[1, 2] The principal point made by the appellants on their appeal is that the respondent was not an innocent purchaser of said note and mortgage without notice, and therefore the note and mortgage purchased by her was subject to the defense that the consideration therefor totally failed. In support of this contention, the appellants rely in part upon the finding of the court that Colin N. Clinch acted as the agent both of the respondent and of W. A. Prole in the transaction in which the plaintiff purchased said note and mortgage from said Prole. The evidence clearly shows that the respondent had no actual knowledge of the true consideration of said note and mortgage. If Clinch was acting as her agent in said transaction, he never revealed to her the fact that the consideration for said note and mortgage was that he would construct upon said lot a dwelling house. Nor did he give respondent any information as to the true consideration of said note and mortgage at the time he was negotiating with her for the sale of said note and mortgage. Counsel for respondent challenges the correctness of said finding, and contends that there is no evidence to support the same. The evidence supporting it is extremely weak, and its sufficiency is extremely doubtful. Respondent had an agent named Gustavus, upon whom she appears to have solely relied in negotiating for the purchase of said note and mortgage. But, conceding that Clinch did act in some respects as the respondent's agent, it is most apparent that his interest in such transaction was adverse to that of the respondent. He was interested as the agent of Prole, and as the arch conspirator in the plot to defraud the appellant Parsons out of her property, to negotiate said note and mortgage. He would not, of course, have been expected to disclose to a prospective purchaser the nefarious part he was acting in said transaction, for the simple and single reason that such disclosure would defeat his own purpose, as no one in all probabilities would have been willing to purchase said note and mortgage if he were informed in advance of his purchase of the facts surrounding its execution and

delivery. Under these circumstances, the knowledge of the agent is not imputed to the principal. This rule is well established and generally accepted. It is stated in 1 Cal. Juris, p. 852, as follows: "Since the rule imputing to the principal the knowledge of the agent rests upon the presumption that the agent will communicate his information, the rule is inapplicable where the facts are such that the presumption of communication does not exist, as where the agent, in the particular transaction in question, is acting in an adverse interest to that of his principal. In such transactions the attitude of the agent is one of hostility to the principal, and it would be absurd to suppose that he would communicate to the principal any facts within his private knowledge affecting the subject of his dealing, unless it would be his duty to do so if he were wholly unconnected with the principal."

[3-6] Appellants further contend that under the facts and circumstances shown in this case the respondent is not a bona fide purchaser without notice of the fact that the consideration for said note and mortgage had failed. In this connection appellants assert that the fact that respondent purchased said note and mortgage for less than one-third of the face value of said note was of itself sufficient to put a prudent and reasonable person upon inquiry as to the consideration of said note. It has been definitely held in this state that the purchaser of negotiable paper before maturity is not required to make inquiry of the makers as to the consideration and circumstances leading up to its execution (*Schoen v. Houghton*, 50 Cal. 528; *Kopperud v. Cookson*, 50 Cal. App. 180, 194 P. 748), and that inadequacy of price paid is not of itself sufficient to raise an inference or suspicion that the purchaser was buying a tainted instrument (*Kopperud v. Cookson*, supra). It has further been held that the purchase of a note before maturity for a grossly inadequate price with knowledge, upon inquiry previously made, of the maker's solvency, but without inquiry as to the consideration of the note, is a circumstance to be considered in determining whether the purchase was made in good faith, and is of itself sufficient to arouse the suspicion of a prudent person and to put him upon inquiry as to the consideration. *Jordan v. Grover*, 99 Cal. 194, 33 P. 889; *Burns v. Bauer*, 37 Cal. App. 251, 174 P. 346.

In the present action there is no evidence that the respondent herein had any knowledge of the solvency of the maker of said promissory note, or that any inquiry was made by respondent as to the solvency of said maker. On the other hand, we may infer from the evidence that respondent purchased said note and mortgage relying almost wholly upon the value of the lot covered by the mortgage. After investigating the value of said lot, she was informed by A. C. Gustavus,

her agent, that it was worth in the neighborhood of \$3,000. She therefore agreed to advance on said note and mortgage the sum of \$1,500. The trial court with all these facts and circumstances before it held the respondent to be an innocent purchaser for value. There was a further fact which we think is of material importance, and which may well have influenced the trial court in arriving at the determination it did. This fact was the agreement on the part of the respondent to resell said note and mortgage to Clinch and wife at any time within six months after the date of said purchase, upon Clinch and wife paying to her the sum of \$1,620 and interest thereon from date of purchase at the rate of 8 per cent. per annum. Appellants contend that this agreement constituted the transaction a mortgage or pledge instead of a sale. But, even if so, respondent would undoubtedly have a qualified ownership of said note to the extent of her loan as against appellants, and that is all that she has been awarded by the judgment herein. This agreement to accept \$1,620 for an assignment of the note and mortgage to Clinch limited respondent's actual interest in said note and mortgage, provided Clinch complied with the terms of said agreement, to said last-named amount. She was not, therefore, acquiring absolutely a security of the value of \$5,000 for the sum of \$1,500, but only an interest in said security to the extent of \$1,620, with a possibility of becoming the owner of the security itself. The fact that Clinch failed to repay to her the amount agreed within the stipulated time did not change the character of the original contract between him and the respondent. He was given the right to purchase, and, in case he exercised such right, the total amount which the respondent would have received would have been the sum of \$1,600 and interest. The difference between this amount and the sum of \$1,500, which respondent paid for the note and mortgage, was not so great, the trial court may well have held, as to arouse the suspicions of the respondent that the note was not what it purported to be. The trial court having found that the respondent was an innocent purchaser for value, we are of the opinion that there was substantial evidence in the record to support such finding. It will not, therefore, be disturbed on appeal.

[7] Appellants rely upon the case of *Briggs v. Crawford*, 162 Cal. 124, 121 P. 381, in support of their contention that the respondent is not an innocent purchaser for value, and therefore not entitled to recover in this action. The facts in that case are in many respects similar to those in the present action,

and it was held that the assignee of the note and mortgage held the same subject to all infirmities or objections which could have been set up against it in the hands of the original mortgagee. That case was decided, however, under the law in force at the date of the execution of said last-named note and mortgage. A note secured by a mortgage at that time was a nonnegotiable instrument, and a purchaser thereof, even for full value and without notice of any defect or infirmity therein, took said instrument subject to all equities in favor of the maker thereof. Said note and mortgage were executed on or about December 1, 1908. In 1923 section 3265 of the Civil Code was amended, and since said amendment a promissory note, executed subsequent to said amendment and otherwise negotiable, is not rendered nonnegotiable by the fact that its payment is secured by a mortgage or trust deed. The promissory note and mortgage involved herein were executed April 12, 1924. The case of *Briggs v. Crawford*, supra, is therefore inapplicable under the present state of the law.

Appellants make the point that practically the entire evidence admitted in the case was without the issues thereof. There is no merit in this point.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.

207 Cal. 798

E. B. WITTY, Plaintiff and Respondent, v. Colin N. CLINCH and Nan K. Clinch, Defendants; George Newberger, Rose Phillips, Merchants' National Trust and Savings Bank of Los Angeles (a Corporation), Successor to Hellman Commercial Trust and Savings Bank (a Corporation), et al., Defendants and Appellants. (L. A. 10022.)

Supreme Court of California. Aug. 15, 1929.

In Bank.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Page, Nolan, Rohe & Freston and Rohe & Freston, all of Los Angeles, for appellants.

Adair & Adair, for respondent.

PER CURIAM. The issues involved herein are precisely like those presented in the companion case of *Witty v. Clinch et al.* (Los Angeles No. 10021) 279 P. 797, this day decided. On the authority of said case, the judgment is affirmed.

207 Cal. 485

MURNANE v. LE MESNAGER et al.★
(L. A. 9939.)

Supreme Court of California. July 1, 1929.

Rehearing Denied July 29, 1929.

1. Appeal and error ⇨1170(5)—Variance does not require reversal unless appellant has been prejudiced thereby (Code Civ. Proc. §§ 469-471, 475; Const. art. 6, § 4½).

Under Code Civ. Proc. §§ 469-471, 475, and Const. art. 6, § 4½, not every variance between pleading and proof necessitates reversal of a judgment, but only where appellant is misled to his prejudice or his substantial rights have been affected thereby.

2. Appeal and error ⇨1170(5)—Parties having proceeded with trial after court's announcement that it was necessary to be liberal with evidence and offer of continuance and permission to amend, elements of surprise and being misled were not considered on appeal (Code Civ. Proc. §§ 469-471, 475; Const. art. 6, § 4½).

Where trial court, after perusing pleadings announced that it would be necessary "to be more or less liberal as to the evidence," to determine the cause, but if situation was one of surprise, court would continue matter and give more time for preparation, and, if that were not desired, would proceed and at conclusion of trial, if necessary, would permit litigants to amend pleadings, and with this understanding parties proceeded with trial, reserving their objections to introduction of evidence, *held* that elements of surprise and being misled because of alleged variance between pleadings and proof were not required to be considered by appellate court under Code Civ. Proc. §§ 469-471, 475, and Const. art. 6, § 4½.

3. Appeal and error ⇨1170(5)—Judgment on cause of action not pleaded nor warranted by its averments cannot be sustained (Code Civ. Proc. §§ 469-471, 475; Const. art. 6, § 4½).

Fundamental principle of pleading is that plaintiff must recover, if at all, on cause of action set out in complaint, and not on some other which may be developed by proofs, and a judgment rendered on cause of action not set out in complaint, and not warranted by its averments, cannot be sustained, except as this rule is modified by Code Civ. Proc. §§ 469-471, 475, and Const. art. 6, § 4½.

4. Appeal and error ⇨1170(5)—Though cross-complaint asserted interest in realty under oral trust, admitting evidence of right to "dower," amount of which was within grantee's discretion, *held* not prejudicial variance (Code Civ. Proc. §§ 469-471, 475; Const. art. 6, § 4½).

Where cross-complaint, in action to determine interest in real property, was drawn on theory that property transferred by deed to grantee for life came to her under contemporaneous oral agreement subjecting property to a trust in cross-complainant's favor as to undivided one-third interest, and that grantee subsequent to grantor's death renounced such trust, admission of cross-complainant's evidence that

she was entitled under said deed to a "dower," amount of which was purely within discretion of grantee, and that she had exercised it by declaring that one-third of property should go to cross-complainant on grantee's death, *held* not to prejudice adverse parties because of variance under Code Civ. Proc. §§ 469-471, 475, and Const. art. 6, § 4½, since under such evidence cross-complainant continued to assert her right to same interest in same property under same deed, and adverse parties were accorded every opportunity to meet evidence so produced.

5. Appeal and error ⇨1048(6)—Refusal to permit cross-examination in court of witness previously testifying by deposition *held* not prejudicial error.

Trial court's refusal to permit cross-examination in court by adverse parties of witness who had previously testified by deposition *held* not prejudicial error, where court permitted said adverse parties to call witness as their own witness, which was done.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by James P. Murnane, as administrator of the estate of Louise P. Murnane, deceased, against Marie Le Mesnager and others, in which defendant Jeanne Le Mesnager filed cross-complaint. From the judgment, plaintiff, cross-complainant, and certain other defendants appeal. Affirmed.

Overton, Lyman & Plumb, of Los Angeles, for appellants Marie Le Mesnager and de Coatparquet.

George A. Connolly, of San Francisco, and Dockweiler & Dockweiler & Finch, of Los Angeles, for appellant Murnane.

J. C. Flannery, and William P. Hubbard, both of San Francisco, John S. Leahy, of St. Louis, Mo., and Joseph Scott, of Los Angeles, for respondents.

WASTE, C. J. There are presented herein three appeals from a judgment determining the respective rights and interests of certain of the parties hereto in and to certain described property, and removing and appointing a trustee thereof. The several parties, whose first names only will be frequently used to designate them, are in substantial agreement upon the following facts: George Le Mesnager, Sr., a native of France, came to the United States and to California some time prior to the year 1877. His first wife, Concepcion Le Mesnager, died in 1892, leaving as her issue four children, viz., Louis, George, Jeanne, and Louise. Two years subsequent to the death of his wife, George Le Mesnager, Sr., married the defendant, cross-defendant, and appellant, Marie Le Mesnager. The issue of this marriage was one daughter, Yvonne Le Mesnager, now known as Yvonne Fraval de Coatparquet, also named as a de-

fendant and cross-defendant herein. By the execution of two deeds, one prior and one subsequent to his second marriage, George Le Mesnager, Sr., transferred and conveyed to Marie Le Mesnager, his second wife, all of the real property, herein involved, situate in the county of Los Angeles. Thereafter, and in 1906, for business convenience, there was organized, under the laws of this state, a corporation known as the Mesnager Land & Water Company. The only stock ever issued by this corporation was 10 shares to George, Sr., president; 280 to Marie, vice president; and 10 shares to Louise, secretary-treasurer. In the month of June, 1906, Marie Le Mesnager transferred to this corporation all of the property theretofore conveyed to her by her husband. At the outbreak of the world war, George Le Mesnager, Sr., went to France to assist the cause of his native country. In the year 1916 he returned to Los Angeles on furlough. The hazard incident to his proposed return to the war zone apparently prompted him to seriously consider making disposition of his worldly accumulations among the several members of his family, and on June 16, 1916, he caused the Mesnager Land & Water Company to transfer and convey to his two sons, through the regular corporate channels, a described parcel of land containing some 1,540 acres. This was accepted by the grantees as their interest and share in and to all of their father's property. Three days thereafter, or on June 19, 1916, a second deed was executed and delivered by the corporation. As this entire cause revolves around this deed, we quote it in part as follows:

"This Indenture, made the 19th day of June, in the year of Our Lord nineteen hundred and sixteen, between the Mesnager Land & Water Company, a corporation, duly incorporated at Los Angeles according to the laws of California, the party of the first part, and Marie Le Mesnager of the same city, county and state, the party of the second part,

"Witnesseth:

"That the said party of the first part, for and in consideration of the sum of five dollars (\$5.00) and other valuable considerations, gold coin of the United States of America, to said company, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has remised, released and forever quit-claimed, and by these presents does remise, release and forever quit-claim, unto the said party of the second part and to her heirs and assigns, all that certain lot, piece, or parcel of land, situate, lying and being in the county of Los Angeles and state of California, and bounded and particularly described as follows, to-wit: * * * [Here follows a description of the property.]

"Said quitclaim and interest into the said land herein described or if sold by the party

of the second part, the amount of money or other consideration derived for the sale to revert to Yvonne Le Mesnager and Louise Le Mesnager after the death of second party or before, just as she may judge to be the best, trusting to her also that she will reasonably and according to what she thinks is right, furnish a dower to Jeanne Le Mesnager. Any sale made by second party shall be final and without any recourse or hindrance against the purchaser.

"Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title interest, into the said property possession; claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof with the appurtenances. * * *

Marie received and accepted this deed, and caused it to be recorded. Subsequent to the execution of this latter deed, George Le Mesnager, Sr., returned to France, where he remained until the close of hostilities. The year 1919 found him again in California. In March, 1922, he and his wife Marie gave to one W. S. Sparr, named as a defendant herein, an option to purchase for \$635,000 all but a small fraction or portion of the lands conveyed to Marie by the deed quoted from above. This option was thereafter acted upon, and Marie, her husband joining with her, transferred to the defendant D. P. Putnam, nominee of the option holder, 1,234.10 acres of land, the amount covered by the option. Fifty thousand dollars of the agreed purchase price was paid upon delivery of the deed, and the balance, secured by mortgage, was to be paid in annual installments of an equal amount. The deferred payments were to bear interest at the rate of 7 per cent. per annum. Shortly thereafter, and in the year 1922, Marie and her daughter Yvonne moved to France, where they have since resided. George Le Mesnager, Sr., died in September, 1923.

This action was instituted by the surviving husband of Louise, a daughter of the first marriage, as administrator of his deceased wife's estate, to have the deed of June 19, 1916, construed, and to have it judicially determined and decreed that the estate of the deceased daughter was the owner of an undivided one-half interest in the property conveyed by said deed, or in its proceeds, subject only to a life estate in favor of Marie and to the rights of the defendant Jeanne, also a daughter of the first marriage. When this action was commenced, the defendant Marie had collected on the principal of the mortgage approximately \$200,000. There remained unpaid on account of interest a sum

in excess of \$140,000. Marie still retains title to a small fraction (51.15 acres) of the parcel conveyed to her for life by the corporation, which is of an approximate value of \$50,000.

In accordance with the prayer of the amended complaint, the trial court appointed the Pacific-Southwest Trust & Savings Bank as receiver, and issued an injunction pendente lite. Answers to the amended complaint were duly filed by the defendants Marie, Yvonne, and Jeanne. The latter filed, also, a cross-complaint, later amended, in which, after alleging many of the matters above narrated, it is prayed that she be adjudged to be the owner of and entitled to an undivided one-third interest in the property conveyed by the Mesnager Land & Water Company to the defendant Marie, or in the proceeds thereof, subject only to a life estate in Marie. The appointment of a receiver and the removal of Marie Le Mesnager as trustee was also requested. When the cause came on for trial, it was announced that a settlement had been reached between the plaintiff and the defendants Marie and Yvonne Le Mesnager. This resulted in the cause going to trial solely upon the amended cross-complaint of Jeanne and the answers thereto. This amended cross-complaint became the basis of the judgment which was entered, and from which the appeals, brought here on a single transcript, are being prosecuted by the defendants and cross-defendants Marie and Yvonne Le Mesnager and the plaintiff and cross-defendant James P. Murnane, as administrator of the estate of his deceased wife.

The cross-complaint of Jeanne Le Mesnager, which, therefore, becomes of the greatest importance, after setting forth many of the matters hereinabove related, avers, in substance, that at the time of the execution and delivery to Marie of the corporate deed, the provision thereof reading: "Said quitclaim and interest into the said land herein described or if sold by the party of the second part, the amount of money or other consideration derived for the sale to revert to Yvonne Le Mesnager and Louise Le Mesnager after the death of second party or before, just as she may judge to be the best, trusting to her also that she will reasonably and according to what she thinks is right, furnish a dower to Jeanne Le Mesnager," was orally agreed by and between George Le Mesnager, Sr., and Marie Le Mesnager, named therein as life tenant, to mean and intended to mean, and at all times should be construed to mean, that Marie held the property therein described in trust for the use and benefit of the *three* daughters of George Le Mesnager, Sr., viz., Louise, Jeanne, and Yvonne, each of whom should receive an undivided one-third interest therein upon the death of Marie Le Mesnager; that such understanding and agreement was the sole consideration and inducement and the moving

cause for the execution and delivery of said deed; *that subsequently and in May, 1922, Marie Le Mesnager renounced such trust and claimed to be the owner of the property free and clear and discharged of any trust in favor of the three daughters, as intended in said deed, and as orally understood and agreed* (italics added); that upon learning of Marie's changed attitude of mind, George Le Mesnager, Sr., threatened to institute legal proceedings against her looking to the recovery of the property unless she executed a writing evidencing the purport and terms of such prior oral agreement and understanding as to the respective rights of the three daughters in and to the property; that George Le Mesnager, Sr., refrained from instituting such legal proceedings on the promise of Marie to execute such written declaration of the trust under which it had theretofore been agreed and always understood she held the property; that up to the time of his death in 1923, George Le Mesnager, Sr., placed full faith and reliance on said promise of Marie Le Mesnager, and believed that she had executed the writing agreed upon; that Marie, on the other hand, never intended to comply with her promise in this regard, and consequently did not execute such written declaration of trust, but, on the contrary, steadfastly refused to do so, *and subsequent to the death of George Le Mesnager, Sr., renounced the trust in favor of the three daughters and under and subject to which she was to hold the property during her lifetime.* (Italics added.) The cross-complaint then prays, among other things, that it be decreed that the cross-complainant was at all times from and after the contemporaneous oral agreement, above referred to, between George Le Mesnager, Sr., and Marie Le Mesnager, and up to the time of the sale of the greater part of the property to the defendants Sparr and Putnam, the owner of and entitled to an undivided one-third interest in and to all of the property conveyed by the corporation to Marie, and after such sale was, *and ever since has been and now is, the owner of and entitled to an undivided one-third interest in and to the proceeds of such sale; that it be further decreed that Marie Le Mesnager never has been the owner of said property or any part thereof, or of any interest therein, other than having been invested with the right to have and take the rents, issues, and profits thereof during her lifetime; and "that she has at all times been holding the title to an undivided one-third interest therein, as trustee for the use and benefit of cross-complainant.* * * * (Italics added.)

More briefly stated, the cross-complaint is drawn on the theory that the property transferred by the corporation to Marie Le Mesnager for life came to her, by virtue of the contemporaneous oral agreement and understanding of George Le Mesnager, Sr., and the

grantee, subject to and impressed with a trust in cross-complainant's favor as to an undivided one-third interest, and that Marie had, subsequent to the death of George Le Mesnager, Sr., renounced such trust. The allegations of the amended cross-complaint were generally, or specifically, denied by the plaintiff and other cross-defendants, who, in their answers thereto, reiterated their allegations to the effect that the two sisters of Jeanne, or, rather, that Yvonne and the estate of Louise, are each the owners of an undivided one-half interest in the property conveyed by the deed of June 19, 1916, and in its proceeds, subject to a life estate in favor of Marie Le Mesnager, and subject, also, to a dower interest in favor of the cross-complainant Jeanne. Certain of the cross-defendants alleged, more specifically, that Marie Le Mesnager, so far from repudiating the trust, has at no time asserted that she was the owner of the real property conveyed by the deed, but has at all times recognized that all her rights were governed by the terms of that instrument. They also specifically allege that Jeanne has no interest in the matter other than the power of Marie Le Mesnager to furnish her (Jeanne) with a dower in case of the latter's marriage.

Such were the well-defined issues when the cause came on for trial. The plaintiff and the defendants Marie and Yvonne, having reached a settlement, the trial proceeded upon the amended cross-complaint of Jeanne Le Mesnager and the answers thereto. The cross-complainant was thereupon called as a witness in her own behalf, and sought to show a different state of facts from those alleged in her cross-complaint. In the language of her counsel, instead of proceeding to establish the trust as to a definite one-third interest under the oral understanding and agreement pleaded, she proposed to show that she was entitled, under the terms of the deed, to a "dower," the amount of which was not fixed or definite, but was "purely within the discretion" of Marie Le Mesnager, who "had the right, under that instrument to exercise that discretion at any time"; and that she (Marie) had exercised it. Over the objection of the adverse parties that they were surprised and that the proof offered was not in accord with the allegation of the cross-complaint and was, therefore, incompetent, irrelevant, and immaterial, and not binding on the adverse parties, the cross-complainant was permitted to testify and to offer other proof that her step-mother had declared to her that the property conveyed by the deed had been transferred to her (Marie) "during her life and that she was to receive all the proceeds and then after her death it was to be equally divided among" the three girls, Louise, Yvonne, and Jeanne, the cross-complainant.

Timely objection to the offer of proof and the evidence on which the findings rest was

made by the parties adverse to the cross-complainant that such evidence was res inter alios acta, and not binding upon the other parties to the deed, being a declaration made by the defendant Marie without the consent or knowledge of such persons. These objections were overruled. The trial court made findings which purport to respond to the substituted theory of the cross-complainant and to conform to the evidence received over the objection of the cross-defendants. These are to the effect that, during the time George Le Mesnager, Sr., was home on furlough from the war in France, he requested Marie Le Mesnager, "as trustee under the terms of the deed dated June 19, 1916, to her from said Mesnager Land & Water Company, to exercise the right and duty given her by said deed to state, determine and fix what portion or sum or dower Jeanne Le Mesnager was to take in said real property or in the proceeds derived from the sale of the whole or any part thereof. Thereupon, said defendant and cross-defendant Marie Le Mesnager declared Jeanne's dower or portion was then and there fixed by her at and was one-third of said real property or one-third of the proceeds derived from the sale of the whole or any part thereof; and that each of the other daughters, Louise and Yvonne, would thus likewise receive a one-third interest * * * that * * * she * * * Marie Le Mesnager should take and receive for her own use and benefit during her life, only the rents, issues and profits * * * and that upon her death the said real property remaining unsold and the corpus of the proceeds derived from any sale or sales of all or any part of said real property should be divided, the one-third to each of said three daughters, i. e., Louise, Jeanne and Yvonne, share and share alike." Further findings are to the effect that Marie Le Mesnager agreed that she would execute, acknowledge, and deliver a "writing making declaration of trust setting forth specifically the portion of the real property or the portion of the proceeds derived from the sale of the said real property or any part thereof, which she as trustee under said deed had fixed as a dower for Jeanne Le Mesnager and specifically setting forth the terms of her agreement with the said George Le Mesnager, Sr., deceased as to her declaration, interpretation, construction, intention and meaning of the provision contained in said deed respecting and concerning the interest of the said Jeanne Le Mesnager in and to said real property or the proceeds derived from the sale * * * that [she] never has executed or delivered any such writing * * * but * * * has from time to time declared to * * * Jeanne Le Mesnager and other members of the family * * * and to others, that the foregoing [the agreement between George, Sr., and Marie found by the court] was the construction as agreed upon

between her and the said George Le Mesnager, Sr., deceased as to the terms of said deed with reference to the rights of herself and of the three daughters in and to the said real property and the proceeds derived from any sale or sales thereof." Other findings are that the interpretation of the language of the deed of June 19, 1916, and the declaration by Marie Le Mesnager as to the exercise of her right and duty, as trustee, in fixing and declaring that Louise, Jeanne and Yvonne should receive a one-third interest in the remainder of the trust "was reasonable, right and just, considering * * * all the surrounding circumstances," and that the provisions in the deed respecting cross-complainant Jeanne Le Mesnager and the interpretation of the right of Marie to declare the interest of Jeanne "were never intended by either George Le Mesnager, Sr., deceased, or the defendant and cross-defendant, Marie Le Mesnager, to be dependent upon, limited by, or in anywise affected by her marriage or failure to marry, her entering a convent or failing to enter a convent, or any other restriction except fair, just and proper distribution of the property conveyed by said deed, or the proceeds derived from the sale thereof, among the daughters" of George, Sr., and Marie, "taking into account the circumstances, conditions and provisions that had been made for all of the children" of said George, Sr., and Marie.

Judgment resting on these findings was entered as prayed for by Jeanne in her amended cross-complaint.

[1] An answer to the suggestion that there was in this case a failure of proof to support the judgment is found in the statute which provides that, where the allegations of the claim or defense to which the proof is directed is unproved only in some particular or particulars, but not in its general scope and meaning, the case is merely one of variance. Code Civ. Proc., § 471. And full and adequate remedy could have been afforded all parties by an order of amendment of the pleading upon such terms as might be just. *Pollitz v. Wickersham*, 150 Cal. 238, 250, 88 Pa. 911, citing Code Civ. Proc., § 469. Variance between the allegations in a pleading and the proof is not to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. The code also provides that the court must, in every stage of an action (and that means on appeal, as well as in the trial of the cause), disregard any error, improper ruling, or defect in the pleadings or proceedings, which, in the opinion of the court, does not affect the substantial rights of the parties. It must appear from the record that the error, improper ruling, or defect was prejudicial and caused substantial injury before the judgment rendered may be reversed or be held to be affected by it; and it must further

appear that a different result would have been probable if such error, ruling, or defect had not occurred or existed. Code Civ. Proc., § 475. Not only do these code sections require this court, under such circumstance, to determine from an examination of the entire record, whether or not there has been a miscarriage of justice before reversing a judgment, but the state Constitution is equally mandatory and imperative. Const., § 4½ of art. 6. It therefore indubitably follows that it is not every variance that will necessitate the overthrow of a judgment. *Taylor v. Morris*, 163 Cal. 717, 724, 127 P. 66.

[2] Where a variance is not material, and does not actually mislead the adverse party to his prejudice, the court may find the facts according to the evidence, or may order an immediate amendment without costs. Code Civ. Proc., § 470. If it appears that the party has been misled, the court may order the pleading to be amended upon such terms as may be just. In this case, the trial court, after a careful perusal of the pleadings, and a consideration of the deed about which the cause revolved—an instrument which the court well characterized as one "that is not altogether clear"—announced to the counsel for the respective parties that the case appeared to be one in which it would be necessary "to be more or less liberal as to the evidence," in order to determine the cause; but if the then situation was one of surprise, and prejudicial to their clients, it would continue the matter and give more time for preparation; and, if that were not desired, the court would proceed, and "at the conclusion of the trial," if necessary, upon motion of counsel "for any of the litigants to amend their pleadings," they would be permitted to do so. With this understanding the parties appear to have been willing to and did proceed with the trial, reserving their objections, on various grounds, to the introduction of the evidence. The elements of "surprise" and being "misled" need not, therefore, be further considered, for the appellants were accorded suitable opportunity to protect themselves against, or to recover from, either.

[3] The question, then, to be considered is whether the admission of the evidence tending to substantiate the new theory of the cross-complaint—evidence not responsive to the facts pleaded in the amended cross-complaint—worked any material prejudice to the cause of the adverse parties. We are not losing sight of the fundamental principle of pleading that "a plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not upon some other which may be developed by the proofs." *Schirmer v. Drexler*, 134 Cal. 134, 139, 66 P. 180, 183; *Reed v. Norton*, 99 Cal. 617, 34 P. 333. The allegata and probata must correspond, and a judgment rendered upon a cause of action not set up in the complaint, and not warranted

by its averments, cannot be sustained either upon principle or authority. *Elmore v. Elmore*, 114 Cal. 516, 519, 46 P. 458; *Chetwood v. California Nat. Bank*, 113 Cal. 414, 45 P. 704. But the doctrine of variance and the penalties to follow when it appears has been greatly mitigated in this state by the provisions of our code (*Higgins v. Graham*, 143 Cal. 131, 134, 76 P. 898), which have already been referred to.

[4] In this case the cross-complainant was asserting a right to an undivided one-third interest in and to real property under the terms and provisions of a deed which she set out in her pleadings. Under the proofs adduced by her at the trial, she continued to assert her right to the same interest in the same property under the same deed. By means of the evidence introduced by her, her claim, as presented in her cross-complaint, was not unproved in its general scope and meaning, but only in some particulars. As to those particulars, it seems to us, as it did to the trial court, the parties adverse to the cross-complainant were accorded every opportunity to meet the evidence which was produced by her. The deed under which all the parties claimed an interest in the property permits of the construction contended for by the cross-complainant in introducing her evidence, and was accepted by the trial court, whose duty it was to pass upon its terms and effect. It is immaterial to us what was meant by the parties who caused the deed to be executed when they used the word "dower" in providing for Jeanne's portion. The trial court has found that, under the discretion given the trustee, Marie, she fixed and determined that portion to be an undivided one-third interest, and that, under the circumstances surrounding the execution of the deed, including the deed itself, the exercise of discretion by the trustee, Marie, was justified, and that the result was equitable and just to all the parties to the litigation. Whether or not all she did in the premises was a sufficient declaration of the interest Jeanne should have, and whether or not she did all things she was claimed to have done in that regard, were matters for the determination of the trial court. We are not prepared to say that the evidence does not support its conclusions in both matters.

[5] We find no prejudicial error in the refusal of the trial court to permit the cross-examination in court by appellants of the witness Haas, who had previously testified by deposition. The court permitted the appellants to call Haas as their own witness, and that was done.

As, under the sections of the code (Code Civ. Proc. 469 and 470, *supra*), where the variance is not material, the court may either direct the fact to be found according to the evidence or may order an immediate amend-

ment, it having adopted in this case the first course, and found the facts in accordance with the evidence, the judgment is affirmed.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

I dissent: PRESTON, J.

207 Cal. 666

**HILLS v. SUPERIOR COURT IN AND FOR
LOS ANGELES COUNTY et al.
(L. A. 11307.)**

Supreme Court of California. July 29, 1929.

1. Executors and administrators ⇨173—Power to grant family allowance is exclusively creature of statute (Code Civ. Proc. § 1466).

Power to grant a family allowance is purely and exclusively creature of statute, Code Civ. Proc. § 1466.

2. Executors and administrators ⇨180—Surviving husband is not entitled to family allowance under statute (Code Civ. Proc. §§ 1465, 1466).

Surviving husband is not entitled to family allowance under Code Civ. Proc. § 1466, authorizing allowance, where property set apart is insufficient for support of widow and children or either, since only persons entitled to family allowance are widow and children or either, in view of section 1465, authorizing court to set aside exempt property for use of surviving husband or wife.

3. Statutes ⇨225—Sections of Code of Civil Procedure relating to setting apart exempt property and granting family allowance should be construed together, since they relate to same subject (Code Civ. Proc. §§ 1465, 1466).

Code Civ. Proc. § 1466, authorizing court to make extra family allowance, and section 1465, authorizing court to set apart exempt property for use of surviving husband or wife, must be construed together, since they relate to the same subject.

4. Executors and administrators ⇨180—Word "family" in statute authorizing court to allow family allowance does not include husband (Code Civ. Proc. §§ 1465, 1466).

Word "family" in Code Civ. Proc. § 1466, authorizing court to make family allowance where property set apart is insufficient for support of widow and children, does not include husband, in view of section 1465.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Family.]

5. Courts ⇨92—Language in opinion purporting to determine question not necessary for decision of appeal must be regarded as obiter dictum.

Language found in opinion purporting to determine question not necessary for decision of appeal must be regarded as obiter dictum.

Preston and Richards, JJ., dissenting.

In Bank.

Application by Arthur M. Hills for writ of mandate to be directed to the Superior Court in and for the County of Los Angeles and Harry R. Archbald, Judge of Department 2 of such court, to compel respondent to grant a petition for family allowance. Petition denied.

E. W. Cunningham, of Los Angeles, for petitioner.

Hewitt, McCormick & Crump, of Los Angeles, for respondents.

CURTIS, J. Petitioner herein applied to the probate court of the county of Los Angeles for a family allowance out of the estate of his deceased wife. The petition was denied, and petitioner thereafter filed in this court his petition for a writ of mandate directed against said probate court and the judge thereof "commanding them to set said Petition for Family Allowance for further hearing, and upon such further hearing to make an Order granting Petitioner a family allowance." No question is raised but that mandamus is the appropriate remedy to test the question herein presented. The petition herein sets forth that the petitioner is the surviving husband of Eugenie Thompson Maginnis Hills, deceased; that her estate was in course of administration in said probate court; that petitioner had filed in said probate court a petition for a family allowance out of the estate of said deceased; and that said court denied said petition. A general demurrer was filed to the petition herein. The petitioner has annexed to, and made a part of, his petition herein copies of his said petition for a family allowance presented to said probate court and of the order of said court denying said petition. The following facts appear from said petition and order: That said deceased at the time of her death left surviving her her said husband, the petitioner herein; that petitioner is without any estate of his own; that throughout the married life of deceased and petitioner said deceased paid out of her own estate all living expenses of herself and said petitioner; that the property of said estate exempt from execution is not sufficient for the support and maintenance of petitioner; and that said deceased left no children or issue surviving her.

[1] The power to grant a family allowance is purely and exclusively the creature of statute. In re Noah, 73 Cal. 583, 588, 15 P. 287, 2 Am. St. Rep. 829; In re Welch, 106 Cal. 427, 432, 39 P. 805; Estate of Heywood, 149 Cal. 129, 130, 84 P. 834; Estate of McSwain, 176 Cal. 280, 168 P. 117. The sole provision to be found in the statutes of this state giving to the courts authority to grant a family allowance is contained in section 1466 of the Code of Civil Procedure. This section, so far as the same is material to the purpose of this proceeding, reads as follows: "*Court may make extra allowance. If the property set*

apart is insufficient for the support of the widow and children, or either, the court or a judge thereof must take [make] such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate.
* * *

[2, 3] It would appear from a simple reading of this section of the code that the only persons whom the Legislature intended should be entitled to an extra or family allowance under this statute or Code section were the "widow and children or either." This conclusion is further strengthened when this section is read in connection with the article of the Code of which section 1466 is a part, and particularly when read in connection with section 1465 of said article. These two sections relate to the same subject, and should be construed together. Estate of McSwain, 176 Cal. 280, 168 P. 117. Taking such parts of these two sections together as are pertinent to the question before us, they read as follows: (Section 1465) "The court may on petition therefor, set apart for the use of the surviving husband or wife, or in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead." (Section 1466) "If the property set apart is insufficient for the support of the widow and children, or either, the court or a judge thereof must take [make] such reasonable allowance out of the estate as shall be necessary for the maintenance of the family. * * *" It seems inconceivable, after mentioning the husband in section 1465 as one of the persons to whom the exempt property might be set apart, that the Legislature, had it intended that he should be entitled to a family allowance under section 1466, would not have expressly mentioned him in this section also. That his name was designedly omitted from section 1466 is apparent from a most cursory reading thereof, and is most persuasive of the conclusion that it was not intended that he should share in the benefits of said section.

[4] It is contended by appellant that the word "family" includes the husband as well as the wife and children, and that, when section 1466 refers to "an allowance out of the estate as shall be necessary for the maintenance of the family," it was intended to include the surviving husband in estates of the deceased wife as well as the wife and children in estates of the deceased husband. The husband, if living, is, of course, a member of the family. Upon his death, the remaining members of the household constitute the family. The term is used in the statutes indiscriminately to designate the family in these two different stages or conditions. For instance, in section 1464 of the Code of Civil Procedure it is provided that, when a person dies "leaving a widow or minor" child, they

are entitled to remain in possession of certain property, including "the wearing apparel of the family." The word "family" in this section could not refer to nor include the husband. It must be, therefore, limited to the widow and minor children. Again, in section 1469 of the Code of Civil Procedure, where, if the deceased left a widow, and minor children, the whole of the property may be set aside to the widow. Before this can be done, however, a notice must be given requiring "all persons interested to appear on a day fixed to show cause why the whole of said estate should not be assigned for the use and support of the family of the deceased." In this section the word "family" unquestionably refers to the widow and children, if there be any children, and to the widow alone, if the deceased left no children. It cannot in any sense include the husband, for the provisions of said section can only become operative upon his death. On the other hand, section 1468 of the Code of Civil Procedure, as it now reads, uses the word "family" in an entirely different sense. By its provisions a homestead set apart by the court for the use of the family, "if the decedent left a surviving spouse and no minor child, is the property of such spouse." Clearly, under the terms of this section, the word "family" as used therein, in case the surviving spouse were the husband, would include him with the surviving children, if the deceased left children, but, in case no children survived the deceased, the "family" would consist of the husband alone. These are the only instances in which the word "family" is used in this article of the Code. It is plain to be seen that it is used in some instances to include the husband and in others it is limited to the wife, or wife and children. We must therefore look to the text of the several sections of the Code in which the word "family" is used in order to determine the sense in which it is employed in any particular section. As we have already seen, when we look to the particular language of section 1466, and especially when we read section 1465 and section 1466 together, the conclusion is apparent that the word "family" as used in the latter section does not include the husband.

[5] Petitioner relies upon certain language used by this court in the Estate of McSwain, supra, to the effect that the family referred to in section 1466 consists of the same persons as those expressly mentioned in section 1465, "that is, the surviving husband and wife, if any, and the minor children, if any, of the decedent." That was a proceeding wherein the administratrix of the estate, who was also the widow of the deceased, had appealed from an order of the probate court directing the payment of a certain sum from the funds of the estate for the maintenance, education, and support of the minor child of the deceased and of his surviving wife. It appears in said

estate that the court had made an adequate allowance to the widow for the support and maintenance of the family of said deceased, consisting of herself and her said minor child; that said minor child voluntarily left her mother's home after the death of her father, and thereafter through her guardian petitioned for, and was given, a separate allowance from said estate. It was this order from which the mother of the child, who was also administratrix of the estate, appealed. It is quite evident that the question of whether the husband was a member of the family as this term was used in section 1466 was not before the court, and therefore that any language found in the opinion purporting to determine that question was not necessary for the decision of said appeal, and must be regarded as obiter dictum. There may also be found in other decisions brief and fragmentary expressions of the court as to the meaning of the word "family," but an examination of the cases in which these occur will show that they have no bearing whatever upon the question now before us. On the other hand, in Estate of Parkinson, 193 Cal. 354, 224 P. 453, this court quite recently expressly construed together sections 1464 and 1466 of the Code of Civil Procedure. In that case the contention was made that the word "family," as used in said section 1466, should be confined to cases where an actual family status existed at the date of the decedent's death. In answering this claim, the court said: "We can see no reason for giving any such restricted significance to the use of that phrase in that section, nor, in fact, in making any distinction between the application of section 1464 and section 1466 of said Code in that regard. Both of these sections are dealing with the support of the widow and minor children, if any, of the decedent, the one before and the other after the return of the inventory." While we are in hearty agreement with the construction thus placed upon these two Code sections, we cannot claim this case as a controlling authority, for the reason that the question of the husband's right to a family allowance was in no way involved in that action, and the language quoted above was not used by the court in reference to such question. It is not necessary, however, for us to depend upon any such uncertain and indefinite expression of this court relative to the construction to be placed upon said section 1466 of the Code of Civil Procedure. We are satisfied from its context and from the use of the word "family" in other Code sections that by no fair or reasonable construction of the term can it be distorted into an authoritative declaration authorizing the probate court to grant a family allowance to a husband out of the property of the deceased wife's estate.

Section 1466 of the Code of Civil Procedure substantially in its present form was enacted in the year 1872, and has ever since said date

been in full force and effect. It is curious that during the long period of time intervening between the date of its enactment and the present the question of a surviving husband's right thereunder to a family allowance has never been before any of the appellate courts of this state. This circumstance can only be explained by the fact that its terms are so clear and plain that no person before the institution of the present proceeding has ever had the temerity to claim at least in these courts that it accorded to the husband the right to a family allowance from the estate of his deceased wife.

There is another circumstance which we think well to mention at this time, and which we think clearly shows that the Legislature, at which the original section 1466 was adopted, never considered that there had been enacted legislation giving the right to a husband to claim a family allowance from his wife's estate. At the same session of the Legislature at which section 1466 of the Code of Civil Procedure was originally enacted there was also enacted section 969 of the Code of Civil Procedure, which provided for appeals in probate proceedings. Among the probate orders made appealable by this section of the Code was an order against or in favor of "making an allowance for a widow or child." We find no provision in the Code adopted at that time giving an appeal from an order against or in favor of making an allowance for a husband. The only reason that we can perceive for the failure on the part of the Legislature at that time to have provided for an appeal from such an order was that it never occurred to the Legislature that by the enactment of section 1466 it had provided for the making of any such allowance to the husband. Section 969 of the Code of Civil Procedure has been incorporated in, and made a part of, section 963 of the same Code. This latter section has been amended at various times since the old section 969 was made a part thereof, but the provision taken from section 969 relative to an appeal from an order making an allowance for the widow or child has never been changed in any respect, and it maintains to-day the precise phraseology of the original section enacted in 1872. During all this time no amendment or other provision has ever been enacted providing for an appeal from an order making an allowance to the husband. We might well infer from the absence in our Code of Procedure of such a provision that it has been the settled conviction of the Legislature as well as of the people generally during all these years that there was no statutory authority for the granting of an order making a family allowance to the husband. If there had been any idea in the minds of the several legislators, who proposed and enacted the various amendments to section 963, that a husband was entitled to an order for family allowance out of

his wife's estate, we would naturally expect that in amending said section there would have been inserted there during some of these various sessions a provision for an appeal from such order, as long as said section gave the right of an appeal from a like order in favor or against a wife or child. It therefore appears to us that the Legislature enacting section 1466 of the Code of Civil Procedure never intended by any of the provisions thereof to give to the husband the right to a family allowance from the estate of his deceased wife. Neither are we of the opinion that the three later Legislatures at which section 1466 had been readopted in slightly modified form, but without changing it in respect to the designation of the persons entitled to a family allowance, had any thought or intention that there was being enacted legislation that would give to a husband the right to claim a family allowance.

As we view the question before us, it was never the intention of the Legislature, nor has it by any reasonable construction to be placed upon section 1466 of the Code of Civil Procedure authorized the court, to grant the order for which the petitioner applied. It was proper, therefore, for the court to deny his said application.

His petition herein therefore is hereby denied.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; SHENK, J.

PRESTON, J. I dissent. The sole question presented by this original proceeding in mandate and general demurrer to the petition is: Do the provisions of section 1466 of the Code of Civil Procedure authorize granting to a surviving husband a family allowance out of the estate of his deceased wife?

Petitioner, a surviving husband without estate of his own, and who throughout his married life was supported and maintained out of his wife's property, seeks a family allowance from her estate now in the course of probate. He alleges also that the estate possesses no real property out of which a homestead might be carved, and that the exempt property is insufficient for his support.

The power of the court to grant a family allowance from the estate of a deceased person is purely statutory. *McSwain's Estate*, 176 Cal. 280, 168 P. 117. The solution of the problem before us, therefore, rests upon the interpretation given to sections 1465 and 1466, Code of Civil Procedure, which read in part as follows:

"1465. *All Property Exempt From Execution to Be Set Apart for Use of Family.*
 * * * Upon the return of the inventory,
 * * * the court may * * * set apart
 for the use of the surviving husband or wife,
 * * * all the property exempt from execution, including the homestead selected.

* * * If none has been selected, * * * the court must select * * * a homestead for the use of the surviving husband or wife and the minor children. * * *

"1466. *Court May Make Extra Allowance.* * * * If the property set apart is insufficient for the support of the widow and children, or either, the court * * * must take [make] such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate. * * *

In brief, the contention of respondents is that under the latter section a condition precedent to allowance by the court of maintenance for the family is that the property set apart be insufficient for the support of the widow and children; hence, where there is neither widow nor children, the granting of a family allowance is unauthorized. This contention of respondents, however, is in the face of a contrary holding of this court. In *re Garrity*, 108 Cal. 463, 38 P. 628, 41 P. 485.

In that case the right to a family allowance was before the court, and it was contended that, inasmuch as real estate existed out of which might be set apart a homestead, until this was done the granting of such allowance was unauthorized, and would further be unauthorized, unless it was found that, after setting apart a homestead, it, together with the exempt property, would be insufficient for the support of the family. The court, ruling that the right to a family allowance existed independent of these conditions, said: "The right of the family to an allowance for its support is not, however, contingent upon a previous order setting apart a homestead for its use. Whether a homestead be set apart or not, section 1466 confers upon the court the power, in its discretion, to 'make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate.'"

Respondents' position may again be summed up in the contention that the word "family" as used in section 1466 excludes a surviving husband. It is to be noted that this section is one of a series of sections relating to "provision for the support of the family." It is easily demonstrable from the text of sections 1464, 1465, and 1468 of this chapter that the word "family" includes the husband—the deceased husband in section 1464 and the surviving husband in the other two sections. Why then should the word be given a meaning in section 1466 that excludes him? It is easily to be supposed that circumstances may exist which entitle him to as much consideration as a widow and minor children are entitled to, and we find no foundation upon which to base a legislative intent to deny him the same right accorded them.

The majority opinion admits the husband is a constituent part of the family, but cuts him off. I presume he should be too gallant to claim such allowance! The opinion ignores the effect of *In re Garrity*, supra, a case of controlling importance.

It is true that this question has not been squarely presented in any previous decision of this court, but the case of *In re Garrity*, supra, goes a long way towards foreshadowing the conclusion herein reached. It is also true that in *Phelan v. Smith*, 100 Cal. 158, 170, 34 P. 667, 671, the court uses this language in referring to said chapter of the Code, especially including said section 1466: "The term 'family' throughout the chapter is used as synonymous with and as representing the surviving wife or husband and children, if any."

In *McSwain's Estate*, supra, this court considered the question of a separate allowance to be made to a minor child of deceased after an allowance had been made to the surviving wife for her support, and used these words: "Sections 1465 and 1466 relate to the same subject. The latter obviously refers to the conditions described in the former. They should be construed together, and, so construed, it is obvious that the family referred to in the latter section consists of the same persons as those expressly mentioned in the former section, that is, the surviving husband and wife, if any, and the minor children, if any, of the decedent."

A similar construction of the word is found in *Re Lamb*, 95 Cal. 397, 407, 408, 30 P. 568, 571, where the court was considering section 1474 of the Code of Civil Procedure relating to setting aside a homestead to the surviving spouse, and used this language: "It is true that the word 'family' in its ordinary signification refers to two or more persons, and, as used in the section just referred to, will include those living under the same roof as kindred or dependents, and under one head, thus constituting a family, as that term is generally understood; but this word, as used in the statute concerning probate homesteads, is not to be so restricted in its meaning as to exclude the only survivor of the family [e. g. the husband] of which the deceased was a member. The object of the statute is to preserve the family home for the use and benefit of the survivor or survivors of those occupying it as such, and the right of the surviving husband or wife to retain this home for such period as the court may direct does not depend upon the fact that there are children or others who may share in its use."

It is true, as respondent contends, that there is certain language in *Estate of Steehler*, 195 Cal. 386, 395, 233 P. 972, which might be considered at variance with the above quotations, but an examination of the holding there made shows that the question before us was not involved, and the language relied upon was used *arguendo*, and was therefore not

determinative of the issue we are considering.

I am therefore of the opinion that under said section the surviving husband, as a constituent element of the family, is entitled to a family allowance out of the estate of his deceased wife, and it is the duty of the court, sitting in probate, to make such suitable allowance to him as under the circumstances may be deemed just and proper.

I think the peremptory writ should issue.

I concur: RICHARDS, J.

100 Cal. App. 215

MARDESICH v. CITY OF LOS ANGELES
et al. (Civ. 6636.)

District Court of Appeal, Second District, Division 2, California. Aug. 1, 1929.

Appeal and error ⇨772—City department of water and power held relieved from default for delay in filing brief, owing to mistake in records.

Although failure of appellants for more than 30 days after transcript was filed to serve and file opening brief, as required by rules of practice, was negligence, it was not entirely inexcusable, and motion for relief from default was granted, where delay was due to mistake in records of appellant, department of water and power of city.

Appeal from Superior Court, Los Angeles County.

Action by Joseph Mardesich against the City of Los Angeles and another. Judgment for plaintiff, and defendants appeal. On motion by plaintiff to dismiss appeal, and by defendants for relief from default. Motion to dismiss denied; motion for relief from default granted.

Jess E. Stephens, City Atty., and W. B. Mathews, Kenneth K. Scott, and Francis H. Lindley, Deputy City Attys., all of Los Angeles, for appellants.

Robert W. Bruce and R. Dean Warner, both of Los Angeles, for respondent.

IRA F. THOMPSON, J. The respondent has made a motion to dismiss the appeal in this case on the ground that the appellants failed for more than 30 days after the transcript was filed to serve and file their opening brief, as required by the rules of practice in this court. Appellants' points and authorities were not on file when the motion was filed on June 11, 1929, but were presented and filed on July 5, 1929, or four days before the hearing of the motion. The appellants have made a motion to be relieved of their default, and in this regard show by affidavits that a deputy city attorney in the department of water and power was in active charge of this litigation; that in the office of the legal division of the department of water and power a

system has been established whereby it is and has been the duty of the chief clerk therein to keep a record of all civil actions in which the city of Los Angeles or the department of water and power are parties, together with a calendar of dates for appearances, hearings, appeals, etc.; that this clerk for some reason received no card advising her of the filing of the transcript in the present case, as is customary, but that during her unavoidable absence from the office her assistant received notice of the transfer of the cause from the Supreme Court to this court; that, inasmuch as this notice did not mention the filing of the transcript, the assistant made no record of the time for filing the brief, and it escaped the attention of the clerk and counsel. It is further shown by the affidavit of the deputy city attorney that the clerk in charge has been in the office for the past three years, and charged with the responsibility of making proper entries on the calendar; that he has relied thereon for that length of time, and "has found few, if any, mistakes in the calendar system"; that he was very busy in the trial of cases during the period of time involved.

No doubt there was negligence on the part of counsel and his office. We think, however, that the negligence was not entirely inexcusable, and that the circumstances are sufficiently similar to the cases of *McCabe v. Healey*, 139 Cal. 30, 72 P. 359, and *Alexander & Co. v. Martz* (Cal. App.) 265 P. 881; that the same rule ought to be applied.

Motion to dismiss denied. Motion for relief from default granted.

We concur: WORKS, P. J.; CRAIG, J.

100 Cal. App. 217

ASHER v. MARTIN et al. (two cases).★
(Civ. 6958.)

District Court of Appeal, First District, Division 2, California. Aug. 2, 1929.

Rehearing Denied Aug. 30, 1929. Hearing Denied by Supreme Court Sept. 30, 1929.

1. Appeal and error ⇨1011(1)—Where there was sufficient evidence to support finding favorable to either party, judgment should not be disturbed on appeal.

Where there was sufficient evidence to support finding favorable to theory of either party, judgment should not be disturbed on appeal.

2. Work and labor ⇨4(3), 26—Where one performs services for another at latter's request, law implies promise to pay reasonable value, and burden is on latter to show services were rendered gratuitously.

Where one performs valuable services for another at latter's request, law implies promise by latter to pay reasonable value of services, and burden of proof is on latter to show that services were rendered gratuitously or without obligation on his part to pay.

3. Work and labor ⇨30(2)—It could not be said as matter of law that presumption of promise to pay for services rendered at defendant's request was dispelled by proof that plaintiff was personally interested in outcome of services.

It could not be said as matter of law that presumption of promise to pay for valuable services rendered at defendant's request was dispelled by proof that plaintiff was personally interested in outcome of services, or that he expected to receive benefits in nature of further employment from others who were interested.

4. Estoppel ⇨63—Party is not precluded from asserting claim because inconsistent with previous claim not successfully maintained.

A party is not precluded from asserting a claim because it is inconsistent with a previous claim which was not successfully maintained.

5. Appeal and error ⇨1050(1)—Admission of testimony held harmless, where same facts were shown by other evidence admitted without objection.

In action for services rendered, admission of testimony relating to plaintiff's office expenses, to employment of assistant, etc., if error, held harmless, where same facts were shown by other evidence to which no objection was made.

6. Appeal and error ⇨1058(1)—Exclusion of evidence held harmless, where facts were covered by other testimony admitted.

Exclusion of evidence offered held harmless, where facts were covered by other testimony which was admitted.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Two actions for services by H. C. Asher against J. D. Martin and another. The actions were consolidated, and, from a single judgment for plaintiff against defendant named, defendant named appeals. Affirmed.

Morgan J. Doyle, of San Francisco, and Walter M. Gleason, of Oakland (Norman J. Ronald, of counsel), for appellant.

W. H. Stammer, of Fresno, for respondent.

NOURSE, J. These two actions for services rendered were consolidated for trial before the court without a jury. Plaintiff had a single judgment against the defendant Martin in the sum of \$1,376.08, but was denied judgment against the Growers' Association. The defendant Martin has appealed from the judgment upon typewritten transcripts.

The controversy arises out of the alleged employment of the plaintiff by the defendant Martin to assist him and also the Growers' Association, of which he was an interested member, in a campaign in opposition to an announced ruling of the railroad carriers in California relating to the use of refrigerator cars in the transportation of grapes, commonly referred to as the "Grape Car Plan of 1926." The plaintiff is a traffic man engaged

in the business of advising shippers with respect to their relations with transportation companies, representing them before the interstate commerce commission, the Railroad Commission and other bodies having jurisdiction over transportation matters, and in the collection of claims and the routing of transportation cars. The defendant Martin is a large grower and shipper of fresh fruits in the territory adjacent to Fresno, who had frequently employed plaintiff on other traffic matters prior to the controversy over the grape car plan.

When this plan was promulgated by the carriers, the defendant Martin became very much disturbed, and approached the plaintiff asking him to take charge of a campaign of opposition to the plan in his behalf. Numerous conferences were held between the parties, and, at the instance of this defendant, the plaintiff engaged an attorney at law to prepare a complaint to be filed with the interstate commerce commission, and thereafter, also at defendant's request, plaintiff, with an assistant, circularized the growers of the locality for signatures in opposition to the plan. The plaintiff continued to advise and consult with this defendant during all the period from the date of the first negotiations in August, 1926, to the hearing before the Commission in March, 1927; he assisted in preparing the case for hearing, and, at the request of this defendant, aided in the incorporation of the Growers' Association for the purpose of supporting the defendant Martin in his campaign.

[1] After a full hearing, the trial court found that these services were reasonably worth the sum allowed in the judgment, and this finding is not seriously attacked. The theory of the appellant is that he did not specifically request respondent to perform the services, and that there was no intention between the parties that appellant should compensate the respondent, but that the respondent, in his capacity as a traffic man, was also interested in defeating the car plan, and that his services were gratuitous. Upon this issue the case was fully tried, and the trial court, upon conflicting evidence, found adversely to appellant. There is abundant evidence showing the original employment of respondent, the performance of the services as requested and directed by appellant from time to time, and the continued assurance of appellant that he intended to bear the burden of the expense. What little conflict appellant presents in this evidence lies in the inferences which he insists the trial court might have drawn from the evidence more favorable to his theory of the case. But, where the evidence supports the findings made, we do not disturb the judgments of trial courts merely because we might have reached a different view of the evidence or might have

drawn different inferences from it. We can see no purpose in going through this evidence and pointing out wherein the answers of the various witnesses might be interpreted as implying one thing or the other. It is sufficient to say that from our review of the record there is sufficient evidence to support a finding favorable to the theory of either party, and that, such being the case, the judgment should not be disturbed.

[2-4] Upon the merits of the controversy, the principles of law involved are simple. When one performs valuable services for another, at the latter's request, the law implies as matter of fact a promise by the latter to pay the reasonable value of the services. In such a case the burden of proof is on the latter to show that the services were rendered gratuitously or without the obligation on his part to pay. It cannot be said as matter of law that this presumption of a promise to pay is dispelled by proof of the fact that the one who performed the services was personally interested in the outcome of the services, or that he expected to receive benefits in the nature of further employment from others who were interested. *Wojahn v. National Bank*, 144 Wis. 646, 129 N. W. 1068, a case involving a similar state of facts. Here the testimony on the part of the appellant tended to show that the respondent had expressed his opposition to the car plan and the fear that it would injure his business as a traffic man; that he had also expressed the hope that, if he was successful in defeating the plan, he would obtain employment in the future from other shippers interested. Assuming all this to be true, it does not remove appellant's obligation to pay the reasonable value of the services which the trial court found had been performed for him and at his request. Respondent first billed the corporation for a portion of the account on the theory that it had been organized for the express purpose of aiding the appellant in raising funds for the campaign, and the respondent sued the corporation on the same theory. But a party is not precluded from asserting a claim because inconsistent with a previous claim which was not successfully maintained. *Lackmann v. Kearney*, 142 Cal. 112, 115, 75 P. 668.

[5] While frankly conceding that no one of the assigned errors may have injuriously affected appellant's efforts to fairly present his defense, appellant assigns a number of errors in the admission of testimony and in the exclusion of testimony proffered by him. Thus he complains of the admission of testimony relating to the respondent's office expenses, to the employment of an assistant to circularize the fruit shippers in support of appellant's campaign, to the preparation of the complaint filed before the commerce commission, and testimony of similar character,

all of which was introduced for the purpose of showing what services had been performed by respondent in order to determine their reasonable value. The testimony appears to be admissible for this purpose, but the same facts were shown by other evidence to which no objection was made, and hence, if error occurred, it was harmless. 2 Cal. Jur. 1020; *Schumann v. Karrer*, 184 Cal. 50, 59, 192 P. 849.

[6] The same rule controls the assignment of error relating to the exclusion of certain testimony offered by appellant. The facts were fully covered by other testimony which was admitted, and appellant has suffered no prejudice. 2 Cal. Jur. 1022; *Schumann v. Karrer*, supra; *Miller & Lux v. Richardson*, 182 Cal. 115, 129, 187 P. 411.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

100 Cal. App. 146

COLTHURST v. JUSTICE'S COURT OF VALLEJO TP. IN AND FOR SOLANO COUNTY et al. (Civ. 3826.)

District Court of Appeal, Third District, California. July 26, 1929.

1. *Certiorari* ☞70(1)—Order discharging writ seeking review of proceedings of justice's court wherein default judgment was set aside held appealable as final judgment.

Order of superior court discharging writ of certiorari seeking review of proceedings of justice's court wherein default judgment was set aside, claimed in excess of justice's jurisdiction, held to constitute final judgment from which appeal would lie; there being no issue of fact necessarily tendered by proceedings for the writ in the superior court.

2. *Justices of the peace* ☞122(5)—Justice's court could not set aside default judgment where application for relief was not made within ten days (Code Civ. Proc. § 859).

Justice's court was without jurisdiction to set aside default judgment where application for relief was not made within ten days' limitation of time allowed by Code Civ. Proc. § 859.

3. *Justices of the peace* ☞122(5)—Notice of rendition of judgment held not invalid because not "signed by justice" as required by statute (Code Civ. Proc. §§ 859, 893).

Notice of rendition of judgment in justice's court served upon defendants held not invalid because not "signed by the justice," as required by Code Civ. Proc. § 893, in view of section 859, not specifying the form of notice of rendition of judgment as prerequisite to application for relief from default.

Appeal from Superior Court, Solano County; William T. O'Donnell, Judge.

Petition by J. E. Colthurst against the Justice's Court of Vallejo Township in and for the County of Solano and another for certiorari to review an order of the Justice's Court vacating a default judgment. From a judgment denying the petition, petitioner appeals. Motion to dismiss appeal denied, and judgment reversed, with directions.

J. E. Colthurst, of Vallejo, for appellant.

O'Hara, Hatch & Pope, of Vallejo, for respondents.

ROLFE L. THOMPSON, J. This is an appeal from a judgment denying a petition for a writ of review. The record on appeal shows that the petitioner filed against Robert H. and Lea Lindsay, husband and wife, in the justice's court of Vallejo township, Solano county, a complaint based upon an account stated; that process was duly served upon the defendants, who failed to appear or answer, and judgment was thereupon entered against them for the sum of \$165.89. The plaintiff forthwith served upon the defendants notice by mail of the rendering of judgment. This notice did not conform to the requirements of section 893 of the Code of Civil Procedure, for the reason that the notice was not "signed by the justice." The docket shows that a subsequent notice was given as follows: "Sept. 15, notice of decision served on defendants by post office at request of defendants." September 19, 1927, the defendants served and filed in the justice's court a notice of motion, supported by affidavits of merits, to vacate the default judgment. This motion was actually presented to the court on September 28th, and, over objection on the part of plaintiff on the ground that the court was without jurisdiction, the motion was granted and the default judgment was set aside. The justice's court was without jurisdiction to grant this motion. The mere filing of the notice of motion for relief was not sufficient. It is necessary that the motion be actually made to the court within the ten days' limitation of time prescribed by law. *Spencer v. Branham*, 109 Cal. 336, 41 P. 1095; *Wheeler v. Superior Court*, 67 Cal. App. 601, 227 P. 931. A writ of certiorari was thereupon filed in the superior court of Solano county.

The petition which was filed in that court recited all of the proceedings of the justice's court, upon which the judge signed a peremptory order directing the justice of the peace to forthwith certify the record of proceedings in his court to the superior court, and restrained the justice's court from further proceedings pending the hearing for review. None of the essential facts were controverted. Subsequently the petition for a writ of review was heard in the superior court and on October 4, 1928, it was finally disposed of by the following ruling: "Ordered, in the above entitled cause, that the writ be and the same is

hereby discharged." This appeal from that final order was thereupon perfected.

[1, 2] An appeal from a final order or judgment in a petition for a writ of certiorari, when the judgment is rendered in excess of jurisdiction, is the proper remedy. 4 Cal. Jur. 1116, § 74; *Millott v. Mare Island Emp. Ass'n*, 44 Cal. App. 271, 274, 186 P. 378; *Beaumont v. Samson*, 4 Cal. App. 701, 89 P. 137. There was no issue of fact necessarily tendered by the proceedings for a writ of certiorari in the Superior Court, and the foregoing order was tantamount to a final judgment from which an appeal lies. *Brown v. Superior Court*, 70 Cal. App. 732, 234 P. 409. The justice's court was without jurisdiction to set aside the default judgment, for the reason that the application for relief was not made within the ten days' limitation of time allowed by section 859 of the Code of Civil Procedure, and the writ of review should therefore have been granted. That section provides in part: "The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor." The defendants were served with notice of the entry of judgment on June 2, 1927. Their application for relief from the default judgment was not actually made until September 28, 1927. The justice of the peace then had no jurisdiction to hear or grant the motion for relief.

[3] The respondent contends that the notice of the rendition of judgment which was served upon the defendants was invalid because it was not "signed by the justice," as required by section 893 of the Code of Civil Procedure, which reads, in part: "Notice of the rendition of judgment must be given to the parties to the action in writing signed by the justice." This requirement, however, does not apply to judgments by default. Ever since the adoption of the Codes of California, pt. 2, tit. 11, c. 8, of the Code of Civil Procedure, in which section 893 is contained, the following heading has existed: "Judgments (other than by default) in Justices' Courts." This chapter heading should be considered in construing the provisions of all sections therein contained (23 Cal. Jur. 772, § 147), and is controlling in its application to the present action, since it specifically excepts default judgments from the effect of section 893, *supra*.

Section 859, *supra*, does require the service of notice of the rendition of a judgment as a prerequisite to application for relief from default. No specific form of notice with respect to such default judgments, however,

is prescribed. The notice of the entry of judgment which was given in the present case was therefore sufficient to set in motion the ten-day limitation of time within which the application for relief must be made. It follows that, since the application for relief was not made within the time prescribed by section 859, supra, the justice's court was without jurisdiction to set the default judgment aside, and the writ of certiorari should have been granted.

For the reasons assigned, the motion to dismiss the appeal is denied, and the judgment is reversed, with direction to instruct the justice's court to vacate its order setting aside the default judgment.

We concur: FINCH, P. J.; PLUMMER, J.

100 Cal. App. 70

HALL et al. v. KING. (Civ. 6450.)★

District Court of Appeal, First District, Division 2, California. July 19, 1929.

Rehearing Denied Aug. 16, 1929. Hearing Denied by Supreme Court Sept. 12, 1929.

1. Partnership ⇨64—Judgment for partners on note payable to trade-name must be reversed, where documentary evidence showing partners published certificate disclosing persons in firm was inherently defective (Civ. Code §§ 2466, 2468; Code Civ. Proc. § 956a; Rule 38 of Supreme Court and District Courts of Appeal).

Where documentary evidence, produced when court made order, within Code Civ. Proc. § 956a, and rule 38 of the Supreme Court and District Courts of Appeal, permitting parties to produce additional evidence on issue whether plaintiffs had done business under name of payee, in effort to show that plaintiffs, suing as copartners on note payable to trade-name, had filed and published certificate required by Civ. Code, §§ 2466, 2468, showing names of persons interested in copartnership, was so inherently defective that no competent proof of issue was made, judgment for plaintiffs must be reversed.

2. Brokers ⇨46—Exclusive agency agreement binds owner only to refrain from selling land through another.

Exclusive agency binds owner to refrain from selling land through any other real estate agent, but does not mean that he may not sell it himself personally and directly, if he finds purchaser on his own account.

3. Brokers ⇨8(3) — Evidence held to show agreement to pay commission for sale of land, satisfying statute of frauds.

In action on note and for broker's commission for sale of real estate, evidence held sufficient to show agreement to pay commission, writing being sufficient to satisfy statute of frauds, and oral dealings of parties interpreting writing as present agreement to pay commission, since agreement need not be entirely in writing.

4. Brokers ⇨86(4, 5)—Evidence held to show plaintiffs were procuring cause of sale, and purchasers were ready and willing.

Evidence in action on note and to recover broker's commission held sufficient to support court's finding that plaintiffs were procuring cause of sale, and that they had found purchaser who proved ready and willing to buy, and who did buy.

5. Brokers ⇨56(3)—Brokers, suing for commission, need not argue that owner prevented sale of land by them, but only that he accomplished sale to purchaser first found by them.

Where sale of property was made to purchaser found by brokers, it was not necessary for brokers, in action for commission, to argue that owner prevented sale by them, but only that owner accomplished sale to purchaser first found by them.

6. Brokers ⇨79—Judgment for broker's commission held not erroneous, because based on express contract, while complaint declared on common count, since contract executed except as to payment may be declared on in indebitatus assumpsit at plaintiffs' option.

In action for broker's commission for sale of land, judgment for plaintiffs held not erroneous, because based on express contract, while complaint declared on common count, since express contract, which has been fully executed, and under which nothing remains to be done by defendant, except payment of money, may be declared on in indebitatus assumpsit at option of plaintiffs.

Appeal from Superior Court, City and County of San Francisco; J. O. Moncur, Judge.

Action by Frank D. Hall and Sidney C. Baker, copartners doing business under the firm name and style of Hall & Baker, against W. S. King. Judgment for plaintiffs, and defendant appeals. Affirmed in part, and reversed in part, with directions.

Derby, Sharp, Quinby & Tweedt and Derby, Single & Sharp, all of San Francisco, for appellant.

C. Harold Caulfield, of San Francisco, for respondents.

PER CURIAM. Plaintiffs recovered judgment upon two counts: First, \$300 balance due upon a promissory note, together with attorney fees and costs; and, second, \$500 for real estate broker's commission. Defendant appeals.

The plaintiffs sued in the style as above set forth in the title of this cause. The promissory note sued upon was made payable to the order of "Hall Baker Co." No assignment of the note from Hall Baker Co. to Hall & Baker was alleged or proven, but judgment was nevertheless given plaintiffs, apparently upon the theory that the payee of the note was in fact the plaintiffs above named. Defendant's objection to the introduction of the

note in evidence upon the ground of variance in this respect was overruled by the court.

Defendant pleaded as a special defense in his answer that plaintiffs had not filed a copartnership certificate as required by law. The court found this allegation to be untrue. Since the trial of the case the Supreme Court, in *Andrews v. Glick*, 272 P. 587, has held that the name "Andrews-Cordano Plumbing Company" was a designation not showing the names of the persons interested as partners in such business, and, therefore, its sole members, Andrews and Cordano, were required to file a certificate under Civ. Code, § 2466, showing the names of the persons interested in the company, before maintaining that action. Under this authority, and the cases cited therein, while the name "Hall & Baker" is not a fictitious name, nor one not showing the names of the persons interested, the name "Hall Baker Co." does come within the meaning of the section. The penalty for not filing the copartnership certificate is the inability of such firm or its assignee to maintain any action upon or on account of any contract or transaction had under such name. Civ. Code, § 2468. The promissory note sued upon in the first count of this action is, *prima facie*, such a contract or transaction, because it was made payable to "Hall Baker Co."

[1] Upon the record it would be the duty of this court to reverse the judgment given upon the first count, which would result in a new trial upon the sole issue of whether the plaintiffs were barred from maintaining action upon this count, because of having accepted the note made payable to Hall Baker Co. and thus doing business under a designation not showing the names of the persons interested as partners, and without having filed and published the certificate as required by Civ. Code, § 2466. Such an order for a partial new trial was made in *Rudneck v. So. Calif. M. & R. Co.*, 184 Cal. 274, 193 P. 775. This court, desiring to avoid the disproportionate delay and expense of returning this \$300 cause of action for a new trial, made an order on its own motion, after submission and consideration of this appeal, permitting the parties to produce in this court additional evidence upon this issue. The order was as broad in its terms as permitted by section 956a of the Code of Civil Procedure and rule 38 of the rules of the Supreme Court and District Courts of Appeal. It would have permitted respondents to produce evidence that, although the note happened to be made payable to Hall Baker Co., nevertheless the plaintiffs had in fact never done business under that name. The evidence produced and offered in this court, however, showed that respondents elected a different course. They produced documentary evidence in an effort to show that since the making of our said order, and before the final hearing date for such additional evidence, they had filed and published

the certificate required by section 2466 of the Civil Code, showing the names of the persons interested in Hall Baker Co. to be the respondents herein. However, the documents offered for that purpose are so inherently defective that no competent proof of the issue has been made, and the judgment on the first count must be reversed.

The second count, as pleaded in the amended complaint, was in the form of *indebitatus assumpsit* for the agreed price of \$500 for services of plaintiffs as real estate agents. Evidence under this count showed a transaction with the plaintiffs in the name of Hall & Baker, which is not a fictitious name, nor one not designating the persons interested in the partnership. Defendant does not claim, and did not plead in his answer, that other persons were interested in the partnership besides the two plaintiffs whose names appear in the designation "Hall & Baker."

Plaintiffs' bill of particulars, served upon defendant's demand, set forth a writing executed by defendant on August 21, 1925, which, after dealing with other matters, read: "Should I at a later date want to sell the * * * above lot * * * Hall & Baker are to have an exclusive authorization so to do and in the event of sale their commission is to be \$500." The bill stated that plaintiffs, acting on said last-quoted part of said agreement, undertook to sell said property, listing the same, and in particular specifying the following services: That Baker had held several conversations with a prospective purchaser, Linehan; that plaintiffs did not recall the exact dates of said services, but alleged that they were between March 15, and May 14, 1926; that during said period plaintiff Hall advised defendant of said efforts to sell; that thereafter defendant sold the property to said Linehan, and had not paid plaintiffs the agreed commission. The court found that plaintiffs were the procuring cause of said sale, and gave plaintiffs judgment for the \$500 commission accordingly.

The attitude of plaintiffs at the trial, as shown by their objections to testimony, was that they were entitled to the commission, no matter to whom nor by whom, nor how the property was sold, so long as it was in fact sold. The court's findings, however, are that the plaintiffs were the procuring cause of the sale. On this appeal the argument of respondents runs along the line that plaintiffs were prevented from performing the contract by the sale of the property by the owner. We think the court's view was the correct one.

[2] The agreement was an exclusive agency, not an agreement giving the exclusive right to sell. An exclusive agency agreement binds the owner to refrain from selling through any other real estate agent, but does not mean that he may not sell it himself personally and directly, if he finds a purchaser

on his own account. *Waterman v. Boltinghouse*, 82 Cal. 659, 23 P. 195; *Snook v. Page*, 29 Cal. App. 246, 155 P. 107; *California Land Security Co. v. Ritchie*, 40 Cal. App. 246, 258, 180 P. 625.

[3] The written agreement is in an unusual form. Appellant claims it is only an agreement to employ plaintiffs at a future date. Plaintiff Baker's testimony was that, when he told defendant that he was trying to sell to Linehan, defendant said, "That is good; try and sell it;" that, when he asked defendant for a contract, defendant replied that none was necessary, that plaintiffs already had an agreement, and that when the property was sold, no matter who sold it, plaintiffs would get the \$500 commission; that he must have talked with defendant 50 times, because he was in the office every day. In view of these conversations with defendant, the agreement to pay a commission is sufficiently proven. The writing is sufficient to satisfy the statute of frauds, and the oral dealings of the parties interpret the writing as a present agreement to pay a commission. The agreement need not be entirely in writing. *Toomy v. Dunphy*, 86 Cal. 639, 25 P. 130.

The evidence is attacked as insufficient to show that plaintiffs were the procuring cause of the sale. It is claimed that plaintiffs did not perform the function of real estate brokers, so as to entitle them to the commission, because they did not procure a contract of sale, nor introduce the buyer to defendant, nor obtain from Linehan, the purchaser, any declaration of willingness to buy. In this connection the evidence is analyzed in an attempt to demonstrate the plaintiffs' activities were on and after March 15th, while defendant's sale to Linehan was before that time, to wit, on March 11th, pursuant to conversations on the 8th and 9th. The testimony on this point was substantially as follows:

Plaintiff Hall had one conversation with Linehan, when he came into plaintiffs' office, in the presence of Mr. Otto Nagel, of the Mercantile Trust Company. This he said was in the latter part of March, 1926. He subsequently reported this to defendant, who said, "That is good." Plaintiff Baker said he had his first conversation with Linehan, in which he urged Linehan to buy the property, "about March 15th, the first of March, 1926, around there somewhere." This was on the street in the presence of said Nagel. That he had three or four more conversations with Linehan along the same line. On cross-examination he said his first conversation could have been between the first of the year to March; that Linehan put him off; that he reported to defendant King, who said, "That is good; try to sell it to him." Nagel testified, also, that he was present at the conversation between Hall and Linehan, and between Baker and Linehan; that plaintiffs praised the property, urging Linehan to buy it, Linehan

asking questions about it, feeling them out as to their idea on the property. Without specifying the date, Nagel said Linehan came to him and persuaded him to negotiate with defendant for the sale, stating that he had a client, Dr. Wall, who would buy, and that he did not want to go directly to defendant, for fear he would boost the price. Nagel did so, and found King willing to sell. Two or three days later, which was March 11th, Nagel, being branch manager of the bank, issued a cashier's check at Linehan's request, and drew up a receipt which defendant King and wife signed, acknowledging receipt of \$2,650 from Mercantile Trust Company as first payment on the purchase price of the property, and specifying terms of sale. Two months later, on May 14, 1926, the deal was closed through a title company by delivery of a deed. King testified that not until he signed this deed on the day last named did he know that any one other than the Mercantile Trust Company was the purchaser. The deed was made to Seymour and Linehan and wife, at the request of the title company. King testified that he had had no previous negotiations or dealings with Linehan, and did not know that Nagel, nor Mercantile Trust Company, were acting for Linehan.

Now, as to the dates of the services of plaintiffs in endeavoring to sell to Linehan, it is to be noticed that plaintiff Baker's testimony does not definitely place them on and subsequent to March 15th, but states they could be prior. Nagel does not fix the date. Asked if he went to plaintiff's office with Linehan after the \$2,650 deposit was made, Nagel said he did not know. Baker's testimony, that defendant said, "Go ahead," and sell to Linehan when informed of Baker's efforts in that direction, certainly indicates plaintiffs' dealing with Linehan antedated Nagel's deposit receipt of March 11th. In view of the uncertainty of dates, we must assume that the court believed Baker's testimony, and that, at the time he reported his activities to King, the latter had not yet signed the binding receipt to sell to the Mercantile Trust Company.

[4] The foregoing facts were competent to prove that plaintiffs first interested Linehan in the purchase of the property, that he was moved by the interest thus aroused in him by the plaintiffs, and went about the business of purchasing the property from the owner through the bank or Nagel without further use of the plaintiffs' services. His exact reasons for doing this are not shown. They are not material, because it does not appear that his action in so doing was caused by any neglect of a broker's duties on the part of the plaintiffs. The evidence, therefore, supports the court's finding that plaintiffs were the procuring cause of the sale. The broker's duties, which must be performed in order to earn the commission, are fully defined in

Twogood v. Monnette, 191 Cal. 103, 107, 215 P. 542, and the plaintiffs' services in this case come within its terms. They found a purchaser who proved ready and willing to buy, and who did buy.

[5] If it is true, as contended by appellant, that he did not know, when he agreed to sell to Mercantile Trust Company, that the real purchaser was the same Linehan whom respondents had worked on and spoken to appellant about, that fact would not subtract anything from the services performed by the respondents. Inasmuch as the sale was made to the purchaser found by the respondents, under the circumstances of this case, it is not necessary for respondents to argue that appellant prevented a sale by them, but only that appellant accomplished the sale to the purchaser first found by them.

[6] Appellant contends that the judgment is erroneous, in that it is based upon an express contract, while the complaint declares upon a common count. We are not able to find that this point was raised at the trial, and in view of the bill of particulars served we cannot see how appellant was in any way prejudiced, if in fact it amounted to a variance. It has been held that an express contract, which has been fully executed, and under which nothing remains to be done by defendant, except the payment of money, which is nothing more than the law would imply against him, may be declared upon in indebitatus assumpsit at the option of the plaintiffs. *Castagnino v. Balletta*, 82 Cal. 250, 258, 23 P. 127, quoting *Greenleaf on Evidence*; *Willett & Burr v. Alpert*, 181 Cal. 652, 659, 185 P. 976, quoting 5 Cor. Jur. 1386-1388. Such is the nature of the contract sued upon here. The judgment was given upon that theory; i. e., for a money debt due upon a contract duly performed by respondents.

The judgment upon the second count is therefore affirmed, and the judgment upon the first count is reversed, with direction to the trial court to retry the sole issue of respondents' right to maintain the action upon the note in suit, neither party to recover costs on appeal.

IN RE ROACH'S ESTATE. (Civ. 6727.)★

District Court of Appeal, First District, Division 2, California. Aug. 7, 1929.

Rehearing Denied Sept. 6, 1929. Hearing Granted by Supreme Court Oct. 3, 1929.

1. Executors and administrators ⇨69—Court can enjoin widow as administratrix fraudulently holding out of inventory properties, which, together with those set aside, exceed in aggregate \$2,500 in value.

If widow appointed administratrix fraudulently held out of inventory properties of the

estate, which, together with properties which she asked to have set aside, would make an aggregate in excess of \$2,500 in value, court could take action to prevent her from so doing.

2. Executors and administrators ⇨69—Contention that administratrix as widow held out property in excess of \$2,500 in value out of husband's estate held without merit.

Contention that administratrix as widow fraudulently held out of inventory property of estate of her deceased husband in excess of \$2,500 in value held without merit, where total properties actually set aside amounted in value to \$1,398.22, and record did not disclose value of real estate nor value of any other items, the total of which would make the estate exceed \$2,500.

3. Executors and administrators ⇨66—Bank account in name of husband and wife jointly held survivor account, which administratrix was not obliged to include in inventory.

Where objections to inventory of widow as administratrix alleged that bank account not included was separate property of deceased husband, but that it stood in name of husband and wife, and there was no evidence regarding any bank account whatever, court may assume that bank account was what is known as a survivor account, and therefore administratrix was not obliged to return any part of bank account in inventory, since allegations of pleading were tantamount to charge of fraud, and fraud is never presumed.

4. Executors and administrators ⇨29(2)—Where hearing on application for letters of administration resulted adversely to son's contentions, he should have proceeded to commence appropriate action.

Where hearing on application for letters of administration resulted adversely to contentions of deceased's son by his first marriage, son should have proceeded to commence an appropriate action immediately, since all litigation should be promptly heard and determined.

5. Executors and administrators ⇨69—Court held not to have abused discretion in overruling objections to inventory and petition for removal of administratrix six months after appointment.

Where son of deceased by first marriage filed objections to inventory of administratrix, and petitioned for her removal at the end of six months, when final application to set aside estate to widow was made, and facts in record showed that son was not acting in good faith, discretion of trial court in overruling objections to inventory and denying petition for removal was not abused.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petition by Marie Roach, administratrix and widow of Joseph Roach, deceased, to set aside the entire estate to her, after which Joseph Francis Roach filed objections to inventory, and petitioned for the removal of the administratrix. Order overruling objections and denying petition for the removal of

the administratrix, and, from an order setting aside the estate to the widow, Joseph Francis Roach appeals. Affirmed.

Matthew A. McCullough, of San Francisco, for appellant.

Kington & Cunningham, of San Francisco, for respondent.

STURTEVANT, J. Joseph Roach died intestate in the city and county of San Francisco on the 3d day of March, 1928. He left him surviving a widow and a minor daughter by that widow, and also a son, about 30 years of age, who was an offspring of a former marriage. On the 26th of March, 1928, the widow applied for letters of administration. In her petition she named the assets as including four different bank accounts in the total sum of \$1,510.22; five bonds, \$250; one automobile, \$500. Later, letters were issued to her, and subsequently an inventory and appraisal was filed. Thereafter the widow filed a petition setting forth that the net value of the estate, after the payment of the debts, was \$1,398.22, and praying for an order that the entire estate should be set aside to her. After notice duly given, the stepson, Joseph F. Roach, appeared, and filed "Objections to inventory and petition for removal of administratrix." The petition and the objections came on for hearing on the same date. The trial court overruled the objections and denied the petition for the removal of the administratrix, and thereupon granted the petition of the administratrix as prayed. From that order the stepson has appealed.

[1-3] In his brief the appellant has gone outside of the record and has stated many things that do not appear in the record brought up. The respondent has done the same. We will not attempt to follow those excursions. In his pleading the appellant alleged that the administratrix had neglected to return in the inventory lot 21 in block 4 of Holly Park tract in San Francisco. He alleged it was separate property of the deceased. He also alleged that the administratrix had not returned in the inventory \$9,000 drawn from the San Francisco Bank, which moneys were also alleged to be the separate property of the deceased "carried in the names of the deceased, Joseph Roach and Marie Roach." The appellant made no attempt to introduce any evidence regarding any bank account whatsoever. In offering his proof, it soon appeared from the evidence presented by the appellant that before he died the deceased executed a deed to the piece of real estate in question. In reply to the court's question, counsel stated, "I am trying to show that the decedent, Joseph Roach, was not capable at the time he executed his deed, or did not understand whether it was a deed or a will." After considerable discussion between court and counsel, the court remarked that, if counsel considered there was any-

thing irregular about the deed, appellant could go ahead by a proper proceeding to have the irregularity determined. On that evidence the objection was submitted. The remark made by the trial court was certainly correct as a general proposition. *Simonton v. Los Angeles T. & S. Bank*, 192 Cal. 651, 221 P. 368; *Howard v. Howard*, 67 Cal. App. 56, 226 P. 984. We do not understand the appellant to contend otherwise. However, we do understand him to take the position that, if the respondent fraudulently held out of the inventory properties of the estate of the decedent which, together with the properties which she asked to have set aside, would make an aggregate in excess of \$2,500 in value, then and in that event the trial court should have stayed its hand. Conceding this contention to be sound, the record does not support the contention of the appellant. The total properties asked to be set aside, and which were actually set aside, were of the total sum of \$1,398.22. The record does not disclose the value of the real estate nor the value of any other items the total of which would make the estate exceed \$2,500. In his pleading the appellant alleges that the bank account of \$9,000 was separate property, but that it stood in the name of the husband and wife. Bearing in mind that the pleading of the appellant is tantamount to a charge of fraud and that fraud is never presumed, we may assume that the bank account was what is known as a survivor account and therefore that there was no reason why the administratrix should have returned any part of that bank account in the inventory.

[4-6] Although the record is not complete, nevertheless it appears that on the hearing of the application for letters the same questions now in dispute were presented to the trial court. After hearing those matters, the trial court ordered letters issued to the administratrix. In doing so it held in effect that a bona fide claim adverse to the estate does not disqualify one from being appointed administrator. It has been so held. In *re Bauquier*, 88 Cal. 302, 26 P. 178, 532. Having done so, and without any new fact appearing, the controversy as delineated would not justify the removal, at a later date, of the administratrix. It is settled law in all jurisdictions that litigation should be promptly heard and determined. When the hearing on the application for letters resulted adversely to the contention of this appellant, he should have proceeded to commence an appropriate action. This he neglected to do. At the end of six months, when the final application came on for hearing, he came forward making the same contentions. Conceding that the trial court might have postponed the hearing, or might have rendered a decree reserving any rights of this appellant, it was not bound to do so. The appellant was appealing to the discretion of the trial court. The facts contained in the record did not satisfy the mind

of the trial court that the appellant was acting in good faith. We are quite unable to say that there was any abuse of discretion.

We find no error in the record. The order appealed from is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 245

PEOPLE v. ROSSEAU. (Cr. 1846.)

District Court of Appeal, Second District,
Division 2, California. Aug. 2,
1929.

1. Intoxicating liquors $\S$ 236(13)—Uncontradicted evidence held sufficient to show that substance of bottle seized contained more than legal content of alcohol fit for beverage purposes.

In prosecution for unlawful selling of whisky, uncontradicted evidence as to contents of bottle seized *held* sufficient to show that substance sold contained more than legal content of alcohol fit for beverage purposes.

2. Intoxicating liquors $\S$ 134—Beverage containing alcoholic content of one-half of 1 per cent. or more, denounced as illegal, is "intoxicating liquor."

"Intoxicating liquor" is a beverage containing an alcoholic content of one-half of 1 per cent. or more, which the national, state, or municipal legislative bodies may denounce as illegal.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Intoxicating Liquor.]

3. Criminal law $\S$ 493—Evidence held to justify jury in concluding that witness, testifying contents of bottle seized was moonshine, had tasted it; "sample."

Where witness testified that he actually sampled contents of bottle seized at time of purchase from accused, and that it was necessary for him to taste every sample he got, and that he knew it was moonshine because of the taste of it, evidence *held* to justify jury in concluding that witness had tasted contents of bottle, since word "sample," used in this sense, may certainly mean taste.

[Ed. Note.—For other definitions, see Words and Phrases, First and Third Series, Sample.]

4. Intoxicating liquors $\S$ 239(5)—Instruction defining intoxicating liquor to include enumerated beverages, and to convict if satisfied that accused sold intoxicating liquor unlawfully, as charged, held not erroneous.

In prosecution for selling liquor, instruction defining intoxicating liquor to include enumerated beverages, and that, if jury is satisfied that defendant sold intoxicating liquor unlawfully, as charged in information, they should find him guilty, *held* not objectionable, because enumerating various kinds of liquors prohibited, since court takes judicial notice that whisky is an alcoholic liquor, that it is intoxicating, and

may be used as a beverage, especially when issue involves moonshine whisky.

5. Intoxicating liquors $\S$ 242—Sentence on conviction for selling liquor under state law should conform to provisions of National Prohibition Act.

Period of imprisonment after conviction for selling intoxicating liquor under state law should conform to provisions of National Prohibition Act.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Ben Rosseau was convicted of selling intoxicating liquor, and he appeals. Judgment modified, and, as modified, affirmed.

Fred Duffy, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant in this case was found guilty upon an information charging that he unlawfully sold whisky containing more than one-half of 1 per centum of alcohol. A motion for a new trial thereafter interposed in his behalf was denied, and he appeals from the judgment and from the order denying said motion.

[1, 2] It is insisted that the evidence adduced by the people entirely failed to show that the substance sold contained more than the legal content of alcohol, or that it was fit for beverage purposes. Four men drove to the defendant's house, one of whom asked him for a pint of whisky, for which he demanded \$2 in advance, and was so paid. He disappeared for three or four minutes, delivered to the purchaser a package containing a bottle, the contents of which three of them testified was "moonshine whisky," and was immediately arrested. The arresting officer testified that for a number of years he had known what liquor was, that prior to entering upon his official duties he had tasted liquor of all brands and was familiar therewith, and that during the last nine preceding months he had been required to taste samples of liquor. The second witness swore that the defendant at first did not want to sell them whisky, but when reminded that they had been there before, he filled their order. This witness testified that, from his experience with liquor since he was a boy in Tennessee, and from sampling it and having the same analyzed by a chemist, he knew the various kinds, and knew the contents of the bottle in question to be whisky. The third witness related the circumstances of the arrest, testifying that he knew the taste of whisky, and that the contents of said bottle was intoxicating liquor.

All of the evidence offered by the defendant was to the effect that he had no liquor, that he sold none to the officers, and he did not deliver any package to them. No evidence

was offered which tended to show that the bottle, if it was so sold, contained poison, or was sold or intended for medicinal purposes. Two of the witnesses testified that it contained whisky, and another that its contents were intoxicating liquor. Witnesses similarly qualified have heretofore testified as to the quality and character of liquors, and such evidence has been upheld as sufficient to support the judgments of convictions. *People v. Ellena*, 56 Cal. App. 428, 205 P. 701; *People v. Silva*, 67 Cal. App. 351, 227 P. 976. "Intoxicating liquor" is a beverage containing an alcoholic content of one-half of 1 per centum or more, which the national, state, or municipal legislative bodies may denounce as illegal. *Ex parte Simmons*, 199 Cal. 590, 250 P. 684. Hence the jury were entitled to believe the testimony of the people's witnesses that a bottle of whisky was purchased from the defendant, and, this being so, the evidence as to its contents stands uncontradicted, and the allegations of the information were established by substantial evidence.

[3] The contention of appellant that the record does not show that any witness actually tasted the liquor in question cannot be fairly upheld. One witness informed the jury that it was moonshine "because of the taste of it"; he actually sampled the contents of the bottle at the time he bought it from the defendant, and that it is necessary for him to taste every sample he gets. It would be hypertechnical to say that the jury were not justified in concluding from this testimony that the witness had tasted the beverage. The word "sample" used in this sense may certainly mean to "taste."

[4] It is complained that the trial court erroneously instructed the jury that "intoxicating liquor" is legally construed to include alcohol, brandy, whisky, rum, gin, beer, and wine or other liquor containing one-half of 1 per centum or more of alcohol by volume, which are fit for beverage purposes, and that if they should find that the liquor in question was whisky, it need not be proved to have been fit for beverage purposes; that the sale of intoxicating liquor is prohibited, except in exempted cases, and, if satisfied that the defendant sold intoxicating liquor unlawfully as charged in the information, they should find him guilty. If this instruction be attacked upon the ground that it enumerates the various kinds of liquors prohibited by the statute, it should be noticed that following this explanation the jury's attention was confined to the sale of whisky, an intoxicating liquor, "as charged in the information."

As was said in *People v. Gray*, 67 Cal. App. 549, 228 P. 358, wherein it appeared that a witness had tasted the contents of bottles sold by the defendant and testified that they contained whisky: "This evidence completely answers the two objections made by the appellant to the effect that the evidence failed to show that the liquor sold was fit for beverage

purposes, and that it failed to show that the liquor was intoxicating. In *People v. Mueller*, 168 Cal. 526-528, 143 P. 750, it was held that the court takes judicial notice that wine is an alcoholic liquor, that it is intoxicating and may be used as a beverage. The same rule would apply when the issue before the court is as to whether or not a particular liquor is whisky. *Black on Intoxicating Liquors*, § 5; 17 Am. & Eng. Ency. of Law, p. 198. See, also, *People v. Allen*, 37 Cal. App. 180, 174 P. 374; *People v. Ellena*, 56 Cal. App. 428, 205 P. 701." It has been also held that this is particularly true when the issue involves moonshine whisky. *U. S. v. Golden* (D. C.) 1 F.(2d) 543.

[5] The period of imprisonment fixed by the judgment is excessive. It should be modified, so as to conform to the provisions of the National Prohibition Act.

The judgment, modified as indicated herein, and order denying a new trial, are affirmed.

I concur: WORKS, P. J.

Owing to the absence of Justice IRA F. THOMPSON, he does not participate in this decision.

100 Cal. App. 797

E. J. GALLAGHER, Plaintiff and Respondent,
v. **Alfred VOYCE, Jr., et al., Defendants;**
Alfred VOYCE, Jr., Appellant.

E. J. GALLAGHER, Plaintiff, v. J. W. WRIGHT & SONS INVESTMENT CO., a Corporation, et al., Defendants. (Civ. 6660.)

District Court of Appeal, First District,
Division 2, California. July 24, 1929.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Raymond D. Williamson, of San Francisco, for appellants.

Oscar Samuels and Jacob Samuels, both of San Francisco, for respondent.

PER CURIAM. The opinion in the above-entitled action filed July 12, 1929, 279 P. 490, was responsive to the appeal taken in that certain action numbered 146089 of the records of the superior court of the state of California, in and for the city and county of San Francisco. By stipulation of the parties another action numbered 146087, *E. J. Gallagher, Plaintiff, v. J. W. Wright & Sons Investment Co., a Corporation, et al., Defendants*, records of the same court, involving identical points, was consolidated with the action first named, and it was further stipulated that the decision of this court in the action first named should control and constitute the decision on appeal in the action last named. Therefore the judgment in action 146087 of

the records of the superior court of the state of California, in and for the city and county of San Francisco, is affirmed.

100 Cal. App. 292

PEOPLE v. MACKIE. (Cr. 1822.)★

District Court of Appeal, Second District, Division 1, California. Aug. 7, 1929.

Rehearing Denied Aug. 19, 1929. Hearing Denied by Supreme Court Sept. 3, 1929.

Escape —Person escaping from state hospital for narcotic addicts held not guilty of offense under statute relating to escape of "prisoners"; "patient" (Narcotic Rehabilitation Act, § 3; Pen. Code, § 107).

Person committed to state hospital for narcotic addicts under Narcotic Rehabilitation Act, § 3 (St. 1927, p. 149), who thereafter escapes, or attempts to escape, from such hospital, is not guilty of any offense under Pen. Code, § 107, relative to escape of "prisoners," who are persons in legal custody charged with some crime or public offense, since one committed to state narcotic hospital for treatment is more properly classified as "patient."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Patient; Prisoner.]

Appeal from Superior Court, Los Angeles County, William T. Aggeler, Judge.

Richard Mackie was accused of having escaped from the State Narcotic Hospital, and, from a judgment dismissing the information, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and William R. McKay, Deputy Dist. Atty., both of Los Angeles, for the People.

John F. Groene, of Los Angeles, for respondent.

HAHN, Justice pro tem. To an information filed by the district attorney of Los Angeles county, wherein it was charged that the defendant and respondent "did wilfully, unlawfully and feloniously and intentionally escape from the lawful care, custody and control of the State Narcotic Hospital at Spadra, Los Angeles County, California, and * * * then and there being in the lawful care, custody and control of the said Hospital and the said Superintendent thereof, under and by virtue of a valid commitment issued by the Superior Court of the State of California in and for the County of San Francisco, on or about October 16th, 1928, adjudging said defendant to be a drug addict, in accordance with the provisions of that certain Act and

Statute entitled and known as the 'Narcotic Rehabilitation Act,' Statutes of 1927, approved April 9th, 1927, - * * and more particularly section 3 of said Act," the defendant and respondent filed a general demurrer alleging "that the facts stated do not constitute a public offense." The trial court sustained the demurrer and dismissed the information. From this ruling the district attorney has appealed.

Section 107 of the Penal Code, under which the information was drawn, reads as follows: "Every prisoner charged with or convicted of a felony who is confined in any jail or prison or an inmate of any public training school or reformatory or county hospital, or who is engaged on any county road or other county work or who is in the lawful custody of any officer or person, who escapes or attempts to escape from such jail, prison, public training school, reformatory or county hospital, or from the custody of * * * any officer or person in whose lawful custody he is, is guilty of a felony and is punishable as provided in section one hundred eight of the Penal Code."

The sole question here involved is whether or not a person committed to a state hospital for narcotic addicts who thereafter escapes, or attempts to escape, from such hospital, comes within the purview of the above-quoted section of the Penal Code. While the section in question, by reason of its extended wording and numerous phrases, more or less connected by disjunctives and modifying clauses, presents the opportunity for varying interpretations, a careful examination of the section, together with its history, would seem to leave no doubt but that its provisions were intended by the Legislature to be limited to those who have been charged with a public offense and while in legal custody, either awaiting trial or after conviction, escape, or attempt to escape, from the prison or other place where the custodial restraint is being exercised. The language at the outset, "Every prisoner," etc., would seem to limit the application of this section to those who are "prisoners." The term "prisoner" is commonly used in law to designate a person in legal custody charged with some crime or public offense. And, while it is true the section includes the words "county hospital" and "reformatory," as well as "jail" and "prison," these institutions are included because quite commonly persons charged with crimes are detained in the county hospital pending trial, or committed to some reformatory. In the case of *In re Haines*, 195 Cal. 605, 234 P. 883, the opinion includes an extended and thorough discussion of the history and purpose of section 107 of the Penal Code. The opinion specifically points out that the reason for the inclusion in the section of "county hospitals" and "reformatories" is the fact that

those charged with crime are often detained in the county hospital or committed to a reformatory. It would seem to require no discussion to justify the conclusion that the section in question would not be applicable to one charged with insanity, and who, either pending a hearing or subsequent to a court's commitment, escapes from the county hospital.

Clearly, the section in question is applicable only to those escaping, or attempting to escape, who are in custody charged with some public offense.

It may be urged that one committed to the state hospital for narcotic addicts is there detained as a prisoner, and that in some way in so becoming a narcotic addict a public offense has been committed.

The law under which the defendant was committed to the state hospital was adopted in 1927, and is entitled the "Narcotic Rehabilitation Act" (Stats. 1927, c. 89, p. 149). Among other things, it provides for a method of bringing into court those who have become addicted to the use of narcotics, and thereafter, upon a hearing before the court without a jury, the court is empowered to commit such person to the state hospital for narcotic addicts for a period of not less than eight months and not more than two years. The very title of the act, as also its provisions, indicate its purpose as social rather than penal. The fact of being a narcotic addict is nowhere denounced as a crime, nor is there language in the act that justifies such an interpretation. It is true that the addict is restrained of his liberty while in the hospital, but that is a circumstance made necessary because of the effect of the drugs upon the conduct of the addict and the length of time required to accomplish his cure. The superintendent or medical director has the power, when in his opinion a cure has been accomplished, to discharge the addict. The entire act is clearly intended for the treatment of the addict from the standpoint of accomplishing a cure of the disease. It will be noted that the act nowhere provides for a jury trial for one charged with being a narcotic addict, as would be his right if he were charged with a public offense.

Addiction to the use of narcotics is to-day recognized as a disease rather than a crime. One committed to the narcotic state hospital for treatment would more properly be classified as a patient than as a criminal. His status is reasonably comparable to that of one charged with insanity and committed to the state hospital for treatment.

From the foregoing considerations, it follows that the information does not state a public offense and that the demurrer was properly sustained.

Judgment affirmed.

We concur: CONREY, P. J.; YORK, J.

GUNDER v. SUPERIOR COURT IN AND FOR RIVERSIDE COUNTY et al. ★
(Civ. 6156.)

District Court of Appeal, Second District, Division 2, California. Aug. 9, 1929.

Rehearing Denied Sept. 7, 1929. Hearing Denied by Supreme Court Oct. 7, 1929.

1. Courts ⇨212—Supreme Court had exclusive appellate jurisdiction of proceeding to cancel property settlement (Const. art. 6, § 4).

Proceeding for cancellation of property settlement between husband and wife and for accounting was of an equitable nature, and lay within exclusive appellate jurisdiction of Supreme Court, under Const. art. 6, § 4.

2. Prohibition ⇨16—Where appeal from judgment canceling property settlement and ordering accounting was pending in Supreme Court, District Court of Appeal would not issue writ of prohibition restraining further proceedings by court and referees appointed.

Where appeal was pending in Supreme Court from judgment canceling property settlement between husband and wife and ordering property retransferred, and ordering an accounting, and referees had been appointed, District Court of Appeal would not issue writ of prohibition restraining further proceedings in case by lower court and persons named as referees, on ground that order appointing referee was improper.

Petition by Agnes Gunder for writ of prohibition to be directed to the Superior Court of the State of California in and for the County of Riverside, and others, to restrain further proceedings in a certain action. Writ denied.

McAdoo, Neblett, O'Connor & Clagett and E. H. Mitchell, all of Los Angeles, for petitioner.

Woodruff, Musick, Pinney & Hartke, of Los Angeles, for respondents.

CRAIG, J. On October 23, 1926, suit was filed in the superior court of Riverside county by Samuel H. Gunder against his then wife, the petitioner herein, for the cancellation of a property settlement theretofore consummated between them. Judgment was rendered in favor of the plaintiff on November 4, 1927, declaring null and void a quitclaim deed and a bill of sale, awarding him possession of the real and personal property, and ordering an accounting by the defendant. A referee was therein appointed to take an account of all property and moneys received by the defendant from the plaintiff, or through reinvestment of the proceeds thereof, and the defendant was restrained from encumbering, transferring, or removing any of the subject-matter of the suit pending such accounting. Said judgment further provided as follows:

"That upon the rendition of said account of said referee to the court, and the court's approval thereof, said plaintiff is and shall be

given a final judgment against said defendant for the immediate possession of any and all personal property, including bonds and money and proceeds thereof in the hands of said defendant, or under her control or any one on her behalf, belonging to said plaintiff, or the value thereof, as well as also for a final judgment in favor of said plaintiff and against said defendant in such amount as the court may find that the plaintiff is entitled to."

The defendant, petitioner herein, appealed to the Supreme Court from "the judgment in the above-entitled action, and each and every part thereof," on November 14, 1927 and the appeal is still pending. Prior to the date last mentioned, and on the 10th day of November, 1927, the plaintiff, Samuel H. Gunder, moved the trial court for the appointment of a receiver, whereupon the same person who had theretofore been appointed referee was designated as such receiver. On May 28, 1928, at the instance of the plaintiff, and without notice, another person was designated as referee in the place and stead of the former, "with full and complete authority to take all necessary steps to receive and hear the accounting specified and required by the court in its certain judgment made and entered in the above-entitled cause on the 4th day of November, 1927." The substituted referee having set a time and place of hearing, petitioner appeared by counsel and objected to any proceedings before him, upon the ground that he had no jurisdiction, which objection was overruled, and the matter was reset for hearing. She then filed in this court a petition for a writ of prohibition, directing that the respondent court and each of the persons named as referees refrain from proceeding in the case of Gunder v. Gunder.

It was objected before the referee, and is here contended as asserted grounds for the writ, that the order appointing him was made more than six months after the entry of judgment, that it was made either ex parte or upon the court's own motion without notice, that it modified in a material respect the judgment from which an appeal had previously been taken, and that all proceedings with respect to an accounting pursuant to the judgment are stayed by the appeal. The respondents contend, regardless of the merits of the proceeding, that since the petitioner seeks to restrain the action of an officer of the trial court, designated and directed to act by a judgment in an equitable proceeding,

which is appealable and has been appealed to Supreme Court, this court has no authority to grant the relief prayed.

[1, 2] That the proceeding in the superior court was of an equitable nature is not doubted. It lay within the exclusive appellate jurisdiction of the Supreme Court. Const. Cal. art. 6, § 4. Unquestionably this court has jurisdiction, but as a matter of practice and policy, where cases were in the superior court, both the Supreme and District Courts have refused to take jurisdiction when the case involved was one originally appealable to the other court. *Favorite v. Superior Court*, 181 Cal. 263, 184 P. 15, 8 A. L. R. 290; *Collins v. Superior Court*, 147 Cal. 264, 81 P. 509; *Estate of Turner*, 39 Cal. App. 56, 177 P. 854. If policy indicated this course where no appeal had yet been taken, it seems clear that the reasons therefor apply even more strongly where, as in this instance, an appeal has been taken to the court having original appellate jurisdiction. Should this petition be granted, questions involved in the appeal to the Supreme Court now pending would necessarily be determined by this court. It is urged by the petitioner that the basis of the appeal is not in itself an appealable judgment or order. If this is true, the proper means of removing it is readily at hand in the form of a motion to dismiss.

In the instant case an agreement purporting to adjust property rights has been canceled by the superior court, and real and personal property ordered retransferred. Before this can be accomplished, if at all, a reference and accounting is deemed by the trial court indispensable to a determination of the character and value of the property. The question as to whether the plaintiff is entitled to any judgment canceling the contract, or to any of the property, is now no longer in the superior court, but is pending in the Supreme Court, and the office of the referee having been created in aid of the superior court in discovering and valuing the estate for its purposes, to affirm, modify, or deny his authority in this proceeding we think would be unwise and unwarranted.

The writ of prohibition is denied.

I concur: WORKS, P. J.

Owing to the absence of Justice IRA F. THOMPSON, he does not participate in this decision.

100 Cal. App. 18

PEOPLE v. YOUNG. (Cr. 1820.)★

District Court of Appeal, Second District, Division 2, California. July 15, 1929.

Rehearing Denied July 30, 1929. Hearing Denied by Supreme Court Aug. 12, 1929.

- 1. Criminal law** $\S$ 1186(4)—Permitting peremptory challenge to juror by prosecution after acceptance by both parties, completion and swearing of jury, and reading of indictment, held prejudicial error (Pen. Code, $\S$ 1068; Const. art. 6, $\S$ 4½).

Under Pen. Code, $\S$ 1068, permitting peremptory challenge to a juror by prosecution after acceptance by both parties, completion and swearing of the jury, and reading of the indictment or statement of the case, held to constitute prejudicial error, requiring reversal, notwithstanding Const. art. 6, $\S$ 4½, where condition of juror's mind was not such as to entitle prosecution to reject him for cause at any time.

- 2. Criminal law** $\S$ 173—Jury having been regularly impaneled and sworn before peremptory challenge was allowed, defendant was placed in "jeopardy."

Where jury was completely and regularly impaneled and sworn before peremptory challenge was allowed, defendant was placed in "jeopardy," which signifies the danger of conviction and punishment which one charged with a criminal offense incurs when duly put on trial before a court of competent jurisdiction and a jury has been charged with his deliverance.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Jeopardy.]

- 3. Criminal law** $\S$ 173—Jury has been charged with defendant's deliverance as regards claim of jeopardy when its members have been impaneled and sworn.

A jury is charged with defendant's deliverance as regards claims of jeopardy, when jury's members have been impaneled and sworn.

- 4. Criminal law** $\S$ 197—Jeopardy bars another prosecution for same offense or one included therein of which defendant might have been convicted under first prosecution.

Defendant having been placed in jeopardy, it is a bar to another indictment or information for the same offense or for an attempt to commit it or for an offense necessarily included therein of which he might be convicted under the first indictment or information.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

E. J. Young was convicted of grand theft, forgery, and conspiracy to cheat and defraud, and he appeals. Reversed, and defendant ordered discharged.

Hearing denied; WASTE, C. J., and RICHARDS and CURTIS, JJ., voting for a hearing.

Troy Pace, of Los Angeles, for appellant.
U. S. Webb, Atty. Gen., and W. R. Augustine, of San Francisco, for the People.

CRAIG, J. The appellant was charged jointly with two others with having committed grand theft, forgery, and conspiracy to cheat and defraud, in the county of Los Angeles. Having been convicted by a jury of these offenses, he appeals. Since a serious question is raised as to the regularity of the impanelment of the jury, which, if tenable, renders all subsequent proceedings in the trial court nugatory and the judgments invalid, we proceed to consider it at once. The facts in this respect are not controverted by the respondent.

It appears that twelve regular jurors and two alternates were examined and accepted, and the jury were sworn during the forenoon of March 25, 1929. The respective counsel waived reading of the information, and the trial judge stated the case to the jury, whereupon the court recessed until 2 o'clock p. m. of the same day. Upon their return at that time, the court remarked that Lester B. Zillgitt, one of the regular jurors, had communicated the fact that he had learned that one Herbert Smith, a witness for the defendant Young, was a member of the same club as himself, and was a social friend of his, but that he had not previously known that Smith was to be a witness in the case. The juror stated that he did not believe their friendly relations would alter his attitude, but that "those things always have a bearing." Following discussion among counsel, the deputy district attorney asked permission to exercise a peremptory challenge, "even though the juror had been sworn, if there is no objection." Counsel for the defendants objected, stating that Smith was but a character witness and knew nothing about the case. The court overruled their objections, allowed the challenge, and excused the juror. Thereupon appellant's counsel announced: "Your honor, at this time, before the jury is called, I desire to enter a special plea upon behalf of the defendants Young and Smith, and that is a plea of former jeopardy today when the jury was impaneled and sworn and the statement of the court was made to the jury; jeopardy attached at this time." Objection on behalf of the people to such plea was sustained, and Mrs. Dolly B. Cates, who was not an alternate, was called from the venire, impaneled and sworn. It is strenuously insisted by appellant that upon the impanelment of the jury and statement of the case he was placed in jeopardy, and that the withdrawal of an accepted and sworn juror in the afternoon immediately prior to calling of a witness was unauthorized. The respondent contends that the "discovery of the fact of his unfitness to sit as a juror was an unex-

pected and unusual happening," bringing the case within the provisions of section 1139 of the Penal Code, authorizing the discharge of the *jury*, after retirement if the illness of one, or other accident or cause, prevents their being kept in deliberation, and within those of section 1141, which provides that, where a jury is discharged or prevented from giving a verdict by reason of accident or other cause, the case may be tried again.

[1] Section 1068 of the Penal Code provides that the challenge "must be taken when the juror appears, and before he is sworn to try the cause; but the court may for cause permit it to be taken after the juror is sworn, and before the jury is completed." We are cited to no authority, nor have we been able to find any, which can be said to have sanctioned the allowance of a peremptory challenge to a juror by the prosecution after the acceptance by both parties, completion and swearing, of the jury, and the reading of the indictment or statement of the case. In any event, it has repeatedly been held in this state that under this section a juror may be challenged after being sworn and before the jury is completed only for cause. *People v. Reynolds*, 16 Cal. 128; *People v. Bemmerly*, 87 Cal. 117, 25 P. 266; *People v. Ward*, 105 Cal. 335, 38 P. 945; *People v. Durrant*, 116 Cal. 179, 48 P. 75; *People v. Boren*, 139 Cal. 210, 72 P. 899; *People v. Schmitz*, 7 Cal. App. 330, 94 P. 407, 419, 15 L. R. A. (N. S.) 717. It occurs to us that the error in this instance is not and cannot be sufficiently mitigated by the application of the rule that a judgment will not be disturbed if the rights of the defendant do not appear to have been substantially infringed, nor by the provisions of section 4½, art. 6, of the Constitution. The peremptory challenge was not only allowed the people after the jury was completed and they had retired for the noon recess following a statement of the issues as joined, but over the objection of the defendant. Zillgitt had been asked by the court at this stage of the proceedings, after previous examination and acceptance, with eleven other regular jurors and two alternates: "Would the fact that you and Mr. Herbert Smith are quite friendly, on quite friendly relations, make any difference with your attitude in the case?" To which he replied: "I don't believe it would." As has been said, both the common-law and statutory modes of selecting jurors are supported by "the principle, so often repeated, that the right of challenge is a right of rejection, not of choice." *Tierney v. United States* (C. C. A.) 280 F. 322. The condition of this juror's mind was not such as to entitle the people to reject him for cause at any time, and the limitation of the time for interposing of challenges as before the completion of the jury has been recognized, by decisions of this state in construing section 1068 of the Penal Code. *People v. Boren*, *supra*; *People v.*

Goldenson, 76 Cal. 328, 347, 19 P. 161; *People v. Duncan*, 8 Cal. App. 186, 96 P. 414. In the case last cited challenges were held properly denied the defendant, as to jurors who had formed opinions that a murder had been committed, one of whom admitted that he was prejudiced in like cases as to the existence of a conspiracy, but each signified that he could fairly decide upon the evidence presented. The rule is most aptly laid down in *People v. Schmitz*, *supra*, wherein numerous decisions of this and other jurisdictions are reviewed, in the following language:

"Section 1068 of the Penal Code provides that a challenge must be taken 'when the juror appears and before he is sworn to try the cause; but the court may for cause permit it to be taken after the juror is sworn and before the jury is completed.' It appears evident that the court could not under the section permit a challenge except 'for cause,' and the cause must have been based on some fact and founded upon a proper showing of facts, upon which the court could have exercised its discretion. If the court, after a juror has been sworn to try the case, can permit him to be challenged without cause, the words 'for cause' should be stricken from the statute. The Code evidently intended that after a juror has been examined, passed, and has taken a solemn oath to try the case he could not then, except for a valid reason, be, at the caprice of one of the parties, discharged. He became a juror in that case, and thus a part of the machinery of the court. He became a part of the tribunal for the purpose of determining the guilt or innocence of the defendant. That tribunal was changed without the consent of the defendant, and in the interest of his adversary. *Greer v. Norvill*, 3 Hill (S. C.) 262. Defendant had the right to rely upon the fact that the juror had been sworn in exercising his right to his own peremptory challenges. The mandate of the statute appears plain and should have been followed. We know of no case, and none has been called to our attention, in which such challenge was upheld."

But three jurors had there been examined, passed, and sworn to try the case when the challenges in question were allowed as to two of them. Regarding the dismissal of another juror who had read in the paper that he was related to the defendant, and asked to be excused, though he did not know whether the relationship might be "fourth or fifth cousins or something through marriage," it was further said:

"The court, on this showing and nothing more, sustained the challenge to the juror under defendant's objection. The evidence entirely failed to show any relationship by consanguinity or affinity within the fourth degree. In fact it did not show any relationship of the juror to defendant in any degree or in any way. The judge, in ruling

upon the challenge, said: 'I think any relationship, no matter how remote, ought to keep a person off the jury.' It was not for the court to set up its judgment against the statute as to the qualifications of a juror. The juror did not know defendant, and did not know of any relationship. He only knew that he had seen something about it in the papers. If this juror could thus be excused without cause, there is no reason why the same thing could not have been repeated as often as the district attorney might have requested it. It is plain that the effect of the ruling was to give to the prosecution an additional peremptory challenge. The defendant exhausted his peremptory challenges, and it must be presumed that the removal of the jurors Harris and Bray without cause, after they had been sworn, was injurious to his rights. Defendant had the right to have the jury impaneled according to the law of the state under which he was being tried. The prosecution did not have the right to arbitrarily dismiss qualified jurors unless it could be done as provided by the Code. The views here expressed are ably supported in an exhaustive opinion written by Mr. Justice Henshaw in *People v. Helm* (Cal. Sup. [152 Cal. 532]), 93 P. 99. The case was reversed upon the rulings of the trial judge refusing to sustain defendant's challenges to certain jurors on the ground of implied bias. The court said that, if the defendant had been compelled to exhaust his peremptory challenges to relieve himself of jurors who should have been excused by the court for cause, 'the rulings of the court upon such jurors become a most important matter of review.'

"The Code provisions in regard to the impanelment of jurors and their qualifications have in view the right of the defendant to a fair and impartial jury, and one not picked and selected by the prosecution. * * *

The foregoing was reaffirmed in *People v. Ruef*, 14 Cal. App. 594, 114 P. 61, wherein the Supreme Court, all justices concurring, denied a hearing after decision by the District Court of Appeal.

[2-4] The conclusion is unavoidable that error of a serious nature and affecting the substantial rights of the defendant was committed by the sustaining of the peremptory challenge. It is equally clear that, the jury having been completed and regularly impaneled and sworn before the peremptory challenge was allowed, this appealing defendant was in jeopardy. Jeopardy signifies the danger of conviction and punishment which one charged with a criminal offense incurs when duly put upon trial before a court of competent jurisdiction, and a jury has been charged with his deliverance. *People v. Tong*, 155 Cal. 579, 102 P. 263, 24 L. R. A. (N. S.) 481, 132 Am. St. Rep. 110. A jury stands so charged when its members have

been impaneled and sworn. *People v. Hawkins*, 127 Cal. 372, 59 P. 697. His jeopardy is real, and he cannot be again subjected to jeopardy unless the jury be discharged without rendering a verdict, by his consent, or upon some legal necessity resulting from physical causes beyond the control of the court. *People v. Hunckeler*, 48 Cal. 334; *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Dec. 272. If deprived of a verdict because an error of law would result in a mistrial, except as provided by statute therefor, the discharge is equivalent to an acquittal, and is a bar to a subsequent trial. *People v. Tong*, supra. A defendant having been placed in jeopardy, it is a bar to another indictment or information for the same offense or for an attempt to commit it, or for an offense necessarily included therein, of which he might have been convicted under the first indictment or information. *People v. Zeigler*, 135 Cal. 462, 67 P. 754, 56 L. R. A. 882.

The judgments are reversed, and the appellant is ordered discharged.

I concur: IRA F. THOMPSON, J.

Owing to the absence of WORKS, P. J., he does not participate in this decision.

100 Cal. App. 82

PEOPLE v. THOMAS. (Cr. 1778.)

District Court of Appeal, Second District, Division 1, California. July 20, 1929.

1. Criminal law ☞543(1)—Admitting deposition of absent witness given at preliminary examination, on evidence he was nonresident, held not abuse of discretion.

Where state made inquiry as to whereabouts of absent witness, and was informed that witness was no longer resident of state, and no contrary evidence was offered, court did not abuse discretion in permitting deposition of absent witness, given on preliminary examination of defendant, accused of assault with a deadly weapon, to be read to jury at trial.

2. Criminal law ☞1169(2)—Admitting deposition of witness given at preliminary examination held not prejudicial error, being cumulative and corroborated.

Where testimony contained in deposition given at preliminary examination and read at trial of defendant, accused of assault with deadly weapon, was merely cumulative and largely corroborated by defendant, allowing deposition to be read at trial was not prejudicial error.

3. Indictment and information ☞189(2)—Accused, charged with and on trial for commission of assault with deadly weapon, could not be convicted of simple assault.

Where information charged offense of assault with a deadly weapon on person of another, accused could be convicted only of the offense as charged, and no other, and could not

be guilty of commission of lesser offense of simple assault, and therefore it was not error to refuse instruction that, although defendant was charged with offense of assault with a deadly weapon, it was within power of jury to find him guilty of simple assault.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

John Thomas was convicted of assault with a deadly weapon, and he appeals. Affirmed.

Utley & Nuffer, of El Centro, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and Edward B. Patterson, Deputy Dist. Atty., both of El Centro, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of assault with a deadly weapon, and from an order denying his motion for a new trial.

[1, 2] The first point presented by appellant for a reversal of the judgment is that on the trial of the action the trial court erred in permitting the deposition of a certain witness given at the preliminary examination of defendant to be read in evidence, in that prior to the offer to read such deposition in evidence due diligence was not shown to have been exercised by the prosecution in attempting to locate the witness within the jurisdiction of the trial court. In that connection the record discloses that a deputy sheriff gave testimony to the effect that, in order to serve a subpoena upon the witness in question, he had made various inquiries among several of the friends and acquaintances of the witness in the neighborhood of his former place of residence, and was informed by them that the witness was no longer a resident of the state. As no adverse evidence was offered, notwithstanding the fact that some other evidence was received, particularly with reference to the sending of a telegram by the district attorney, addressed to the absent witness at his supposed place of residence without the state, together with the receipt of a reply to such telegram from some third person—to all of which defendant objected, and as to which there well might be proper question as to its admissibility—it is manifest that, in permitting the deposition of the witness taken upon the preliminary examination of defendant to be read to the jury, the trial court did not abuse its discretion, and therefore that its ruling in the matter cannot be disturbed by this court. 8 Cal. Jur. 129, and cases there cited; *People v. Lewandowski*, 143 Cal. 574, 576, 77 P. 467; *People v. Reilly*, 106 Cal. 648, 40 P. 13; *People v. Leavens*, 12 Cal. App. 178, 184, 106 P. 1103; *People v. Edwards*, 14 Cal. App. 128, 130, 111 P. 263; *People v. Lederer*, 17 Cal. App. 369, 373, 119 P. 949; *People v. Poo On*, 49 Cal. App. 219, 223, 192 P. 1090; *People v. Padilla*, 81 Cal. App. 528, 531, 254 P. 585; *People v. Clayton* (Cal. App.) 264 P.

1105. Moreover, the testimony given by such witness was but cumulative of that given by other witnesses, and largely corroborated by the testimony of defendant. It follows that no prejudicial error was committed by the trial court in that regard.

[3] Appellant also complains that the trial court refused to give to the jury an instruction, offered by defendant, to the effect that, although defendant was charged with the offense of assault with a deadly weapon, it was within the power of the jury to find defendant guilty of simple assault. With reference to such specification of error, appellant cites the record herein, which contains evidence from which it might be concluded that, immediately prior to the commission by defendant of the offense specified in the information, defendant had committed a simple assault on the same person whom, according to the allegation in the information, he had thereafter assaulted with a deadly weapon; and it is appellant's contention that, had the jury believed the testimony given in behalf of defendant, a verdict might have been rendered by which defendant would have been acquitted of the crime of assault with a deadly weapon, although at the same time he might have been convicted of the offense of simple assault.

Referring to the information herein, it is noticed that defendant was charged with the commission of assault with a deadly weapon, " * * * by shooting with a loaded firearm, willfully, unlawfully, and feloniously, in and upon the person of another, to wit, Sam McGee, * * * which said assault was likely to and did produce great bodily injury to and upon the person of said Sam McGee." It is apparent that the gist of the accusation was that defendant unlawfully shot Sam McGee. If the charge of the unlawful commission by defendant of the acts constituting the crime were substantiated, he was guilty of the offense charged, and no other. Consequently a verdict of guilt as to the lesser included offense would have been wholly inimical to the facts and the law with reference thereto. There could be no room for a compromise verdict. In the case of *People v. Albori* (Cal. App.) 275 P. 1017, a question identical with that here under consideration was involved. After a careful consideration of the authorities of this state bearing upon similar situations as to the facts, the court reached the conclusion that no error was committed by the trial court in refusing to give the requested instruction to the jury. Included within the language of the opinion may be found the following:

" * * * There are numerous authorities to the effect that where the evidence is such as to make it clear that if the defendant is guilty at all, he is guilty of the offense charged, and not of any included offense, that it is proper to refuse to instruct the jury that

they may convict of an included crime. [Citing authorities.] * * * Had it been established beyond any doubt that the appellant had fired the pistol which injured Contorno and Judson, a refusal to instruct on simple assault would have been proper under the authorities cited. * * * The indictments charged the appellant with having fired the shots, and with nothing else; the people were limited by their choice of words to proof of an offense not less than 'assault with a deadly weapon.'"

On trial of the instant case, defendant admitted that he fired the shot that struck McGee. Since he was on trial for that act alone, it necessarily follows that he was either guilty of the crime of which he was charged, or in that connection that he was guilty of the commission of no criminal offense whatsoever. The conclusion results that no error was committed by the trial court in refusing to give to the jury the instruction to which reference has been had.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOLLZER, Justice pro tem.

100 Cal. App. 243

GULLICK v. INTERSTATE DRILLING CO.
et al. (Civ. 6446.)★

District Court of Appeal, Second District, Division 2, California. Aug. 2, 1929.

Rehearing Denied Aug. 31, 1929. Hearing Denied by Supreme Court Sept. 30, 1929.

Appeal and error §934(1)—Appellate court presumes trial judge intended judgment he signed to be judgment in case, and appeal not dismissed.

Where at close of plaintiff's case defendant moved for nonsuit, which court granted, and subsequently court signed judgment, which, after reciting proceedings and that court had, after due consideration, granted motion for nonsuit, awarded to defendants their costs, and judgment described in notice of appeal was only judgment appearing in judgment roll, appellate court presumed trial judge intended judgment he signed to be judgment in case, and appeal was not dismissed, on ground that judgment subsequently signed was of no force and effect.

Appeal from Superior Court, Los Angeles County; Charles D. Wallace, Judge.

Action by T. M. Gullick against the Interstate Drilling Company and others. Judgment for defendants and plaintiffs appeal. On motion to dismiss appeal. Motion denied.

Henry M. Lee, of Los Angeles, for appellant.

Isaac Pacht, of Los Angeles, for respondents Interstate Drilling Co. and H. Director.

Perry F. Backus, of Los Angeles, for respondent Zimmerman.

IRA F. THOMPSON, J. The respondents have made a motion to dismiss the appeal herein on the ground that the judgment appealed from is a nullity, and on the further ground that a reversal of the judgment would be an idle act, and not affect the force or finality of a judgment of nonsuit. The pertinent facts are as follows:

At the close of plaintiff's case, and on October 15, 1928, the defendants and respondents made a motion for a nonsuit, which the court granted. On October 19 the court signed a judgment, which, after reciting the proceedings and that the court had, after due consideration, granted a motion for a nonsuit, awarded to the defendants their costs. On the authority of *Burks v. Bronson*, 58 Cal. App. 143, 207 P. 1018, it is said by respondents that the order granting the motion is final, and that the judgment subsequently signed is of no force or effect. It is to be observed that the notice of appeal refers only to the judgment signed October 19, 1928, and entered and docketed on October 22, 1928. One further condition of the record must be set down. The judgment described in the notice of appeal is the only order or judgment appearing in the judgment roll contained in the clerk's transcript. The transcript also contains the clerk's certificate that "the foregoing attached papers constitute the judgment roll in this action."

In this condition of the record we must presume that the trial judge intended that the judgment which he signed should be the judgment in the case. In the case relied upon by respondents the "order was entered on the minutes and noted in the register of actions by the clerk." Under the situation there recited, and by virtue of subdivision 5 of section 581 of the Code of Civil Procedure, it became "effective for all purposes when so entered." But we are faced with a problem somewhat akin to that in *Gordon v. Donahue*, 79 Cal. 501, 21 P. 970, where we find the following language:

"Measured by the foregoing rule, the judgment should be affirmed, because, if the paper referred to as the findings was not filed until after the entry of the judgment, then it must be presumed, in the absence of a showing to the contrary, that as the clerk of the trial court was required by section 670 of the Code of Civil Procedure, immediately after entering the judgment, to make up the judgment roll, he regularly performed his official duty (Code Civ. Proc. § 1963, subd. 15), and made it up within the proper time, including therein all papers then on file which should have gone into it, and the paper referred to as the findings showing merely, under the signature of the judge thereto, a date subsequent to the time when the judgment roll is presumed to have been completed, need not be regarded as a portion thereof. It

then follows that, as no findings appear in the judgment roll, we must presume that they were waived."

Or, in the absence of a showing of a minute order, at least we must assume, in the words of the court in *Skaggs v. Taylor*, 77 Cal. App. 519, 247 P. 218, that the order was "superseded by the judgment from which an appeal has been taken."

Motion denied.

We concur: WORKS, P. J.; CRAIG, J.

100 Cal. App. 12

ABNEY et al. v. BELMONT COUNTRY CLUB PROPERTIES, Inc. (Civ. 6409.)★

District Court of Appeal, First District, Division 1, California. July 15, 1929.

Rehearing Denied Aug. 14, 1929. Hearing Denied by Supreme Court Sept. 12, 1929.

1. Vendor and purchaser ⇨341(3)—Evidence of vendor's waiver of payments and right to cancel for delinquency held admissible in action for amount paid.

In action to recover amount paid on purchase price of real property for failure to resell, evidence of waiver by vendor of performance in making payments of principal or interest and of vendor's right to cancel for delinquency held admissible.

2. Corporations ⇨432(12)—Inference from evidence not rebutted that vendor corporation, in whose name contract provisions were waived, was owned by agent selling land, supported implied conclusion that vendor was but instrumentality of selling agent.

In action to recover amount paid on purchase price of real property, inference from evidence by plaintiffs that vendor corporation, in whose name selling agent's representative waived certain provisions of contract, was owned by agent, together with vendor corporation's failure to rebut, supported implied conclusion that vendor was but instrumentality of selling agent.

3. Corporations ⇨378—Where two corporations appear same, law and equity to protect third persons' rights treat them as identical.

Where it appears that two business enterprises are owned, conducted, and controlled by same parties, both law and equity will, when necessary to protect rights of third persons, disregard legal fiction that two corporations are distinct entities, and treat them as identical.

4. Corporations ⇨410—Waiver indorsed on contract selling land by one stating selling agent corporation he represented owned vendor corporation bound vendor.

Waiver indorsed on contract for sale of land by one who stated that selling agent corporation owned and controlled defendant vendor corporation sued by purchasers to recover purchase

price paid for failure to re-sell as agreed held binding upon vendor.

5. Corporations ⇨410—Purchasers could treat contract selling land as abandoned and sue for amount paid, where vendor corporation of different name giving notice of cancellation, owned selling agent corporation.

Where vendor corporation of different name than one which executed contract to sell land notified purchasers of its determination to cancel contract and retain amount paid thereon, purchasers were justified in treating contract as abandoned and suing to recover amount they had paid, where evidence showed selling agent corporation owned vendor corporation giving purchasers notice.

6. Vendor and purchaser ⇨339—Formal rescission or notice of purchasers' election was not prerequisite to recover amount paid on land, where they received no value and vendor notified of cancellation.

Formal rescission or notice of purchasers' election to rescind contract for sale of land held not prerequisite to action to recover amount paid after vendor corporation owned by selling agent notified them of determination to cancel contract, where purchasers had received nothing of value and as to them there was an entire failure of consideration.

7. Vendor and purchaser ⇨341(2)—Purchasers suing for amount paid on land need not allege and prove they were ready, able, and willing to perform contract, where vendor notified of cancellation.

It was not essential that purchasers suing to recover amount paid on purchase price of land under contract allege and prove that they were ready, able, and willing to carry out contract, where vendor corporation owned by selling agent notified them of determination to cancel contract, and purchasers had not received anything of value.

8. Appeal and error ⇨1050(1)—Parol evidence of selling agent's promise to resell land, if inadmissible, held not prejudicial, where it could not change result.

In action to recover amount paid on purchase price of certain real property for failure to resell it as agreed, admission of parol evidence of promises by selling agent that resale would be made within 30 days, if erroneous, held not prejudicial, where it could not have changed result of trial and explained reason for waiver by vendor corporation owned by selling agent of its right to cancel for failure to make payments.

9. Costs ⇨203—Judgment ⇨314—Judgment filed held erroneous as to costs awarded requiring modification, where cost bill was prematurely filed four days before.

Where decision and judgment were filed on November 22, 1927, awarding plaintiffs \$15 as costs, and record showed that their cost bill was filed November 18, 1927, bill was premature and judgment to extent of costs awarded was erroneous on its face requiring modification.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

★Rehearing denied. Hearing denied by Supreme Court.

Action by John N. Abney and another against the Belmont County Club Properties, Inc. Judgment for plaintiffs, and defendant appeals. Modified, and, as modified, affirmed.

Hankins & Hankins, of San Francisco, for appellant.

J. E. McCurdy, of San Mateo, and Julian H. Biddle, of San Francisco, for respondents.

PER CURIAM. This action was brought to recover the amount paid on the purchase price of certain real property which plaintiffs agreed to buy from defendant corporation. The agreement was in writing and was dated June 22, 1926. The purchase price was \$2,875, of which \$720 was paid, the balance being payable in installments of \$50 each month with interest. Title to the property was retained by defendant, whose selling agent in the transaction was Monroe, Lyon & Miller, Inc., also a corporation. The plaintiffs alleged that the execution of the contract and the payment made as above were induced by defendant's promise to resell the property within 30 days at a price fixed by the parties in excess of the purchase price, and the representation that the defendant would require no further payments from plaintiffs; that on August 20, 1926, defendant waived in writing all further payments under the contract and the right therein provided to cancel the same for any delinquency in that regard; that contrary to this agreement defendant failed to resell the property, made demands for further installment payments thereon, and on February 28, 1927, notified the plaintiffs that it elected to cancel the contract and declare forfeited the amount paid by them. These allegations were denied. The trial court found for the plaintiffs and entered judgment for the recovery of the amount paid with interest thereon and costs of suit.

Defendant contends that the findings are unsupported and that these in turn do not support the judgment; that the decision is against law; that the court erred in admitting certain evidence over objection; and that the judgment for costs was improper.

In response to complaints by plaintiffs, one R. K. Reidford conferred with their representative, and on August 20, 1926, indorsed upon the contract of purchase held by them the following: "Further payments a/c of principal or interest in the above are hereby waived.—M. L. & M. by R. K. Reidford." "We waive right to cancel for delinquency.—R. K. Reidford."

[1] Evidence of a waiver by the vendor of performance of such provisions of the contract was admissible (*Seals v. Davis*, 25 Cal. App. 68, 142 P. 905); and while it is not contended that Reidford was without authority to act for Monroe, Lyon & Miller, Inc., it is

claimed that the indorsements were not binding upon the defendant.

The evidence shows that L. G. Monroe, by whom the sales contract was signed, as president of defendant corporation, also represented officially its corporate agent. Moreover, it appears that the offices of the two corporations were at the same address, and that the demands for payment addressed to plaintiffs bearing date August 25, September 21, and November 7, 1926, respectively, none of which were signed, were headed as follows:

"Belmont Country Club Properties, Inc.

"Monroe, Lyon & Miller, Inc.

"65 Sutter street."

[2-7] According to the plaintiffs, Reidford, at the time the indorsements were made upon the contract, and in response to their inquiry as to why the name of the defendant, rather than the agent corporation, was indorsed thereon, declared that the defendant corporation was owned by Monroe, Lyon & Miller, Inc., and on December 31, 1926, the plaintiffs, in a letter directed to defendant after their receipt of the demand last mentioned, stated that Reidford, on its behalf, had waived further payments, together with the right to cancel the contract. The asserted authority of Reidford was not denied by defendant then or in its subsequent letters to the plaintiffs; and, notwithstanding that the relationship between the corporations themselves and with those purporting to represent them was a matter peculiarly within the knowledge of the defendant, it failed to produce any evidence on this or any other issue at the trial. The inference from the evidence adduced by the plaintiffs, together with defendant's failure to rebut the same—which presumably it would have done had the facts been favorable—support the implied conclusion of the trial court that the defendant was but the instrumentality of Monroe, Lyon & Miller, Inc., and that the acts of the latter through its agent were those of the defendant. Where such facts appear, both law and equity will, when necessary to protect the rights of third persons, disregard the legal fiction that the two corporations are distinct entities, and treat them as identical. *Wenban Est., Inc., v. Hewlett*, 193 Cal. 675, 227 P. 723; *McCormick Saeltzer Co. v. Grizzly, etc., Co.*, 74 Cal. App. 278, 240 P. 32. We conclude, therefore, that the waiver indorsed upon the contract by Reidford was binding upon the defendant; and that the latter having in violation thereof notified the plaintiffs of its determination to cancel the contract and retain the amount paid thereon, the plaintiffs were justified in treating it as abandoned by defendant and suing to recover the amount they had paid. *Smith v. Jaccard*, 20 Cal. App. 280, 128 P. 1023, 1026; *McNeil v. Kredon*, 31 Cal. App. 76, 159 P. 818; *Seals v. Davis*, supra; *Pelorian v. Waldman*, 54 Cal. App. 116, 201 P. 344. Nor was a formal rescission or a notice of

their election to rescind a prerequisite. They had received nothing of value, and as to them there was an entire failure of consideration. Under such circumstances no notice of rescission or offer to restore was necessary before bringing suit. *Orton v. Privett*, 202 Cal. 754, 262 P. 713; *Mahony v. Standard Gas, etc., Co.*, 187 Cal. 399, 202 P. 146; *Richter v. Union Land Co.*, 129 Cal. 367, 62 P. 39; *Larkin v. Mullen*, 128 Cal. 449, 60 P. 1091; *Kelley v. Owens*, 120 Cal. 502, 47 P. 369, 52 P. 797; *De Bakcsy v. Strain*, 61 Cal. App. 518, 215 P. 105; *Shull v. Crawford*, 33 Cal. App. 36, 164 P. 330; *Carter v. Fox*, 11 Cal. App. 67, 103 P. 910. Neither was it essential that they allege and prove that they were ready, able, and willing to carry out the contract. *Merrill v. Merrill*, 102 Cal. 317, 36 P. 675.

We agree with appellant that the evidence was insufficient to support a finding of fraud in connection with the sale of the property to plaintiffs; nor does it appear that the promise to resell was made without the intention to perform. Nevertheless, defendant recognized its obligation in the latter respect and that the plaintiffs had ground for complaint. The waiver mentioned was shown to have been made for that reason, and the attempt by defendant to terminate the rights of plaintiffs notwithstanding the waiver furnished sufficient ground for rescission by the latter.

[8] The contract signed by plaintiffs with the defendant made no provision for the resale of the property by the latter; and it was provided therein that "to avoid misunderstandings it is understood by both buyer and seller that this signed agreement contains all the agreements, expressed or implied, between the parties. * * *" On the same date, however, plaintiffs authorized *Monroe, Lyon & Miller, Inc.*, to make such sale, no time therefor being specified except that the authorization should remain in force 60 days from date and thereafter until revoked in writing. Defendant contends that, in view of the above, the trial court erred in admitting parol evidence of promises by the selling agent that a resale would be made within 30 days. The admission of this testimony, if erroneous, was not prejudicial, as it could not have changed the result of the trial. Furthermore, it explained the reason for the waiver by defendant of its right to cancel for failure to make the payments, the violation of which waiver, as stated, gave the plaintiffs the right to maintain their action.

[9] The decision and judgment in the action, which were filed on November 22, 1927, awarded the plaintiffs the sum of \$15 as costs. The record shows that their cost bill was filed on November 18, 1927. This was premature (*Sellick v. De Carlow*, 95 Cal. 644, 30 P. 795; *Gale v. Dixon* [Cal. App.] 267 P. 342); and while no motion to strike the memorandum from the files was made, the judg-

ment to the extent of the costs awarded therein was erroneous on its face and should be modified (*Quitow v. Perrin*, 120 Cal. 255, 52 P. 632; *White v. Gaffney*, 1 Cal. App. 715, 82 P. 1088). With the above exception we find no merit in the appeal.

It is therefore ordered that the judgment be modified by deducting therefrom the sum of \$15, and, as so modified, it is affirmed. It is further ordered that respondents recover their costs on appeal.

100 Cal. App. 66
ALFORD et al. v. HESSE. (Civ. 6718.)

District Court of Appeal, First District, Division 1, California. July 19, 1929.

1. **United States** ☞40—Regulations prescribed by Secretary of the Interior for prospecting for oil and gas on government lands are to be given effect of statutes (Act Cong. Feb. 25, 1920 [41 Stat. 437]).

Rules and regulations prescribed by Secretary of the Interior, pursuant to power given by Act Cong. Feb. 25, 1920 (41 Stat. 437), authorizing Secretary of the Interior, under proper rules and regulations, to grant permits giving exclusive right for period not exceeding two years to prospect for oil and gas on lands within public domain and not within any known geographical structure of a producing oil and gas field, are, when not in conflict with the statute itself, to be given effect of statutes.

2. **Evidence** ☞47—Courts judicially notice rules and regulations prescribed by Secretary of the Interior under statutory authority (Act Cong. Feb. 25, 1920 [41 Stat. 437]).

Rules and regulations prescribed by Secretary of the Interior, pursuant to power given by Act Cong. Feb. 25, 1920 (41 Stat. 437), will be judicially noticed by the courts.

3. **Mines and minerals** ☞6—Assignments of right to oil under lands in public domain, made previous to award of permit from Secretary of the Interior giving right to prospect, were invalid (Act Cong. Feb. 25, 1920 [41 Stat. 437]).

Under Act Cong. Feb. 25, 1920 (41 Stat. 437), and regulation of Secretary of the Interior promulgated thereunder, providing that permits to prospect for oil and gas on public domain, not within any known geographical structure of known producing oil and gas field, may be assigned on consent of Secretary of the Interior, but that mere rights to receive permits are not assignable, assignments of interest in oil in such land before award to defendant of required permit by Secretary of the Interior were invalid.

4. **Mines and minerals** ☞6—Complaint allegations that assignees of mineral rights in government lands "were and now are" owners of interest therein referred to invalid assignments as sources of title (Act Cong. Feb. 25, 1920 [41 Stat. 437]).

In action to cancel notes executed by plaintiff in consideration of defendant's execution of

agreement granting plaintiff exclusive right to go into possession of oil and gas lands belonging to United States, and to develop said lands for oil and gas under a permit given by Secretary of the Interior, on ground that defendant's representation that he was only person interested in lands as respects such right was untrue, in that defendant had previously assigned his interest to others at a time when permit had not yet been issued to him, *held*, that further allegations of complaint that assignees, since date of assignment "were and now are" owners of an interest in the realty, referred to invalid assignments as sources of alleged interest, and were not allegations that any interests were acquired by conveyances from defendant subsequent to award of permit, under Act Cong. Feb. 25, 1920 (41 Stat. 437).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by J. W. Alford and others against Edward W. Hesse, in which defendant filed cross-complaint. From an adverse judgment, plaintiff named appeals. Affirmed.

Stuart D. Anderson and Martin Forrest, both of Los Angeles, for appellant.

Derthick & Hull and W. J. Cusack, all of Los Angeles, for respondent.

PER CURIAM. An appeal by one of the plaintiffs in the above action from the judgment on the pleadings in favor of the defendant.

The action was one for the cancellation of two promissory notes executed by the plaintiffs to the defendant on October 8, 1926, and the latter by his cross-complaint sought to recover on the notes. The amended complaint alleged that the defendant was the owner of a permit to prospect for oil and gas upon certain lands owned by the United States, which permit was issued to him by the Secretary of the Interior; that the consideration for the notes was the execution on the above date by the defendant to the plaintiffs of an agreement granting the latter the sole right and permission to go into possession of these lands, to drill and develop the same for oil, gas and other hydrocarbon substances, to extract such substances therefrom under the permit and under a lease, or any extension or renewal thereof that might be granted by virtue of the permit, and to enjoy all the privileges of the permittee or lessee thereunder. It was further alleged that to procure the execution of the notes the defendant represented that he was the only person interested in the lands so far as such interest related to the right to prospect for or develop oil thereon, that there were no liens or incumbrances thereon which would in any way affect the rights granted by the agreement, and that he was entitled to the possession thereof; that plaintiffs believed the above representations to be true, and relying thereon, executed the notes, which they would not otherwise have done; that the representations

were untrue; that the defendant had in fact, on or about August 24, 1923, assigned an interest in the above land and in the oil therein to Jacob F. Karr, who ever since that date had been the owner and holder of an interest therein; and that defendant, on or about April 17, 1924, also assigned a similar interest therein to Julius Segall and Sam Marshall, who have since been the owners and holders of such interest.

An answer to the cross-complaint was filed by the plaintiffs, alleging that the only consideration for the notes was cross-complainant's assumption of the promises and obligations set forth in the agreement mentioned, and that the notes were executed and delivered without consideration. Upon motion by the defendant and cross-complainant, based upon the pleadings, it was adjudged that plaintiffs take nothing by their complaint, and judgment was entered upon the cross-complaint for the principal sum of the notes, with interest, attorney's fees, and costs.

[1, 2] The permit was issued on July 19, 1924, pursuant to an act of Congress entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain," approved February 25, 1920 (Fed. Stats. Ann. Supp. 1920, p. 187 [41 Stat. 437]), and was thereafter extended to December 31, 1926. The act authorizes the Secretary of the Interior, under such necessary and proper rules and regulations as he may prescribe, to grant permits, which shall give the exclusive right for a period not exceeding two years to prospect for oil and gas upon land wherein such deposits belong to the United States, and are not within any known geological structure of a producing oil or gas field. The rules and regulations prescribed by the Secretary of the Interior pursuant to the power given by the act are, when the same are not in conflict with the act itself, to be given the effect of statutes. *U. S. v. Morehead*, 243 U. S. 607, 37 S. Ct. 458, 61 L. Ed. 926; *Leonard v. Lennox* (C. C. A.) 181 F. 760; *Hodgson v. Midwest Oil Co.* (D. C.) 297 F. 273; *Id.* (C. C. A.) 17 F.(2d) 71. Such rules and regulations the courts will judicially notice. *Lawrenceburg R. M. Co. v. Jones & Co.*, 204 Ala. 59, 85 So. 719; *Webb v. White Engin. Corp.*, 204 Ala. 429, 85 So. 729; *Carr v. First National Bank*, 35 Ind. App. 216, 73 N. E. 947, 111 Am. St. Rep. 159; *Hettleman v. Frank*, 136 Md. 351, 110 A. 715; *Larson v. First National Bank*, 66 Neb. 595, 92 N. W. 729; *State v. Southern Ry. Co.*, 141 N. C. 846, 54 S. E. 294; *Whitney v. Spratt*, 25 Wash. 62, 64 P. 919, 87 Am. St. Rep. 733. And here it appears without dispute that section 12½ of the oil and gas regulations of the General Land Office of the Department of the Interior, promulgated on March 11, 1920, under the authority of the above act, provides as follows: "Permits after being awarded may be assigned to qualified persons and corporations upon first obtaining the consent of the Secre-

tary of the Interior. Mere rights to receive a permit are not assignable."

[3, 4] It is not contended that the defendant had at any time an interest in or right to the possession of the above land other than that given him by the permit, and it is clear that the assignments alleged to have been made by him previous to the award of the permit here involved were under the above regulations of no validity. Appellant claims, however, that the averment "that Jacob F. Karr since said date was and now is the owner and holder of said interest in and to said real property," and a similar allegation with respect to Segall and Marshall should be construed to mean merely that these parties had acquired from the defendant and owned present interests in the property.

This contention cannot be sustained, as these averments refer to the assignments as the sources of the alleged interests, and are not allegations that any interests were acquired by conveyances from the defendant subsequent to the award of the permit. It is our conclusion that the pleadings relied upon by the plaintiff were insufficient to state a cause of action against the defendant, or a defense to his cross-complaint, and that the motion for judgment on the pleadings was properly granted.

The judgment is affirmed.

100 Cal. App. 125

WILSON v. POLICE COURT OF CITY OF MODESTO et al. (Civ. 3868.)

District Court of Appeal, Third District, California. July 25, 1929.

Courts §209(2)—Application for writ of prohibition was denied, as petitioner had not applied to superior court for such writ.

Application for writ of prohibition, to be directed to the superior court of Stanislaus county, to restrain further action under ordinance complained of, on ground that section 1 of said ordinance was not an emergency measure, was denied without prejudice, as petitioner had not applied to superior court for such writ.

Application by Fred Wilson for writ of prohibition against the Police Court of the City of Modesto and another. Writ denied.

PER CURIAM. Denied without prejudice, on the ground that it does not appear that the petitioner has applied to the superior court of Stanislaus county for a writ of prohibition to restrain further action under the ordinance complained of, on the ground that section 1 of said ordinance is not an emergency measure.

PEOPLE v. KEYES. (Cr. 1806.) ★

District Court of Appeal, Second District, Division 2, California. Aug. 14, 1929.

Rehearing Denied Aug. 17, 1929.

Criminal law §49—Doctors' affidavits held not to warrant admission to bail pending appeal on ground of threatened danger to health.

Motion for admission to bail pending appeal from conviction, urged on ground of threatened danger to defendant's health by reason of his incarceration, held denied, since affidavits of physicians and dentist did not show such imminence of dangerous results to life or health of defendant as to obviously require his removal from jail.

Appeal from Superior Court, Los Angeles County; Edward I. Butler, Judge.

Asa Keyes was convicted of a criminal charge, and appealed. On motion that he be admitted to bail pending the determination of such appeal. Motion denied.

Milton Cohen and Paul W. Schenck, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WORKS, P. J. The defendant was convicted of a criminal charge, and has appealed to this court from the judgment rendered against him. Meanwhile he is confined in the county jail, and he now moves that he be admitted to bail pending the determination of his appeal, because of threatened danger to his health by reason of his incarceration.

Respondent contends that we are without jurisdiction to grant the motion, for the reason that section 1291 of the Penal Code provides that a "defendant may be admitted to bail upon an appeal" by an order "made by any magistrate having the power to issue a writ of habeas corpus, or by the magistrate before whom the trial was had," while section 808 of the same Code, providing what persons are magistrates, does not set down justices of the District Court of Appeal in the list of justices and judges contained in it. We find it unnecessary to decide this question.

Granting for the sake of argument that we possess the power here invoked by appellant, it can be exercised only where "there is such imminence of dangerous results to the life or health of the defendant as to obviously require his removal from the county jail" at the time his application for admission to bail is made. Ex parte Turner, 112 Cal. 627, 45 P. 571. See, also, People v. Cornell, 28 Cal. App. 654, 153 P. 720; People v. Eiseman, 69 Cal. App. 143, 230 P. 669. The motion now before us is based upon the affidavits of five physicians and a dentist. After referring to minutely conducted physical examinations of appellant and to the results obtained therefrom, the physicians summarize

their views as to the probable effect of his present confinement upon appellant. The first of them says that appellant's "condition is such that unless he is permitted to have medical and surgical attention urgently required and unavailable under jail facilities his condition will steadily deteriorate and will result in great permanent and irreparable injury to his health." There is no showing here of an immediately imminent danger to appellant's material well being. It is said, it is true, that certain medical and surgical attention is "urgently required" by him, but the only effect of his failure to obtain it will be that "his condition will steadily deteriorate and will result" in permanent and irreparable injury to his health. It is plain from this that no permanent injury has yet supervened. Moreover, how long will it be that appellant's condition "will steadily deteriorate" before a permanent injury to his health "will result"? Is it to be ten days, or six months, or a year? We are not informed. This showing is plainly insufficient. Two of the other physicians state their conclusions in language identical with that above quoted from the first of the five, except that one of them omits the words "permanent and." The remaining two physicians offer their opinions in language which is practically the same in effect. The dentist says that the condition of appellant's teeth is such that it will "cause a progressive deterioration of Mr. Keyes' health and is likely to result in permanent and irreparable injury to his health unless said condition be remedied."

Motion for admission to bail denied.

I concur: CRAIG, J.

THOMPSON, J., being absent, does not participate in the foregoing opinion.

100 Cal. App. 102

WRIGHT v. ALLDREDGE et al. (Civ. 6746.)

District Court of Appeal, Second District,
Division 2, California. July 23, 1929.

Appeal and error ⇨787—Appellants having merely filed formal notice of appeal, and neither taken further steps toward perfecting appeal nor showing excuse, appeal was dismissed.

Where appellants appealed by merely filing formal notice of appeal, without filing transcript, and county clerk certified that no transcript had been ordered prepared, or any further steps taken toward perfecting appeal, time for filing transcript having expired, and respondent having moved for dismissal of appeal, and appellants having made no effort to show that they were within any exception, appeal was dismissed.

Action by Flora B. Wright against W. W. Alldredge and others. Judgment for plain-

tiff, and certain defendants appeal. On motion by defendants other than the Magnetic Springs Company to dismiss appeal. Appeal dismissed.

George H. Moore, of Los Angeles, for appellants.

Samuel J. Crawford, of Ocean Park, for respondent.

CRAIG, J. The defendants Alldredge appealed on April 25, 1929, from a judgment entered against them and in favor of the plaintiff in the county of Los Angeles on April 15, 1929, by filing merely a formal notice of appeal. No transcript has been filed, and the county clerk certifies that none has been ordered prepared, or any further steps taken toward perfecting said appeal. The time for filing the transcript having expired, the respondent on July 8, 1929, moved for dismissal of the proceedings in this court. Since the appellants have made no effort to show that they were within any exception, the motion must be granted. *White v. White*, 112 Cal. 577, 44 P. 1026.

The appeal is dismissed.

I concur: IRA F. THOMPSON, J.

Due to the absence of Presiding Justice WORKS, he does not participate in this opinion.

100 Cal. App. 284

Ex parte MARSHALL. (Cr. 1545.)

District Court of Appeal, First District, Division 1, California. Aug. 7, 1929.

1. Judgment ⇨822(3)—Decree of foreign court disposing of custody of minor was res judicata and binding on local court, in absence of change of circumstance.

In proceedings to determine right to custody of minor, where no change was shown to have taken place in petitioner's condition or moral fitness since date of order and judgment of foreign court disposing of same question, former adjudication of right to custody of minor was res judicata, and doctrine of comity between states required that the decree of foreign court be recognized.

2. Judgment ⇨822(3)—Foreign court having considered facts which were grounds on which right to custody of minor was based, its order was conclusive.

Where, in proceedings to determine right to custody of minor on ground that party having custody failed to educate or take proper care of minor, facts alleged occurred before entry of order of foreign court and was considered by that court, its order was conclusive.

Petition by Frank Marshall for a writ of habeas corpus against Aileen H. Haremza and husband. Petition granted.

L. C. Pistolesi, of San Francisco, for petitioner.

Robert E. Fitzgerald, of San Francisco, for respondents.

PER CURIAM. This matter is before the court on petition for a writ of habeas corpus to determine as between petitioner, Frank Marshall, and respondents, Aileen H. Haremza and Donald Haremza, the right to the custody of Betty Nadine Anderson, a minor child, not related by blood to either petitioner or respondents.

The history of the case, as disclosed by the record, is as follows: On October 10, 1923, the minor, who lived with petitioner and respondent Aileen H. Haremza, was, by proceedings had in the probate court of the county of Wyandotte, state of Kansas, duly adopted by respondent Aileen H. Haremza, formerly married to petitioner, Frank Marshall, but now the wife of Donald Haremza. On September 21, 1927, while divorce proceedings were pending between petitioner, Frank Marshall, and respondent Aileen H. Haremza, formerly Aileen H. Marshall, and which terminated in a decree of divorce being entered, petitioner, Frank Marshall, and respondent Aileen H. Haremza, then his wife, entered into a written agreement concerning the custody of the minor, by which agreement Aileen H. Haremza transferred the custody and care of the minor to petitioner. Petitioner moved from California, taking the child with him, to Casa Grande, in the state of Arizona. On November 16, 1928, Aileen H. Haremza filed in the superior court of the state of Arizona, in and for the county of Pinal, petition for a writ of habeas corpus, praying that the writ be granted, directing that Frank Marshall have the person of the minor, Betty Nadine Anderson, before the court, together with the cause of her detention, confinement, and restraint, and that the court make an order awarding Aileen H. Haremza the custody of such minor. The writ issued, and on November 21, 1928, the petition and return came on for hearing, and the court made and entered its order "that the application of petitioner be denied and that said minor child, Betty Nadine Anderson, remain in the care and custody of Frank Marshall, in the town of Casa Grande, county of Pinal, state of Arizona." On December 12, 1928, respondent Aileen H. Haremza abducted the minor, and brought her to the state of California. On May 1, 1929, petition for a writ of habeas corpus was filed in the superior court of the state of California, in and for the county of San Mateo, by petitioner, which writ was issued as prayed, and ordered Aileen H. Haremza and Donald Haremza, her husband, to have the minor before the court, and upon the hearing, on May 4, 1929, the court made its order "that the application of the petitioner, Frank Marshall, be and it is de-

nied, and that said minor child, Betty Nadine Anderson, be and remain in the care, custody and control of Aileen H. Haremza." Subsequently petitioner, Frank Marshall, instituted this proceeding, in which he petitions the court to make its order awarding to him the custody of the minor child.

[1] The question presented is whether the order and judgment of the Arizona court awarding the custody of the minor to petitioner herein is binding upon the courts of this state in a proceeding of this nature. There is nothing in the record here, nor in the record of the superior court of San Mateo county, presented at this hearing, to show that the conduct of petitioner, Frank Marshall, since the order was entered by the Arizona court, had been such as to render him unfit to have the custody of the minor, nor is it contended that his condition or moral fitness had undergone any change whatever since the matter was adjudicated in the Arizona court. This question has been directly passed upon in *In re Wenman*, 33 Cal. App. 592, 165 P. 1024, which was a proceeding in habeas corpus brought to recover the custody of a minor child, abducted and brought from New York into this state by the mother, in violation of a divorce decree entered in the state of Connecticut awarding the custody of the child to the father. There the court says: "The doctrine of comity between the states of the Union requires that a judgment granting a divorce and awarding the custody of a minor child rendered by a court of one state shall be conclusive in the jurisdiction of the other states, in the absence of a showing of changed conditions affecting the welfare of the child. *State ex rel. Nipp v. Dist. Court*, etc., 46 Mont. 425, 128 P. 590, Ann. Cas. 1916B, 256. * * * It is shown by the record before us that the minor was brought to this state by the respondent in direct violation of a decree of a court of competent jurisdiction of a sister state awarding its custody to the petitioner. The child's presence here is founded on a tort or offense against the law, and it is not made to appear that since the entry of the decree under which the petitioner is now claiming he has become an unfit or unsafe person to have the care and control of his minor child; * * * a due respect for the orderly administration of the law and according to the doctrine of comity among sister states requires this court to recognize the right of the petitioner under the decree of the court of the state of Connecticut hereinbefore referred to."

As there is nothing in the record here, nor in the record of the proceeding before the superior court of San Mateo county presented to this court, showing any change in the moral fitness or condition of petitioner Frank Marshall since the order was made by the Arizona court, nor any charge made that since the entry of such order he has become

an unfit or unsafe person to have the care of the minor, the case cited disposes of the question presented.

[2] Respondents in their return allege that the child up to November 2, 1928, when she was taken by petitioner from California to Arizona, was not supported nor educated by petitioner; that in September, 1927, petitioner placed the child in the custody of Mr. and Mrs. George Bailey at Pittsburg; that in the month of October, 1927, the Baileys moved to Stockton; that in February, 1928, they moved to Crescent City; that in June, 1928, they moved to San Francisco, and during all such time had the child with them in their care and custody; and that petitioner failed to compensate the Baileys for caring for the child. All of this, however, is alleged to have occurred prior to the entry of the order by the Arizona court, and, having been considered by that court, its order is conclusive here. As was said in *In re Wenman*, supra: "Some of the more important matters with which the respondent charges the petitioner in her return are alleged to have existed prior to and at the time of the entry of the decree of divorce. As to them, we think it evident that the decree is conclusive, and that this court cannot now reexamine them for the purpose of depriving the petitioner of a custody therein awarded to him."

Respondents urge that the decision of Hon. George H. Buck in the superior court of San Mateo county, upon petitioner's application therein, is, in the absence of any statement in the present application showing change of fact or circumstance since that date, *res judicata*, and binding upon this tribunal and a bar to this proceeding, citing in support of such contention, *In re Holt*, 34 Cal. App. 290, 167 P. 184; *In re Viola Frazier*, 50 Cal. App. 45, 194 P. 510; and *In re Gille*, 65 Cal. App. 617, 224 P. 784. These cases hold that a final adjudication on a writ of habeas corpus brought to determine the right of a parent or guardian to the care and custody of a minor child determines all questions necessarily involved between the same parties upon the same facts; that in all such proceedings the welfare of the child is the cardinal consideration; that the conditions which determine the welfare of the child are not permanent and often change, and for this reason a judgment or decree awarding such custody is in its nature temporary, and applies only to existing facts and conditions; that proceedings on habeas corpus to determine the right to the custody of a minor is really one of private parties contesting private rights, and in such cases both principle and considerations of public policy require the application of the doctrine of estoppel to judicial proceedings, and therefore a former adjudication on the question of the right to the custody of a minor child, brought upon habeas corpus, may

be pleaded as *res judicata* as to all facts existing at the time of the adjudication.

We do not question the rule announced in these cases, and agree with respondents that a former adjudication of the right to the custody of a child upon habeas corpus is *res judicata* as to all facts and conditions as they existed at the date of the adjudication. However, as no change is shown to have taken place in petitioner's condition or moral fitness since the date of the order and judgment of the Arizona court, and no change in petitioner's condition or moral fitness since such date was shown at the hearing in the superior court of San Mateo county, nor passed upon by that court, the decision of the Arizona court is *res judicata*, and is controlling until such change in appellant's condition is shown.

It is therefore ordered that respondents Aileen H. Haremza and Donald Haremza forthwith deliver to petitioner, Frank Marshall, the minor child, Betty Nadine Anderson.

100 Cal. App. 300

" **PEOPLE v. PLUMMER.** (Cr. 1034.) "

District Court of Appeal, Third District, California. August 7, 1929.

Burglary $\S$ 42(3)—Evidence showing possession of property recently stolen, together with guilty conduct, held sufficient to sustain conviction of burglary.

In prosecution for burglary, evidence showing possession of property recently stolen, together with guilty conduct in relation thereto, held sufficient to sustain conviction.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Reuben Plummer was convicted of burglary in the second degree, and he appeals. Affirmed.

J. C. Webster, of Sonora, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with the crime of burglary and with a prior conviction of the crime of rape. He entered a plea of not guilty, but admitted the prior conviction. He was convicted of burglary in the second degree. This is an appeal from the judgment and the order denying a new trial.

The appellant contends that the evidence is insufficient to justify his conviction. He resided with his mother in the town of Columbia, Tuolumne county. George Wilson, whose wife is a sister of the defendant, resided in the same town. Leo Pense, also a resident of the town, is an acquaintance of the defendant of long standing. Pietro Sanguinetti

owns a two-room house about three-fourths of a mile from the town. The house contained some clothing canned goods, and other articles, but was unoccupied by any person. February 17, 1929, some person broke into this house and stole the canned goods, some clothing, and other property stored therein. February 19 the defendant went to Murphy's, in Calaveras county, looking for work. He walked a part of the way, and was then given a ride for the remainder of the trip by Wilson, with whom were Pense and others. If the testimony of Wilson and Pense is true, the defendant told Pense, during the forenoon of February 19, that, if Wilson would take him to Murphy's, he (the defendant) would give Wilson some canned goods; that on their arrival at Murphy's the defendant drew a diagram showing where the canned goods were hidden in an out-of-the-way place near Columbia, and stated that they were covered with leaves; that on their return to Columbia during the evening of the same day Wilson and Pense, between 10 and 11 o'clock at night, went on foot to the place designated by the defendant, found the goods hidden there as described by him, placed them in two sacks, and started back to Wilson's home, intending to leave the goods there; that before they reached Wilson's home a man accosted them and asked what they had in the sacks; that this question convinced them that the goods had been stolen, and, that as soon as they reached the Wilson home, they placed the goods in an automobile, took them away some distance, and hid them in a hole in the ground, covering them with rocks. On their return again to Wilson's home, they were arrested, and later, during the same night, they informed the sheriff where the goods were hidden.

If the foregoing were all of the testimony, even though sufficient to convict, it would leave a strong suspicion that Wilson and Pense committed the burglary and were endeavoring to escape punishment by making it appear that the defendant had committed it. But the defendant was arrested at the Indian Camp at West Point in Calaveras county on February 28. In the room he there occupied there was at that time a shirt clearly proved to belong to Sanguinetti, who testified that the shirt was in his house when he left it a few months before the burglary. When the defendant was arrested, he enumerated certain articles in the room belonging to him, without mentioning the shirt, saying he had nothing else there. It was satisfactorily shown at the trial that no one else at that place had or claimed the shirt in question, and, while it is possible that some one else placed the shirt in the room, the only reasonable inference from the evidence is that the defendant took it there. Wilson and Pense were kept in the county jail at all

times subsequent to their arrest, and were still confined therein at the time of the trial.

The evidence shows more than the mere possession of stolen property. The natural inference from defendant's particular description of the place where the canned goods were hidden is that he stole them and secreted them there. The fact that he gave them to Wilson and Pense was an implied assertion that he owned them. Possession of property recently stolen, together with guilty conduct in relation to the property, are sufficient to sustain a conviction. 4 Cal. Jur. 742.

Appellant complains of an instruction given by the court, substantially in the language of the instruction set forth in *People v. Alba*, 52 Cal. App. 603, 605, 199 P. 894. It is urged that the instruction contains the same error as the one condemned in *People v. Boxer*, 137 Cal. 562, 563, 70 P. 671. The instruction in that case, however, was condemned because it "assumes that the defendants may have received the stolen property into their possession after the burglary was committed by other parties." No such error appears in the instruction complained of in this case. The court refused to give an instruction requested by the defendant relative to the possession of stolen property by a defendant, but the instructions given by the court fully covered the subject-matter thereof.

The judgment and the order are affirmed.

We concur: ROLFE L. THOMPSON, J.;
PLUMMER, J.

100 Cal. App. 37

**LINDSEY et al. v. SUPERIOR COURT IN
AND FOR THE CITY AND COUNTY OF
SAN FRANCISCO et al. (Civ. 6984.)**

District Court of Appeal, First District, Division 1, California. July 17, 1929.

1. Insane persons §92—Ward rather than guardian should have been named as plaintiff in suit to rescind contract.

Ward rather than guardian should have been named as plaintiff in suit for rescission on ground of fraud of contract for purchase by ward of furnishings of an apartment house and recovery of damages.

2. Insane persons §92—Order substituting guardian for ward in action for rescission, though erroneous, should not be given effect as dismissal, where not intended as such.

In suit by ward to rescind for fraud a contract for purchase of apartment house furnishings, order substituting guardian, though erroneous, should not be given effect as a dismissal of action as against ward, where it was manifestly not intended as such.

3. Insane persons ☞92—Erroneous order for substitution of guardian as plaintiff held not to deprive court of jurisdiction to allow trial amendment restoring ward as party plaintiff.

In suit by ward to rescind for fraud contract for purchase of apartment house furnishings, where guardian was erroneously substituted as plaintiff, neither the erroneous order for substitution of the guardian as plaintiff nor the amendment made in conformity therewith deprived court of jurisdiction to allow trial amendment restoring ward as party plaintiff.

4. Insane persons ☞92—Permitting amendment substituting ward for guardian after case was submitted on motion for nonsuit held discretionary (Code Civ. Proc. § 473).

Under Code Civ. Proc. § 473, it was within court's discretion to permit an amendment substituting ward for guardian as plaintiff after case was submitted on the motion for nonsuit.

5. Insane persons ☞92—Court permitting amendment at trial restoring ward as plaintiff, after guardian was erroneously substituted, retained jurisdiction, though more than three years elapsed since summons was issued, where defendants voluntarily appeared (Code Civ. Proc. § 581a).

In action by ward to rescind for fraud contract for purchase of apartment house furnishings, where guardian was erroneously substituted as plaintiff, court was not without jurisdiction to allow amendment at trial, under Code Civ. Proc. § 581a, restoring ward as party plaintiff, though more than three years had elapsed since summons was issued, where defendants voluntarily appeared within the three-year period and answered to the merits of the amended complaint which stated a cause of action in favor of the ward.

6. Prohibition ☞3(2)—Writ cannot take place of appeal or be employed to correct errors of subordinate tribunals (Code Civ. Proc. § 1102).

Under Code Civ. Proc. § 1102, function of writ of prohibition being to restrain subordinate tribunals from exceeding their jurisdiction, writ cannot be used to take the place of an appeal or employed as a means of correcting errors of such tribunals, even though objection thereto is based upon jurisdictional ground.

Application for writ of prohibition by George Lindsey and others, directed to the Superior Court in and for the City and County of San Francisco and others. Writ denied.

George M. Lipman, Harold Levin, and Walter F. Lynch, all of San Francisco, for petitioners.

Francis C. Brown, of San Francisco, for respondents.

PER CURIAM. An original application for a writ of prohibition to the superior court of the city and county of San Francisco, directing said court to desist and refrain from further proceedings in an action pending therein, which was commenced on November 10, 1925, by Katherine Horton against George and Em-

ma Lindsey, and is numbered 163152 according to the register of actions in said court. The suit was for the rescission, on the ground of fraud, of a contract for the purchase by plaintiff of the furnishings of an apartment house, the recovery of sums paid by her thereon, and for damages.

A summons was issued, but, so far as appears, was not served upon the defendants. Thereafter, on September 13, 1927, the plaintiff was adjudged to be an incompetent person, and P. G. Sanborn was duly appointed and qualified as the guardian of her estate. On June 23, 1928, respondent, upon the application of the guardian, made an order for his substitution as plaintiff in the action, and on June 26, 1928, an amended complaint was filed therein, stating the same facts as appeared in the original complaint, with the additional fact of the appointment of Sanborn as guardian. The amended complaint, however, was entitled "P. G. Sanborn, Guardian, on Behalf of Katherine Horton, an Incompetent Person, Plaintiff"; the name of the incompetent being omitted in the caption, although the pleading alleged that the same was filed on her behalf, and one W. E. Bivens, alleged to have been an agent of the principal and certain fictitious defendants in the transaction, was also joined as a defendant.

Thereafter, on July 24, 1928, there was filed a second amended complaint with the same caption, and containing substantially the same allegations of fraud as those appearing in the original and first amended complaint. On July 27, 1928, defendant Bivens filed his answer "to the amended complaint," denying the material allegations therein, and on September 6, 1928, defendants George and Emma Lindsey filed their joint general demurrer to the "second amended complaint," alleging also that the pleading was uncertain in the particulars specified in the demurrer. An answer, putting in issue the material allegations of the amended pleading, was filed by them at the same time, and, the demurrer having been overruled, the parties on December 18, 1928, proceeded to trial.

It appears that evidence in support of the allegations of the complaint as amended was introduced over objection by defendants, and, the plaintiff having rested, defendants moved for a nonsuit upon the ground of variance between the allegations of the complaint and the evidence offered, in that no cause of action in the guardian as such was shown. The guardian then moved for leave to amend to conform to the proof by substituting the ward as plaintiff, by her guardian, and that the action be continued in her name. The defendants, who opposed this motion, thereupon moved to dismiss the action upon the ground that, more than three years having elapsed since the filing of the original complaint and the summons not having been served, the

court, under the provisions of section 581a of the Code of Civil Procedure, was, saving its power to enter an order of dismissal, without jurisdiction to proceed. The motions for a nonsuit and the dismissal of the action were denied, and an order entered permitting the complaint to be amended as requested.

Petitioners contend that the first amendment, whereby the guardian was named as plaintiff in the action, although alleging that the amended pleading was filed on behalf of the ward, was in effect a new action; and that the summons issued on November, 1925—which was the only summons issued—not having been served, and more than three years having elapsed, the court was without jurisdiction to allow the amendment sought at the trial or to do otherwise than dismiss.

[1, 2] That the ward rather than the guardian should have been named as plaintiff is well settled (*Fox v. Minor*, 32 Cal. 111, 91 Am. Dec. 566; *Dixon v. Cardozo*, 106 Cal. 506, 39 P. 857); but, as held in the case last cited, which is similar in its facts, the order substituting the guardian, though erroneous, was manifestly not intended as a dismissal of the action as to the incompetent plaintiff, and should not be given that effect.

[3] As stated, the pleadings throughout show a cause of action in the original plaintiff; and, while it may be assumed that a demurrer to the amended complaint should properly have been sustained on the ground that no cause of action was shown to be vested in the guardian, neither the erroneous order for his substitution as plaintiff nor the amendment made in conformity therewith deprived the court of jurisdiction. *Dixon v. Cardozo*, supra; *Westphal v. Arnoux*, 51 Cal. App. 532, 197 P. 395.

[4, 5] Section 473 of the Code of Civil Procedure provides that "the court may in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding * * * by correcting a mistake in the name of a party, or a mistake in any other respect, * * *" and it was within the court's discretion to permit such amendment after the case was submitted on the motion for nonsuit. *Robinson v. Exempt Fire Co., etc.*, 103 Cal. 1, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93. Section 581a of the Code of Civil Procedure, after providing for the dismissal of actions unless summons shall have been issued within one year, also provides that "all such actions must be in like manner dismissed, unless the summons shall [have been] served and the return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served. * * *" Here the defendants voluntarily appeared within the three-year period and answered to

the merits the amended complaint, which stated a cause of action in favor of the ward. As was said in *Nisbet v. Clio Mining Co.*, 2 Cal. App. 436, 442, 83 P. 1077, 1080: "'Courts, under the reformed system of procedure, look to the substance of things rather than to form, and to persons and things rather than mere names. This manner of treating things constitutes the life and spirit of the reformed system of procedure.' (*Anglo, etc., Co. v. Turner Casing Co.*, 34 Kan. 340, 8 P. 404.) That system was designed to enable courts of justice to brush aside technicalities affecting no substantial right, and decide causes upon the merits. In the case at bar the body of the complaint clearly indicated that the intention was to sue the Clio Mining Company and recover upon its debt, and parties appearing in that action could not close their eyes to substantial facts, and rely upon mere technical omissions in the caption or title of the cause. * * *"

In *Cox v. San Joaquin Light & Power Co.*, 33 Cal. App. 522, 166 P. 578, an action to recover damages for the death of a servant was brought by the widow of the deceased in her own name under the mistaken supposition that the case fell within the provisions of section 377 of the Code of Civil Procedure, which provided for the maintenance of such actions by the heirs or personal representatives of the deceased. After the statute of limitations had run against the cause of action, in order to bring the case within the provisions of section 1970 of the Civil Code, an amendment was filed wherein the widow, as administratrix of the estate of the deceased, was substituted as plaintiff in the place of herself as an heir at law. It was contended that the amendment resulted in a complete change of the cause of action, which was barred by the statute of limitations. In deciding against this contention, the court refers with approval to the analogous case of *Reardon v. Balaklala Consol. Copper Co. (C. C.)* 193 F. 189, 191, and quotes therefrom as follows: "It should be borne in mind * * * that the substantive cause of action counted on in the amended complaint has not been changed. It remains precisely the same as that stated in the original pleading. No new facts are alleged as a ground of recovery, the only change being in the name of the plaintiff and the capacity in which [she] sues. * * * This being so, the change effected by the amendment is obviously in no just sense the bringing of a new action. It is one of form rather than of substance, and in the interests of justice is to be treated as such, rather than to adopt a view which would result in an irretrievable bar to all remedy. * * *"

The above is peculiarly applicable to the case at bar, and it is our conclusion that the amendment had not the effect claimed, but that respondent court, notwithstanding the amendment retained jurisdiction of the cause,

and, due to their voluntary appearance, acquired jurisdiction of the parties defendant.

[6] Should the orders complained of be erroneous, they may be reviewed in a proper proceeding; but the function of a writ of prohibition being to restrain subordinate tribunals from exceeding their jurisdiction (Code Civ. Proc. § 1102), it cannot be used to take the place of an appeal (Coker v. Sup. Court, 58 Cal. 177, 179; Valentine v. Police Court, 141 Cal. 615, 75 P. 336; Van Hoosear v. R. R. Commission, 189 Cal. 228, 207 P. 903; Takeba v. Sup. Ct., 43 Cal. App. 469, 185 P. 406; Apartment, etc., Financing Corp. v. Will, 69 Cal. App. 276, 231 P. 349), or employed as a means of correcting errors of such tribunals (Amos v. Superior Ct., 196 Cal. 677, 239 P. 317), even though objection thereto is based upon jurisdictional grounds (County of Sutter v. Superior Ct., 188 Cal. 292, 204 P. 849).

We find no merit in the contentions of petitioners, and the writ is accordingly denied.

100 Cal. App. 188

FRICKSTAD v. MEDCRAFT. (Civ. 6954.)

District Court of Appeal, First District, Division 2, California. July 31, 1929.

1. Assault and battery ⇨13, 15—One may use necessary force to prevent assault on himself or injury to his property.

Private person may use such force as is necessary to prevent an assault on his person or injury to his property.

2. Appeal and error ⇨1010(1)—False imprisonment ⇨31—Finding that dentist, in calling policeman to remove obstreperous patient, did not exercise unnecessary restraint, held sustained and conclusive on appellate court (Pen. Code, §§ 834, 835, 837, 841, 847).

Finding of trial court that dentist, in calling policeman to remove obstreperous patient from his office, exercised no greater restraint than was necessary to protect himself against assault, held sustained by evidence, and conclusive on appellate court, in action for false imprisonment, under Pen. Code, §§ 834, 835, 837, 841, 847.

3. False imprisonment ⇨15(2)—One who authorizes officer to do unlawful act, or who participates in unlawful arrest, is liable.

One who authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures or participates in unlawful arrest, is liable.

4. False imprisonment ⇨8—Dentist, calling policeman to remove obstreperous patient from his office, was not guilty of false imprisonment by virtue of subsequent detention of patient by officer, though dentist failed to swear out complaint (Pen. Code, §§ 834, 835, 837, 841, 847).

Dentist, who caused policeman to be summoned solely to remove obstreperous patient

from his office, did not thereafter become liable to patient for false imprisonment, under Pen. Code, §§ 834, 835, 837, 841, 847, by virtue of the officer's subsequent detention of patient, though dentist failed to swear out a complaint.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Taral T. Frickstad against H. C. Medcraft. From a judgment for defendant, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

L. L. Steele, of Oakland, for appellant.

John L. McNab, of San Francisco, for respondent.

LAMBERSON, Justice pro tem. Action for damages for false arrest and imprisonment. Trial by the court without a jury. Findings and judgment for defendant. Plaintiff appeals therefrom, and from an order denying his motion for a new trial.

The plaintiff, at the time of the arrest and imprisonment complained of, which occurred on the 11th day of August, 1926, was 79 years of age, somewhat infirm from a nervous affliction, and of rather irascible disposition. The defendant was a dentist practicing in the city of Oakland, and for a period of about a year the plaintiff had visited the defendant's office for the purpose of having dental work done, involving the construction and fitting of artificial teeth. The plates had been several times remade by the defendant or his assistant; the last work of that nature having been done about three weeks before the time of the incident which is the subject of this action. At that time some change was made in the lower set or plate at the request of the plaintiff, and on August 11, 1926, plaintiff returned to the office of the defendant, where he was received by an attendant and placed in an operating chair. He then complained to the defendant that the lower plate was one-sixteenth of an inch too short, and produced a pair of calipers to demonstrate the deficiency. The defendant thereupon informed the plaintiff that he could not do anything more under the circumstances without making an additional charge. The plaintiff thereupon became angry, and proceeded toward a door between the reception room and the operating room. As he reached the door, he turned and addressed a defamatory epithet to the defendant, who then crossed the operating room and opened the door, in which there was a glass panel. The findings as to this and subsequent incidents are as follows:

"That defendant opened the door from his inner office to the outer office to usher the plaintiff out of the office, and while engaged in opening the door plaintiff struck at defendant with a heavy cane. That defendant evaded the descending blow of said cane, and the blow smashed the glass entrance door of

defendant's office. That plaintiff endeavored to again assault defendant with his cane, and defendant, to protect himself against injuries solely, caught plaintiff by the wrists, and asked his nurse to call a police officer to take the plaintiff away. That said officer demanded of plaintiff his name, but plaintiff replied, 'You find out.' That said officer thereupon, without suggestion from the defendant, took the plaintiff to the police station, where he was kept for some time. That defendant did not request that plaintiff be taken to the police station, and was not informed that plaintiff was detained at the police station until he received a telephone request to come to the police station. On arriving at the station, defendant declined to place any charge against the plaintiff.

"The court expressly finds that the defendant exercised no greater restraint over plaintiff than was necessary to protect the defendant against further assault; that defendant did not request his detention, and did not know that he had been detained at the police station, or was under any form of arrest by the officers of the Oakland police."

The testimony of the defendant was, in substance: That plaintiff made a second stroke with his cane, and that the defendant caught him by the wrists. That the plaintiff also attempted to kick the defendant. That they were then out in the hall, and the defendant called to his office nurse to telephone for the police. That plaintiff was a feeble old man, and the defendant did not know what to do with him. That when the policeman came the defendant said: "I want this man to pay for that glass. I wish you would take him away." The policeman said: "You bet he will pay for that glass. What is your name?" The plaintiff said: "You find out." The policeman said: "Come over to the city hall and we will find out." That the defendant said nothing about arresting the plaintiff. The plaintiff was taken to the city hall, and to the sergeant's desk in the police station, where he was ordered upstairs, searched, and confined in a cell for a period variously estimated to have been from two to four hours.

The defendant testified that he did not know that the plaintiff was imprisoned in the police station until the lapse of a period of from one to three hours, when he was summoned to the police station and asked to sign a complaint, which he refused to do and was reprimanded by the desk sergeant.

There is very little conflict in the evidence as to the incidents which occurred in the office. The plaintiff offered testimony to the effect that the defendant assaulted him, by pushing him through the door of the operating room, and that plaintiff then struck back with his cane to defend himself, and in doing so struck the glass in the door.

The evidence is sufficient to support the finding that the plaintiff assaulted the defend-

ant with his cane, and that the defendant exercised only such restraint as was necessary to protect himself against further assault, and it may be added that the evidence was sufficient to support the conclusion that the defendant exercised only such force as was necessary to protect the property in the room from further damage. The restraint of the plaintiff by the defendant occurred while plaintiff was actually engaged in a disturbance of the peace, and was conducting himself in a disorderly manner, and while making an assault upon the defendant.

Sections of the Penal Code relating to the subject of arrest, and which are pertinent to the issues involved herein, are the following:

Section 834, which reads: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

Section 835: "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention."

Section 837: "A private person may arrest another: 1. For a public offense committed or attempted in his presence. * * *"

Section 841: "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape."

Section 847: "A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace-officer."

[1] A private person may use such force as is necessary to prevent an assault upon his person or an injury to his property.

[2] Whether the view be taken that the defendant acted in the protection of himself or his property, or arrested plaintiff for the commission of a misdemeanor committed in his presence, the finding of the trial court that the defendant exercised no greater restraint than was necessary to protect himself against further assault has abundant evidence for its support, and is conclusive in the appellate court.

[3, 4] Plaintiff contends that the action of the defendant in causing a policeman to be summoned, and in delivering him to the policeman, and in not thereafter swearing to a complaint, created a cause of action for damages for false imprisonment, and cites in support of his contention the cases of *Korkman v. Hanlon*, 53 Cal. App. 147, 199 P. 880, and *Riffel v. Letts*, 31 Cal. App. 426, 160 P. 845.

Neither of the cases cited is in point, for the reason that the arrest which was the basis of the cause of action in each case was made after the commission of the alleged offense had ceased, and the rule laid down in those cases follows the rule so well stated in the case of *Allen v. London & Southwestern Railroad Company*, L. R. 6 Q. B. 65, also cited by plaintiff. A very full discussion of that rule appears in the opinion of the court in the case of *Korkman v. Hanlon*, and we shall not discuss it further here.

In this case, the only evidence as to what occurred when the policeman arrived appears in the testimony of the defendant, which has already been related. The findings of the court have also been heretofore stated in full. These findings are supported by the evidence, which does not justify a conclusion that the defendant advised or encouraged the subsequent imprisonment of the plaintiff. The language of the defendant imports a desire to have the plaintiff removed from the scene of the difficulty, rather than to have him imprisoned. The original restraint and detention of the plaintiff by the defendant having been proper under the circumstances, his delivery to the police officer was fully authorized by the provisions of section 847 of the Penal Code hereinbefore stated, and the duty of the defendant ended when he delivered the plaintiff to the officer. Having performed that duty by promptly having an officer summoned, and by delivering the plaintiff to such officer, his responsibility ceased.

The rule established in this state is stated in the case of *Miller v. Fano*, 134 Cal. 103, 66 P. 183, as follows: "If a party authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest without process, or participates in the unlawful arrest or imprisonment, such party is liable." This rule has been recognized in the case of *Squires v. Southern Pacific Co.*, 42 Cal. App. 459, 183 P. 695.

In the case under consideration a difficulty faced the defendant which he could only overcome, according to the findings of the trial court, by restraining the plaintiff and delivering him to an officer as soon as one was available. The fact that a complaint was not filed thereafter does not render the defendant a trespasser, in the absence of an affirmative showing that the defendant actually encouraged the officer to imprison the plaintiff. No element of malice or abuse of his authority on the part of defendant, up to the time when the policeman took the plaintiff away from defendant's office, appears in the case.

The defendant's authority and control over the plaintiff ended upon the delivery of the plaintiff to the officer, who thereupon assumed responsibility, and it does not appear that the defendant did anything contrary to the authority conferred upon him by section

847 of the Penal Code. *Gisske v. Sanders*, 9 Cal. App. 13, 98 P. 43.

We are of the opinion that the evidence is sufficient to support the finding that defendant did not request the arrest of the plaintiff, did not request his detention, and did not know that he had been detained at the police station, or was under any form of arrest by the officers of the Oakland police.

The judgment and order appealed from are affirmed.

We concur: **NOURSE, Acting P. J.;**
STURTEVANT, J.

100 Cal. App. 289

SOURICH v. BARICH. (Civ. 6822.)★

District Court of Appeal, First District, Division 2, California. Aug. 7, 1929.

Rehearing Denied Sept. 5, 1929. Hearing Denied by Supreme Court Oct. 3, 1929.

Mechanics' liens $\S$ 281(4)—In suit to foreclose contractor's lien, evidence sustained judgment for defendant making payments to protect building constructed from liens.

In suit to foreclose contractor's lien, evidence held to sustain judgment for defendant filing cross-complaint for amounts paid in protecting building constructed from laborers' and materialmen's liens, under evidence showing that defendant did not act as volunteer in making payments, and that, after each payment had been made, he promptly notified plaintiff and her agent, and that payment was duly approved.

Appeal from Superior Court, City and County of San Francisco; **Edmund P. Morgan**, Judge.

Action by **G. M. Sourich** against **Peter J. Barich**, wherein defendant filed a cross-complaint. From the judgment, plaintiff appeals. Affirmed.

A. Don Duncan, of San Francisco, for appellant.

Benjamin L. McKinley, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to foreclose a contractor's lien. The defendant appeared and answered and also filed a cross-complaint. The plaintiff answered the cross-complaint, and the case was tried before the court sitting without a jury. The trial court made findings of fact in favor of the defendant, and, from a judgment entered thereon, the plaintiff has appealed, and has brought up a typewritten transcript.

Thomas A. Sourich was a contractor and builder. Prior to August 8, 1925, he had become seriously embarrassed financially. On the date last mentioned, his wife, **Guiditta Sourich**, and the defendant entered into a

contract, by the terms of which Mrs. Sourich undertook to enlarge, alter, and repair a building for the defendant. The contract price was \$28,000. Immediately thereafter Mr. Sourich, as the agent of his wife, entered upon the performance of the contract. Apparently everything progressed well until November 13th, when Mr. Sourich was declared a bankrupt. On November 15, 1925, the plaintiff and the defendant stated an account, and it was found that the plaintiff had earned \$16,000, which was paid in full. About the same time the parties entered into an oral contract, the exact terms of which do not appear, by the terms of which the plaintiff was to proceed to perform the contract, but all bills were to be paid directly by the defendant after first being duly approved by the plaintiff. About December 1, 1925, the contract had been so nearly completed that certain of the artisans, including Mr. Sourich, left the job, and the painters came forward to do the painting. From that day Mr. Sourich was not in constant attendance. There is some evidence in the record that his constant attendance was not necessary. There is some evidence in the record that the plaintiff abandoned the contract. Be this as it may, the contract proceeded and was fully completed on or about January 29, 1926. Between November 13, 1925, and January 29, 1926, numerous bills for labor and material became due and payable. Many of those bills were approved by the plaintiff and were thereupon paid by the defendant. Some of those bills were not approved in advance by the plaintiff, but nevertheless they were paid by the defendant. In her briefs, the plaintiff claims that the payments last referred to were made voluntarily. Except in one or two instances she does not claim that the bills so paid were not correct both as to quantity and quality of materials furnished and as to the amount in dollars and cents. In those instances in which she does complain, she does not show by the proof the exact extent of the inaccuracy, if any. There is one claim of overpayment, but as to that claim the evidence was distinctly conflicting. There is some evidence that some of the bills were paid a short time before they were actually due. There is much evidence to the effect that the defendant was constantly engaged in receiving calls from the creditors of the plaintiff or her agent, of reporting those calls to the plaintiff or her agent, and that from November 13, 1925, the defendant was compelled to make a most strenuous effort to keep his building from being covered with liens.

During the progress of the work certain extras were performed. As to the amount thereof, the parties do not disagree.

The total cost of all work was \$29,850.09. The trial court deducted \$200.40, the price of some material furnished by the builder, \$560.62, the agreed cost of extras, and \$28,000, the contract price. The balance, \$1,089.07, was the excess cost over the cost stipulated in the contract. For the amount of that excess the trial court gave judgment in favor of the defendant. If the defendant did not act as a volunteer in making any of the above-mentioned payments, the judgment should be affirmed. The story as recited above clearly indicates that he did not act as a volunteer; moreover, after each payment had been made, he promptly notified the plaintiff or her agent, and the payment was duly approved. Because of the view we take of this case, it becomes unnecessary to discuss any of the other points made in the briefs.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 107

SNOWDEN v. CONNOR et al. (Civ. 6761.)

District Court of Appeal, Second District, Division 1, California. July 24, 1929.

Appeal and error $\hookrightarrow$ 356—Notice of appeal more than 60 days after judgment and more than 30 days after denial of new trial was too late (Code Civ. Proc. § 939).

Where notice of appeal was filed more than 60 days after entry of judgment and more than 30 days after denial of motion for new trial, notice was filed too late, under Code Civ. Proc. § 939, and appeal was dismissed.

Motion to dismiss appeal by defendants from a judgment of the Superior Court of Los Angeles County. Motion granted.

Action by Earl F. Snowden against C. E. Connor and others. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal. Motion granted.

Earl E. Howard and Albert J. Sherer, both of Los Angeles, for appellants.

Fred E. Peterson and Berge Lion, both of Los Angeles, for respondent.

PER CURIAM. The notice of appeal was filed more than 60 days after entry of judgment, and more than 30 days after denial of the motion for a new trial. This was too late. Code Civ. Proc. § 939; Schainman v. Kierce, 199 Cal. 249, 248 P. 905.

The motion is granted, and the appeal is dismissed.

100 Cal. App. 107

PEOPLE of the State of California, Plaintiff and Respondent, v. George A. DICKSON, Defendant and Appellant. (Cr. 1845.)

District Court of Appeal, Second District, Division 1, California. July 24, 1929.

Appeal by defendant from a judgment of the Superior Court of Los Angeles County, Carlos S. Hardy, Judge, of conviction of driving automobile while intoxicated. Affirmed.

Thomas W. Cochran, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and W. R. Augustine, of San Francisco, for the People.

PER CURIAM. The only point presented on the appeal is that the evidence is insufficient to support the verdict in this, that there is no substantial evidence to prove the charge that the defendant while driving his automobile as alleged in the information, was under the influence of intoxicating liquor. An examination of the record discloses evidence which, in the opinion of the court, is sufficient to support the verdict on that matter.

The judgment is affirmed.

PEOPLE v. GUZMAN. (Cr. 1801.)★

District Court of Appeal, Second District, Division 2, California. Aug. 13, 1929.

Rehearing Denied Aug. 27, 1929. Hearing Granted by Supreme Court Sept. 10, 1929.

1. Criminal law ⇨393(1)—Statute placing burden on accused to prove citizenship held unconstitutional as applied to prosecution for possessing firearms by unnaturalized foreign-born person (Code Civ. Proc. § 1983, as added by St. 1927, p. 434; St. 1923, p. 696; Const. art. 1, § 13).

Code Civ. Proc. § 1983, as added by St. 1927, p. 434, providing that in any action or proceeding by the state to enforce a law denying certain privileges or licenses to aliens, alleged alien shall have burden to establish fact that he was at time of exercising right or privilege a citizen or eligible to become such, provided the state has proved that he actually exercised right or privilege, held unconstitutional as applied to prosecution for possessing firearms by unnaturalized foreign-born person, under St. 1923, p. 696, since contrary to Const. art. 1, § 13, guaranteeing that any defendant in criminal case cannot be compelled to be witness against himself.

2. Weapons ⇨17(2)—State has burden to prove that alleged unnaturalized foreign-born person, prosecuted for possession of firearms, was an unnaturalized foreigner (St. 1923, p. 696).

In prosecution for possession of firearms, forbidden to be carried by unnaturalized for-

eign-born person, under Firearms Act (St. 1923, p. 696), the state has not only the burden of proving that accused had one of proscribed weapons in his possession, but also that he was an unnaturalized foreigner.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

German Guzman, an alleged unnaturalized foreign-born person, was convicted of having in his possession a firearm of the character forbidden by law to be carried by such persons. From the judgment, and from an order denying a new trial, defendant appeals. Reversed.

Trujillo & Eriksson, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, P. J. Defendant was convicted of a violation of the Firearms Act (St. 1923, p. 696), in that he, alleged to have been an unnaturalized foreign-born person, had in his possession a firearm of the character forbidden by the act to be carried by such persons. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

[1, 2] At the trial the prosecution showed that appellant had one of the proscribed weapons in his possession, but did not prove that he was an unnaturalized foreigner. Appellant offered no evidence upon this latter issue. Some years ago the Supreme Court decided that the establishment of the corpus delicti, in prosecutions under this statute, required proof of possession of the weapon and of the foreign nativity and nonnaturalization of the defendant. *People v. Quarez*, 196 Cal. 404, 238 P. 363. Subsequent to this decision, at the session of 1927 (St. 1927, p. 434), the Legislature enacted section 1983 of the Code of Civil Procedure, a new section, which reads as follows:

"Whenever in any action or proceeding, civil or criminal, brought by, or in the name of, the state or the people thereof, or by or in the name of any political subdivision or agency of the state, or by any public board or officer on behalf of any thereof, to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, or to a person not a citizen or resident of this state, and whenever in any action or proceeding in which the state or any political subdivision or agency thereof, or any public board or officer acting on behalf thereof, is or becomes a party, it is alleged in the pleading therein filed on behalf of the state, the people thereof, political subdivision or agency, or of such board or officer, that such right, privilege or license has been exercised by a person not a citizen of the United States, or not eligible to become such citizen or by a

person not a citizen or resident of this state, as the case may be, the burden shall be upon the party for or on whose behalf such pleading was filed to establish the fact that such right, privilege or license was exercised by the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such person, or upon any person, firm or corporation claiming under or through the exercise of such right, privilege or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, or was a citizen or resident of this state, as the case may require, and was at said time legally entitled to exercise such right, privilege or license."

It was in reliance upon this enactment that the prosecution attempted no proof as to the nativity and nonnaturalization of appellant, assuming to leave the burden of proof upon these matters to him. It is contended by appellant that section 1983 is unconstitutional, when sought to be applied as it was in the present instance, and we have recently decided, in a case in which our judgment has not yet become final, that it is. In that case we said:

"The only constitutional provision relied upon by appellant which appears to warrant attention is section 13 of article 1 of the Constitution of California, in which it is guaranteed that the defendant cannot be compelled in any criminal case to be a witness against himself. Undoubtedly any law which would have the effect of forcing a defendant to produce evidence against himself would be unconstitutional.

"Under the rule *ab inconvenienti*, it has been held that negative allegations regarding matters peculiarly within the knowledge of the defendant need not be proved; but this exception to the general rule has been limited in this state to that particular class of cases where the prosecution is required to prove the nonexistence of a license. *People v. Quarez*, supra; *People v. Frey*, 165 Cal. 140, 131 P. 127. In these cases it was held that the precise element involved in the charge against the appellant here, the nativity of the defendant, was not of such a nature as to come within the rule *ab inconvenienti*. The Legislature cannot, by merely declaring it to be so, change the inherent nature of the issue and thus bring proof of the nativity within the class of matters excepted from the general rule as being within the particular knowledge of the defendant, if in fact it is not of that character. Otherwise, it would be competent for the Legislature to pass a law providing

that in a prosecution for murder, upon proof of the death of the person alleged to have been murdered, the defendant must show that such death did not come about through unlawful means, and that in the absence of such proof this element of the *corpus delicti* should be deemed confessed, the act declaring this provision to be within the exceptional rule *ab inconvenienti*. Obviously the mere fiat of the Legislature could not thus metamorphose the issue as to the nature of the agency that produced death.

"Accepting, then, the decisions of our Supreme Court, as announced in the *Quarez* Case, that this issue of nativity is not one whose proof is especially within the knowledge of the defendant, we must conclude that it remains not within the exception *ab inconvenienti*.

"It is argued that the only result of the provision is to create a presumption of the foreign nativity of the defendant from proof that he had a firearm of the forbidden length in his possession. But it is clear that in this case far greater and more serious consequences than this would result. The presumption would be but an entering wedge, opening the door to damaging admissions otherwise barred, and which, coupled with the presumption attempted to be created by the statute, might be sufficient to establish the element of non-nativity and thus complete the case against the defendant. We have here an effort to accomplish indirectly that which undoubtedly could not be done directly, to conjure up through a process of legislative necromancy a semblance of evidence, and to require the courts to treat this counterfeit as real evidence. There is no rational connection between the fact that a person has in his possession a firearm of a certain type or size and that individual's place of birth. If evidence of crime may be thus fabricated in the form of a presumption without any foundation in fact, the most serious felony might be presumed from entirely innocent acts and circumstances. There must be a reasonable connection between the fact and the presumption which the law directs to be drawn therefrom. *People v. Osaki et al.* (Cal. App.) 278 P. 252."

People v. Bruno (Cal. App.) 279 P. 175.

In the present case the prosecution failed to prove an essential element of the charge against appellant, and failed to prove the *corpus delicti*.

Judgment and order reversed.

I concur: CRAIG, J.

Justice IRA F. THOMPSON, being absent, does not participate in the foregoing decision.

100 Cal. App. 255

In re STRUVE'S ESTATE.***STRUVE v. STRUVE.**

(Civ. 6941.)

District Court of Appeal, First District, Division 2, California. Aug. 5, 1929.

As Modified on Denial of Rehearing, Sept. 4, 1929. Hearing Denied by Supreme Court Oct. 3, 1929.

1. Wills ⇨47—Periods of forgetfulness and despondency of testatrix, 78 years old, held not unsoundness of mind, rendering testatrix incapable of making will.

Periods of forgetfulness and despondency of testatrix, 78 years old at time of execution of will, over death of son, who had lived with her for many years prior to his death, and who had been a constant friend and companion, held not unsoundness of mind rendering testatrix incapable of making the will.

2. Wills ⇨38(1)—“Insane delusion,” to affect testamentary capacity, must be product of diseased mind, coming into existence and adhered to against reason or evidence.

“Insane delusion,” sufficient to affect testamentary capacity, must be product of diseased mind, which comes into existence without reason or evidence to support it, and which is adhered to against reason and evidence; that is, testamentary capacity does not depend on testatrix's ability to reason logically or on her freedom from prejudice.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Insane Delusion.]

3. Wills ⇨38(3)—Testatrix's belief that sons had taken advantage of her by recording deeds held not insane delusion affecting testamentary capacity.

Expressions of belief on part of testatrix that her sons had taken an unfair advantage of her by recording two deeds from husband conveying certain real property to them before her death held not insane delusion, rendering testatrix incapable of making valid will.

4. Wills ⇨384—Error, if any, in admitting evidence in will contest was harmless, where appellant failed to make out a case.

Admission of evidence over objection on issue of undue influence, if error, was harmless, in will contest, where appellant failed to make out a case on ground of undue influence.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Proceeding by Edgar Struve to contest the admission to probate of the will of Cecelia M. Struve, deceased, opposed by Elmer H. Struve. From a judgment admitting the will to probate, contestant appeals. Affirmed.

C. F. Lacey and Scott & Pioda, all of Salinas, for appellant.

Wyckoff & Gardner, of Watsonville, for respondent.

NOURSE, J. This is a contest of an objection to the admission to probate of the will of Cecelia M. Struve, deceased. The cause was tried before the court sitting with a jury, and resulted in a verdict in favor of the proponent of the will. The contestant has appealed on a typewritten transcript.

The contest was instituted by Edgar Struve, a son of the deceased. The grounds of the contest were unsoundness of mind and the exercise of undue influence by Elmer H. Struve, a grandson of the testatrix and the chief beneficiary under her will. The jury, in answer to special issues submitted to it, rendered special verdicts finding the deceased was of sound and disposing mind at the time of the signing of the will, and that the will was not procured through the undue influence of Elmer Struve. On this appeal the appellant concedes that the testimony upon the issue of undue influence was conflicting, and that the special verdict upon that issue is supported by evidence legally sufficient for that purpose. Our examination of the record convinces us that the only competent evidence was that in support of the special verdict upon this issue, and that the issue might well have been taken from the jury at the close of the contestant's case. Upon this point we cannot do better than quote the language of *Estate of Perkins*, 195 Cal. 699, 710, 235 P. 45, 49: “There is an utter lack of any proof of pressure brought to bear upon the testatrix, which overpowered her mind and overcame her volition at the very time the will was made. In *re Ricks' Estate*, 160 Cal. 450, 117 P. 532.”

[1] Upon the issue of the general unsoundness of mind of the testatrix, the record presents the same situation. The only competent evidence in the record unmistakably proves the soundness of mind of the testatrix, and the only testimony to the contrary was that this woman, who was 78 years of age at the time the will was executed, had periods of forgetfulness and despondency, and suffered great grief over the death of her son Peter, who had lived with her for many years prior to his death, and who had been a constant friend and companion. That such evidence is insufficient to support a contest on the ground of mental incapacity there can be no longer any doubt, in view of the many decisions specifying the quantum of proof necessary in such cases. *Estate of McDonough*, 200 Cal. 57, 62, 251 P. 916, where cases are cited.

[2, 3] Though these were the issues which were tendered in the contest and trial by the jury, the appellant on this appeal insists that the verdict must be overturned because of the insane delusion of the testatrix, arising out of the expressions of the belief on her part that the contestant and his brother had taken

an unfair advantage of her by recording two deeds conveying certain real property to them. Without deciding that the point is properly before us at this time, we may briefly review the evidence upon which it is based, in order that the issue might be finally determined. The testatrix and Hans Struve were married in Denmark in 1865. Shortly after their marriage they came to Watsonville, Cal., and settled on a farm of over 300 acres. In 1900 they bought a house in Watsonville, which they made their home, and in 1902 they surveyed the farm, dividing it into three parts, of about 106 acres each, and placed three deeds of gift, one to each of their sons, Henry, Peter, and Edgar, each covering one of the 106-acre tracts, in escrow with a bank in Watsonville. Nothing appears as to the terms of the escrow, but the evidence unmistakably shows that the parents expected that these deeds would be held by the bank in escrow, at least until the death of the father, and there is unmistakable evidence that the mother believed that it was the intention of the parties that they should remain in escrow until her death. The sons entered into possession of the respective parcels of land, and continued to farm them either individually or through leases to others, and left the deeds with the bank until some time in 1923, when Henry and Edgar appeared at the bank and obtained the deeds to their respective parcels. These they had recorded. Peter, who was a bachelor, lived with his mother, after his father's death in 1908, until his own death in September, 1925. His deed was left with the bank until after his death, when it was withdrawn upon the consent of the mother. A few months after Henry and Edgar recorded their deeds, the mother learned that they had done so, and apparently became very angry with them, expressing to them and to others that they had violated the agreement with her husband and herself that the deeds should remain in escrow until her death. This feeling that they had taken advantage of her remained with her down to the time of the execution of the will, and was given by her as one reason why she did not leave more of her estate to her sons Henry and Edgar.

Several years before Peter's death Mrs. Struve had made a will dividing her property equally between her three sons, but about six months after the death of Peter, he having willed the bulk of his estate to her, Mrs. Struve destroyed the former will and executed the will which is now the subject of this contest. In this will she left the property which she had received from Peter's estate to her grandson Elmer, the proponent of this will, and divided equally between her two sons Henry and Edgar the property which she had owned before Peter's death. Her estate consisted of cash in bank of about \$6,000, live stock and farming equipment of the value of about \$5,000, and a ranch of about 125

acres, of the value of \$12,500, all of which was received from Peter's estate. In addition to this she left about \$200 in cash, personal effects valued at \$100, and the home place in Watsonville, of the value of \$3,500, none of which was derived from Peter's estate. The \$200 in cash and the home place she left to Henry and Edgar in equal shares. Specific bequests were made to others, which would come out of the property derived from Peter's estate, and the residue was left to her grandson Elmer. In explanation of the bequest to the grandson of the bulk of the estate which she had received from her son Peter, the evidence discloses that on many occasions she had stated that it was Peter's wish that what was left of his estate should go to this grandson, who was a great favorite of Peter, as well as of the testatrix.

As we understand the argument of appellant, it is that because the deeds were left with the bank in escrow, without specific instructions as to time of delivery, the sons were within their legal rights when they obtained the deeds from the escrow holder, and that therefore the mother had no reason to feel that they had taken any advantage of her, or wronged her, in obtaining the deeds and placing them of record. The answer is that she entertained the belief that there was an understanding between the parties that the deeds would be left in escrow until her death, and that it is of no moment that she was mistaken as matter of law that an oral agreement of this nature did not affect the legal rights of the parties. It appears that her interest in having the deeds remain in escrow was to prevent the sons from disposing of the land, an interest which no doubt arose from the practice of her Danish ancestry to keep the lands of the family intact. Whatever may have been the reason for being put out because of the actions of her sons, it is evident that her belief that she had been wronged by them was nothing more than a mistaken belief, which under no possible theory can be held to be an insane delusion. On this question the cases are all one way. An insane delusion sufficient to affect testamentary capacity must be a product of a diseased mind, "which comes into existence without reason or evidence to support it, and which is adhered to against reason and against the evidence." *Estate of Shay*, 193 Cal. 355, 361, 237 P. 1079, 1081. Putting it another way: "Testamentary capacity does not depend upon the testatrix's ability to reason logically or upon her freedom from prejudice. A belief may be illogical or preposterous, but it is not, therefore, evidence of insanity." *Estate of Perkins*, 195 Cal. 699, 708, 235 P. 45, 49. "It is a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of his belief or knowledge of any fact which would in reason or in probability furnish evidence in its support."

Estate of Gunther, 199 Cal. 119, 125, 248 P. 514, 516.

[4] Finally it is argued that the trial court committed error in permitting a witness to testify that the son Peter, prior to the execution of his will in July, 1923, told him that whatever might be left of his property at his mother's death would eventually go to Elmer. The objection is that this testimony was hearsay, and not responsive to any issue in the case. The evidence was offered to rebut the testimony of the contestant that the grandson Elmer had practiced undue influence upon the testatrix, by which he persuaded her to bequeath to him the bulk of the estate which she had received from her son Peter. Though the testimony of contestant was wholly insufficient to support the charge, the proponent felt called upon to meet it by showing that the provisions in the will of Mrs. Struve were in accord with the expressed wishes of her son Peter. Having failed to make out a shadow of a case on the ground of undue influence, the appellant was not prejudiced by the admission of the testimony objected to.

We concur: KOFORD, P. J.; STURTEVANT, J.

208 Cal. 14

**DEPARTMENT OF NATURAL RESOURCES,
DIVISION OF FISH AND GAME, v. IN-
DUSTRIAL ACCIDENT COMMISSION et
al. (S. F. 13326.)★**

Supreme Court of California. Aug. 22, 1929.

Rehearing Denied Sept. 12, 1929.

Master and servant  **364—Volunteer deputy fish and game warden held "public officer," and not "employee" within Compensation Act, so that his death was not compensable (Workmen's Compensation Act, § 8, subd. (a); Pol. Code, § 642, as amended by St. 1927, p. 947).**

Volunteer deputy fish and game warden, serving without pay, held a "public officer" within Pol. Code, § 642, as amended by St. 1927, p. 947 and not an "employee" of fish and game commission so as to come within provision of Workmen's Compensation Act, § 8, subd. (a), St. 1917, p. 835, entitling widow to an award on his death while engaged in performing duties of his position.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Employé; Officer.]

In Bank.

Application for certiorari by the Department of Natural Resources, Division of Fish and Game, to review and annul an order of the Industrial Accident Commission awarding compensation to Margaret Machado for the death of Frank Machado. Award annulled.

Daniel W. Burbank and C. F. Laumeister, both of San Francisco, for appellant.

G. C. Faulkner, of San Francisco, for respondents.

PER CURIAM. The petitioner herein seeks to have reviewed and annulled a decision and award of the Industrial Accident Commission, by the terms of which the widow and minor son of one Frank Machado were granted an award by the commission upon the occurrence of the sudden death of said Frank Machado, who was drowned while acting in the capacity of a volunteer deputy of the fish and game commission of the state of California. The undisputed facts are these: Prior to October 15, 1927, Frank Machado applied to the fish and game commission for appointment to the position of volunteer deputy fish and game warden in the region of Wat-

sonville. The fish and game commission approved his application, whereupon Machado subscribed to the oath of office and furnished the bond as required by the provisions of section 642 of the Political Code (as amended by St. 1927, p. 947), and also paid the fee of \$5, required premium on said bond, and thereupon and on October 15, 1927, received his certificate of appointment as such volunteer deputy of said commission. While serving in that capacity, and on June 10, 1928, said Frank Machado was accidentally drowned through the capsizing of his motorboat in Pinto lake in Santa Cruz county and while he was actively engaged in performing the duties incident to his position. Thereafter, and upon the application of his widow and minor son, the Industrial Accident Commission, upon a showing of the foregoing facts and its finding thereon, made and entered its award in favor of said applicants, whereby the petitioner herein was ordered to pay the sum of \$1,150 as death benefits and burial expenses to the applicant, Margaret Machado. A petition for rehearing filed by the petitioner herein was thereafter denied by the commission, whereupon the petitioner filed this application for a writ of review.

The primary question of law presented upon this application is as to whether Frank Machado at the time of his death was such an employee of the fish and game commission as to come within the provisions of the Workmen's Compensation Act relating to public officers and to the class of public officers, the widow, heirs and dependents of which are entitled under the terms of the act to receive an award upon the death of such employee while in the course of performing the services required by his official position. That Frank Machado was a public officer under the provisions of section 642 of the Political Code is conceded by the parties to this proceeding. He was what was known as a volunteer deputy fish and game warden, appointed as such under the provisions of the foregoing section of the Political Code, which permits the fish and game commission to appoint deputies "with or without pay." That Frank Machado was of the latter class, and from and after the time of his appointment up to the time of his death was engaged in the service of said commission without pay, would seem to be apparent from the facts attending his appointment and service, the only sum of money which he received from the commission during the period of his service being the sum of \$5, returned to him for the purpose of reimbursing him for the amount which he had been required to pay as premium upon his bond. It is true that under a rule of the commission relating to volunteer deputies it is provided that, since the secretary of state requires the payment of a fee of \$5 upon the filing of the bond of a volunteer depu-

ty, "each volunteer deputy will be paid a salary of five dollars for the first month's service to compensate him for the bond premium. Thereafter his services will be volunteer and without compensation." It would seem, however, to be clear under the very terms of the foregoing rule that at least from and after the first month of the decedent's service and the receipt by him of the sum of \$5, as provided for in said rule, his services thenceforth and up to and including the time of his death were "volunteer and without pay," and that he must therefore be held to have been an appointed public officer, serving as such without pay. Section 8, subd. (a), of the Workmen's Compensation Act (Stats. 1917, p. 835), provides as follows:

"The term 'employee' as used in sections six to thirty-one, inclusive of this act shall be construed to mean: Every person in the service of an employer as defined by section seven hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors, whether lawfully or unlawfully employed, and all elected and appointed paid public officers, and all officers and members of boards of directors of quasi-public or private corporations, while rendering actual service for such corporations for pay, but excluding any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and also excluding any employee engaged in household domestic service, farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising and any person holding an appointment as deputy clerk, deputy sheriff or deputy constable appointed for the convenience of such appointee, who receives no compensation from the county or municipal corporation or from the citizens thereof for services as such deputy; provided, that such last exclusion shall not deprive any person so deputized from recourse against any private person employing him for injury occurring in the course of and arising out of such employment."

The history of the various amendments to said statute in so far as the matters referred to in the aforesaid section thereof are concerned, and the course of judicial decisions which apparently resulted in the successive amendments thereof, would seem to shed a clear light upon the intent of the Legislature in the adoption of the final amendment of section 642 of the Political Code, and which amendment was in full force and effect at all times during the appointment and service of said decedent. By the provisions of the Workmen's Compensation Act as originally adopted in 1913 (Stats. 1913, p. 279), it was provided in section 14 thereof that, "the term 'employee' as used in sections twelve to thirty-five, inclusive, of this act shall be construed to mean: Every person in the service of an employer as defined by section thirteen here-

of under any appointment or contract of hire or apprenticeship, express or implied." The term "employer" as originally used in said act was given application (section 13) to "the state, and each county, city and county, city, school district and all public corporations therein, and every person, firm, voluntary association, and private corporation (including any public service corporation), who has any person in service under any appointment or contract of hire, or apprenticeship," etc. In the case of *Mono County v. Industrial Accident Commission*, 175 Cal. 752, 167 P. 377, wherein the Industrial Accident Commission had made an award against the county of Mono and in favor of the widow of one James P. Dolan, the duly elected and qualified sheriff of said county, and who had been killed while in the performance of his official duties as such sheriff, this court, in annulling said award, held that the provisions above quoted from sections 13 and 14 of said act could not be given application to the sheriff of Mono county, for the reason that he was not to be held an employee of the county "under any appointment or contract of hire," as provided by the terms of said act then in force. While said cause was pending before this court, the Legislature undertook to amend the Workmen's Compensation Act (Stats. 1917, p. 831) so as to embrace within the meaning of the term "employee" as used therein "all elected and appointed paid public officers."

In the case of *County of Monterey v. Industrial Accident Commission*, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359, a deputy sheriff named N. H. Rader, appointed as such by the sheriff of the county of Monterey to serve as such and as part of a posse comitatus in aid of such sheriff, while attempting the arrest of certain persons engaged in the violation of the state and federal prohibition laws, was killed while in the course of performing such public service. Under the provisions of the law relating to the appointment of such deputy sheriffs for such emergency service, the person so appointed was entitled to receive pay from the county in a designated amount while serving in such a public official capacity. Upon the death of said Rader the Industrial Accident Commission having made an award of compensation to his minor child, this court decided that such award should be upheld after a careful review of the several changes which had been made in the Workmen's Compensation Act affecting the status of public officers; and in so doing held that the decedent in the case then before it came within the provisions of the amendment to the act adopted in 1917, which purported to embrace within its benefits "all elected and appointed *paid* public officers." In so deciding, this court differentiated between those deputies of public officers who were engaged in the public service and were serving chiefly for their own convenience and without pay and those who were serving for pay in their

particular official capacity; and held that as to the former class it was the clear intent of the Legislature in its amendment to the Workmen's Compensation Act adopted in 1917 to exclude those who were thus serving without pay from the beneficial provisions of the act. Following that decision by this court, the Legislature, while otherwise making various amendments in the Workmen's Compensation Act at the several sessions thereof, has undertaken to make no change in the provisions thereof relating to those public officers who are to be held to come within the term "employees" for the purpose of being brought within the beneficial provisions of said statute. We therefore see no escape from the conclusion that public officers of the class of the decedent herein who are serving without pay are not to be held included within the beneficial provisions of said act so as to entitle themselves, or, in the event of their death, their heirs or dependents, to receive an award at the hands of the Industrial Accident Commission.

It necessarily follows that the award made by the commission in the instant case must be annulled, and it is so ordered.

207 Cal. 722

WHEATLEY v. SUPERIOR COURT IN AND FOR NAPA COUNTY et al. (S. F. 13281.)

Supreme Court of California. July 31, 1929.

1. Highways $\S$ 90—Notice fixing time for filing property owners' protests in proceeding to form bridge and highway district need not describe improvement (St. 1923, p. 452, as amended by St. 1925, p. 714).

In proceedings under authority of St. 1923, p. 452, as amended by St. 1925, p. 714, for formation of bridge and highway district, notice fixing time within which property owners' protests would be received held not invalid for failure to set forth description of improvement.

2. Constitutional law $\S$ 62—Functions of officer or board inquiring into inclusion or exclusion of territory within bridge and highway districts are purely judicial (Const. arts. 3, 4, $\S$ 1).

Functions of officer or board in inquiring into inclusion or exclusion of territory within boundaries of bridge and highway districts are purely judicial in their nature, and therefore there can be no contention that legislative powers are delegated contrary to Const. arts. 3, 4, $\S$ 1.

3. Highways $\S$ 90—Bridge and highway district held public and quasi municipal corporation (St. 1923, p. 452, as amended by St. 1925, p. 714; Const. U. S. art. I, $\S$ 10).

Bridge and highway district formed under St. 1923, p. 452, as amended by St. 1925, p. 714, held to be public and quasi municipal corpora-

tion, in disposing of contention that attempt to form such district was violation of Const. U. S. art. 1, $\S$ 10.

4. Appeal and error $\S$ 840(3) — In reviewing proceedings incorporating bridge and highway district, constitutionality of statutes with reference to provisions for taxation will not be determined (St. 1923, p. 452, as amended by St. 1925, p. 714).

Contention that St. 1923, p. 452, as amended by St. 1925, p. 714, relative to organization of bridge and highway districts, is unconstitutional with reference to provisions for taxation, will not be considered in proceeding to review legality of proceedings leading up to formation of district, since, regardless of validity of taxing provisions, district may become valid agency of state, and, if directors have been given unlawful power, exercise thereof will be controlled or prevented by proper proceeding.

In Bank.

Application by Henry Wheatley, in his individual capacity and on behalf of other protesting taxpayers, for a writ of review directed to the Superior Court in and for Napa County and others. Proceedings of respondent affirmed.

Casper A. Ornbaun and Charles A. Strong, both of San Francisco, Hale McCowen, Jr., and Charles M. Mannon, both of Ukiah, and Edward S. Bell, of Oakland, for petitioner.

George H. Harlan, of San Rafael, U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondents.

John J. O'Toole, of San Francisco, amicus curiæ.

Hart H. North and Edson Abel, both of San Francisco, amici curiæ in support of petitioner.

LANGDON, J. This matter comes to us upon a petition for a writ of review to determine the legality of the findings and judgment and other proceedings leading up to the formation of the proposed Golden Gate bridge and highway district, which matter has been determined by the defendant superior court contrary to the contentions of petitioner.

Petitioner is a resident, freeholder, taxpayer, and elector of the county of Napa, Cal., and as such filed a protest against the formation of the proposed Golden Gate bridge and highway district and the inclusion of his lands within said district.

The proceedings under attack here were had under the authority of an act of the Legislature passed in 1923 (St. 1923, p. 452), and entitled: "An Act to provide for the incorporation and organization and management of bridge and highway districts and to provide for the acquisition and construction by said districts of bridges and approaches thereto, and for the acquisition of all property necessary therefor, and also to provide for the issuance and payment of bonds by said districts, for the levying of taxes and the collec-

tion of tolls by said districts and for the annexation of additional territory thereto."

In 1925 (St. 1925, p. 714) said act was amended so as to provide for the acquisition, and construction of highways by the corporation to be formed under the act and in other particulars hereinafter mentioned.

After the passage of the act of 1923, the proceedings herein discussed were instituted in an attempt to form a bridge and highway district. A voluntary organization sent a written application to the boards of supervisors of the counties of Del Norte, Humboldt, Mendocino, Lake, Napa, Sonoma, Marin, and the city and county of San Francisco, to pass a uniform ordinance, therewith submitted. The uniform ordinance provided that the county therein named desired to join with the others above mentioned in forming a bridge and highway district to embrace contiguous territory under the provisions of chapter 228, p. 452, of the Statutes of 1923; it directed that a petition be circulated in the county in accordance with the provisions of said act, and that the ordinance should be published in a manner prescribed. This uniform ordinance was passed by six only of the counties mentioned, to wit: Sonoma, Mendocino, Marin, Napa, Del Norte, and the city and county of San Francisco. Petitions to the secretary of state were circulated accordingly and signed by 10 per centum of the number of qualified electors of each county from which the petitions were presented who voted for Governor of the state at the last general election. The counties of Humboldt and Lake refused to act upon the application, and no such ordinance was passed by them nor petition circulated. After the passage of these ordinances and the signing of the petitions, the Legislature amended the act governing the formation of bridge and highway districts, at its session in 1925 in the particular hereinbefore stated and in other particulars with reference to the representation allowed to the various counties forming the district and also with reference to the necessity for the district being formed from contiguous territory and in some other particulars not important to be mentioned here.

[1] Subsequently the secretary of state published a notice in each of the six counties fixing a time within which the protests would be received and filed by the owners of property within the proposed bridge and highway district.

Petitioner herein objects to the sufficiency of this notice, contending that it violates the petitioner's constitutional rights, in that it does not appear therein nor can it be ascertained from said notice, what project or improvement is contemplated by reason of the formation of said proposed bridge and highway districts, that said notice fails to state what bridge or bridges are to be acquired or constructed, or where said bridge or bridges and the approaches thereto are to be con-

structed, and that it fails to give notice of what highway or highways are to be constructed, and that there is nothing in said notice to enable petitioner and other taxpayers to determine whether their property will be benefited by the formation of said district or to determine whether said district should be formed.

The question of notice to taxpayers in this proceeding was considered by this court in the case of *Doyle v. Jordan*, 200 Cal. 170, 252 P. 577, and it was therein stated that nothing in the act under consideration provides that the project for which it is proposed to form the district shall be set forth in any particular or specified manner or shall be described or contained in any particular or specified document or instrument which may form a part of the proceedings taken for the incorporation of the district, and that the act merely provides that the project for which the district is formed should be definitely designated somewhere in the proceedings in order, at least, that the board of directors of the district might know the extent and the limits to which they might proceed after the organization of said district. The steps taken in the formation of the district are then discussed in *Doyle v. Jordan*, supra, and it is concluded that they meet the requirements of the statute. There are no facts presented in the instant proceeding which make the language of *Doyle v. Jordan*, supra, inapplicable here.

[2] It is next contended that the superior court was without jurisdiction to act, since the statute under which the district was sought to be formed violated section 1, arts. 3 and 4, of the Constitution of California, in delegating legislative powers to a judicial or administrative officer, in providing that, at the time specified in the notice, the superior courts shall have jurisdiction to hear and determine all matters urged by the protestants against the formation of the said proposed bridge and highway district or against the inclusion of their lands therein, and the said superior court shall have jurisdiction to exclude the said lands from said proposed districts, etc.

It has been repeatedly held that the functions of an officer or board in inquiring into the inclusion or exclusion of territory within the boundaries of similar districts are purely judicial in their nature. *Imperial Water Co. v. Board of Supervisors*, 162 Cal. 14, 120 P. 780; *Miller & Lux v. Board of Supervisors*, 189 Cal. 254, 208 P. 304; *Fallbrook Irrig. District v. Bradley*, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 354, 4 S. Ct. 48, 28 L. Ed. 173.

[3] The third point raised by petitioner is that any attempt to form a bridge and highway district under the statute of 1923, as amended in 1925, is a violation of section 10, art. 1, of the Constitution of the United States, in that the petitions signed by the

electors of Napa county and the ordinance passed by the board of supervisors of said county provided for a bridge and highway district under the statute of 1923, and the statute of 1925 amending the former one, materially changes the conditions under which the said board of supervisors and the said electors of the said county offered to enter said district. This objection is made upon the basis of petitioner's argument that a bridge and highway district to be formed under the act is not a public and quasi municipal corporation, for if it be a public and quasi municipal corporation, the terms upon which it was formed do not constitute a contract between the state and those within the district. *Johnson v. San Diego*, 109 Cal. 468, 42 P. 249, 30 L. R. A. 178.

We think the corporate structure under consideration here is analogous to a municipal water district, a public utility district, a municipal utility district, and a metropolitan water district. The procedure for the formation and the operation of them all is strikingly similar. These various districts have been held valid as public and quasi municipal corporations or districts, and the statutes under which they have been formed have been upheld in the following cases: *Henshaw v. Foster*, 176 Cal. 507, 169 P. 82; *In re Orosi Public Utility District*, 196 Cal. 43, 235 P. 1004; *In re East Bay Utility District*, 196 Cal. 725, 239 P. 38; *City of Pasadena v. Chamberlain* (Cal. Sup.) 269 P. 630. In *Doyle v. Jordan*, supra, the statute under which the bridge and highway district was formed was classed with the statutes involved in the cases above cited, and its validity sustained upon the authority of such cases. We think this is a public and quasi municipal corporation within the rule of cases cited. *Johnson v. San Diego*, supra.

[4] In a brief filed by the California Farm Bureau Federation and others in support of the petition for writ of review, it is urged that the act under consideration presents certain unconstitutional features with reference to its provisions for taxation, and we are asked to decide that question here. We think such a problem is not presented at this time. In the case of *Doyle v. Jordan*, supra, it was expressly stated that, regardless of the validity of the taxing provisions of the act, the

district, when formed, may become a valid and constitutional agency of the state, and that, if the directors thereof have been given any unlawful powers, in a proper proceeding, when they attempt to exercise them, such exercise will be controlled or prevented by the courts. As in the case of *Doyle v. Jordan*, supra, we are herein concerned only with the proceedings incorporating the district.

The proceedings are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SIENK, J.; SEAWELL, J.

207 Cal. 795

Louis R. DEMPSTER, in His Individual Capacity and on Behalf of Other Protesting Taxpayers, Petitioner, v. SUPERIOR COURT of the State of California IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO et al., Respondents. (S. F. 13282.)

Supreme Court of California. July 31, 1929.

In Bank.

Casper A. Ornbaun and Charles A. Strong, both of San Francisco, Hale McCowen, Jr., and Charles M. Mannon, both of Ukiah, and Edward S. Bell, of Oakland, for petitioner.

George H. Harlan, of San Rafael, U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondents.

John J. O'Toole, of San Francisco, amicus curie.

Hart H. North and Edson Abel, both of San Francisco, amici curiæ in support of petitioner.

PER CURIAM. This matter comes to us upon a petition for a writ of review to determine the legality of the findings and judgment and other proceedings leading up to the formation of the proposed Golden Gate bridge and highway district, which matter has been determined by the defendant superior court contrary to the contentions of petitioner. The questions raised have all been disposed of in a case from the county of Napa, Cal., involving precisely the same legal situation, which case has been this day decided by this court. *Wheatley v. Superior Court et al.* (S. F. 13281, of the records of this court) 279 P. 989.

For the reasons stated in the case last cited, the proceedings are affirmed.

207 Cal. 796

Albert ESAISA, In His Individual Capacity and on Behalf of Other Protesting Taxpayers, Petitioner, v. SUPERIOR COURT of the State of California IN AND FOR the COUNTY OF SONOMA et al., Respondents. (S. F. 13283.)

Supreme Court of California. July 31, 1929.

In Bank.

Casper A. Ornbaun and Charles A. Strong, both of San Francisco, Hale McCowen, Jr., and Charles M. Mannon, both of Ukiah, and Edward S. Bell, of Oakland, for petitioner.

George H. Harlan, of San Rafael, U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondents.

John J. O'Toole, of San Francisco, amicus curiæ.

Hart H. North and Edson Abel, both of San Francisco, amici curiæ in support of petitioner.

PER CURIAM. This matter comes to us upon a petition for a writ of review to determine the legality of the findings and judgment and other proceedings leading up to the formation of the proposed Golden Gate bridge and highway district, which matter has been determined by the defendant superior court contrary to the contentions of petitioner. The questions raised have all been disposed of in a case from the county of Napa, Cal., involving precisely the same legal situation, which case has been this day decided by this court. *Wheatley v. Superior Court et al.* (S. F. 13281, of the records of this court) 279 P. 989.

For the reasons stated in the case last cited, the proceedings are affirmed.

207 Cal. 797

C. L. CRAWFORD, In His Individual Capacity and on Behalf of Other Protesting Taxpayers, Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF MENDOCINO et al., Respondents. (S. F. 13284.)

Supreme Court of California. July 31, 1929.

In Bank.

Casper A. Ornbaun and Charles A. Strong, both of San Francisco, Hale McCowen, Jr., and Charles M. Mannon, both of Ukiah, and Edward S. Bell, of Oakland, for petitioner.

George H. Harlan, of San Rafael, U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondents.

John J. O'Toole, of San Francisco, amicus curiæ.

Hart H. North and Edson Abel, both of San Francisco, amici curiæ in support of petitioner.

PER CURIAM. This matter comes to us upon a petition for a writ of review to determine the legality of the findings and judgment and other proceedings leading up to the formation of the proposed Golden Gate bridge and highway district, which matter has been determined by the defendant superior court contrary to the contentions of petitioner. The questions raised have all been disposed of in a case from the county of Napa, Cal., involving precisely the same legal situation, which case has been this day decided by this court. *Wheatley v. Superior Court et al.* (S. F. 13281, of the records of this court) 279 P. 989.

For the reasons stated in the case last cited, the proceedings are affirmed.

207 Cal. 732

BUTLER v. WILLIAMS, County Auditor. ★ (Sac. 4270.)

Supreme Court of California. July 31, 1929.

Rehearing Denied Aug. 29, 1929.

1. Officers ⇐99—Proper compensation of officer is to be determined by Legislature (Const. art. 11, § 5).

What compensation of an officer should be deemed in proportion to his duties, within Const. art. 11, § 5, is matter of fact to be ascertained and determined by the Legislature and not by the courts.

2. Counties ⇐74(5)—Act fixing county surveyor's salary at \$10 per month held not unconstitutional (Pol. Code, § 4236k; Const. art. 11, § 5).

Where salary of county surveyor, which had previously been at the rate of \$2,400 per year in counties of the seventh class was fixed at \$10 per month by Pol. Code, § 4236k, act lowering compensation was not repugnant to Const. art. 11, § 5, authorizing Legislature to fix salaries of county officers, but was valid exercise of power by Legislature.

3. Counties ⇐74(5)—Person elected county surveyor after act fixed salary at \$10 per month cannot complain of inadequacy, and that it would destroy office (Pol. Code, § 4236k).

Where, after enactment of Pol. Code, § 4236k, fixed salary of county surveyor at \$10 per month in counties of the seventh class, relator sought election and succeeded in being elected to position, he cannot complain because of inadequacy of compensation and that act fixed salary at so small amount as to result in destruction of the office, where relator could engage in private practice and was provided by county with suitable office.

4. Counties ⇐74(5)—It must be presumed that Legislature, in fixing county surveyor's salary in counties of the seventh class considered other advantages to incumbent (Pol. Code, § 4236k).

It must be presumed that Legislature, in enacting Pol. Code, § 4236k, fixing salary of county surveyor at sum of \$10 per month in coun-

ties of the seventh class, took into consideration fact that surveyor still had right to engage in private practice, which was of substantial value to him, that county provided him with suitable office, furniture, heat, light, and care, and relieved surveyor of certain engineering duty he was required to do previously when salary was at rate of \$2,400 per year.

Shenk, J., dissenting.

In Bank.

Application by Drury Butler for a writ of mandate prayed to be directed to L. P. Williams, as County Auditor of Sacramento County, to require respondent to draw a warrant in favor of petitioner. Writ denied.

Superseding opinion 270 P. 697.

Rehearing denied; SHENK and PRESTON, JJ., voting for a rehearing.

Butler, Van Dyke & Desmond, of Sacramento, for petitioner.

Neil R. McAllister, Dist. Atty., and Alex. J. Ashen, Deputy Dist. Atty., both of Sacramento, for respondent.

CURTIS, J. Prior to the year 1925, the salary of the county surveyor of the county of Sacramento, a county of the seventh class, was fixed by section 4236k of the Political Code at the sum of \$2,400 per annum. In that year said section of the Code was amended (St. 1925, p. 811, § 11) to read as follows:

"Counties of the Seventh Class. Surveyor. Sacramento. In counties of the seventh class, the county surveyor shall receive a salary of two thousand four hundred dollars per annum; and in addition thereto all necessary expenses for work performed in the office and all necessary expenses and transportation for work performed in the field; provided, however, commencing January 3, 1927, in counties of the seventh class the county surveyor shall receive a salary of one hundred twenty dollars per annum, and in addition thereto all necessary expenses for work performed in the office and all necessary expenses and transportation for work performed in the field."

The amendment consisted in adding to the section as it originally stood all that portion of said amended section beginning with the word "provided."

Thereafter, at the general election held in said county in November, 1926, the petitioner herein was elected to said office of county surveyor for the full term of four years, beginning January 3, 1927. He thereafter qualified as such county surveyor, and on the 3d day of January, 1927, entered upon the discharge of the duties of said office, and has ever since continued to discharge said duties. Some months thereafter he demanded of the respondent herein, the county auditor of said county, that he, as said county auditor, issue his warrant in favor of petitioner and directed to the county treasurer of said county,

ordering said county treasurer to pay to petitioner his salary at the rate of \$200 per month beginning on the 3d day of January, 1927. The county auditor refused to comply with said demand, whereupon the petitioner in May, 1928, filed in the District Court of Appeal, in and for the Third District, his petition praying for a writ of mandate directed to said county auditor commanding him to issue to petitioner a warrant on the county treasurer of said county, directing said county treasurer to pay to petitioner the sum of \$3,200 for services rendered by said petitioner as county surveyor of said county from the 3d day of January, 1927, to and including the 2d day of May, 1928. An alternative writ of mandate was issued out of said district court, directed to said county auditor. In the return of the county auditor to said writ and in his answer to said petition, it was alleged that the salary of petitioner as county surveyor of said county since the 3d day of January, 1927, was the sum of \$120 per annum and that said county auditor had drawn warrants in favor of petitioner at the end of each month during the term of office of petitioner for his said salary at the rate of \$120 per annum, but that petitioner had refused to accept said warrants and the same remained in the office of said county auditor. It was further alleged in said return and answer that petitioner, in addition to his salary, is furnished a suitable office in the county courthouse of said county, together with suitable office furniture, heat, light, and care of the same, and that ever since January 3, 1927, the board of supervisors of said county has employed a competent engineer and other engineering assistants to draw plans and specifications for the construction of highways, bridges, and other structures built by said county and that by reason thereof the petitioner has not been called upon to do any of the engineering work appertaining thereto.

The matter came on for hearing before said District Court of Appeal, resulting in a judgment in favor of the petitioner as prayed for in his said petition. Upon the application of the respondent herein, said proceeding was transferred from said District Court of Appeal, and a hearing thereon ordered in this court.

We can see but little, if any, difference in principle between the question here presented and that which was determined in the case of *De Merritt v. Weldon*, 154 Cal. 545, 98 P. 537, 671, 16 Ann. Cas. 955. In this latter case, the facts recited in the opinion show that the plaintiff therein was elected city marshal of the city of Ukiah. At the time of his election the salary of said office was \$60 per month. This salary had been fixed by the board of trustees of said city under the power given to said board by section 855 of the Municipal Corporation Act then in force (Gen. Laws 1906, p. 900), which section

read in part as follows: "The clerk, treasurer, marshal, and recorder shall severally receive, at stated times, a compensation, to be fixed by ordinance by the board of trustees." Thereafter, and during said plaintiff's first term of office, the board of trustees created the office of "Executive Officer," prescribed the duties of such officer, and fixed his salary at \$75 per month. On the same day it fixed the salary of the marshal at \$10 per month. Plaintiff was appointed as such executive officer and continued to hold such office until 1907 and drew the salaries of both offices, having been re-elected in 1904 and 1906. In March, 1907, the board of trustees revoked his appointment as executive officer. Plaintiff thereupon claimed the salary of \$60 per month, which had been fixed by said board of trustees by ordinance prior to the date of his first election to the office of marshal. Payment thereof was refused, and he instituted said action for the purpose of compelling the payment of his salary in the amount of \$60 per month. The claim was made there, as it is made here, that, while the legislative body has the power to fix the salary of the officer, it is precluded from fixing the salary at so small an amount that its action would result in the destruction of the office. This is clearly made to appear from the following language found on page 549 of the opinion (98 P. 538): "It is urged: That the effect of the provisions of the Municipal Corporation Act [sec. 855] is to require that the trustees shall fix a reasonable compensation; that, while it is for them to determine what is a reasonable compensation, they are at least precluded from fixing it at so small an amount that their action results in the destruction of the office of marshal, a coordinate department of the government of the town, by reason of the fact that no competent person would seek the office or perform the duties thereof for the compensation fixed; that any ordinance fixing the compensation at such a low figure is in conflict with the provisions of the General Municipal Corporation Act, and therefore void; and that for this reason the ordinance fixing the compensation at \$10 per month is void." In reply to this contention the court held (page 553 of 154 Cal. [98 P. 540]): "The duties of the marshal were, then, only such as were prescribed by the state law. Under this, in a town of some 1800 inhabitants, he was in charge and control of the department of police, required to execute such process as might be delivered to him for execution; he was in charge of the city prison, if there was such a prison; he would be required to take charge of any chain-gang that might be established by the trustees, but none had been established; and he was required to collect all town taxes and town licenses. The last undoubtedly constituted the principal part of his duties. These are all the duties specifically imposed by the

statute. While we may feel that \$120 per annum is not a reasonable compensation for the performance of these duties, and would fix a larger sum if it were within our province to determine what would be reasonable, we cannot hold, and the trial court was not warranted in holding, that the act of the trustees in fixing that amount was tantamount to the destruction of the office of marshal, in that no competent person would perform the duties for any such amount. It must therefore be held that the action of the trustees was a lawful exercise of the power confided to them to fix the compensation of the marshal, not in conflict with any law of the state. It follows that the marshal can recover only the salary so fixed."

[1] There is no substantial difference between the authority given the Legislature by section 5 of article 11 of the Constitution to fix the salaries of county officers and section 855 of the Municipal Corporation Act empowering the board of trustees to fix the salaries of the marshal and other officers of cities of the sixth class. If there is any difference between these two grants of power, it is in the use of the words "in proportion to duties," found in the section of the Constitution above mentioned. But the significance of this phrase has been determined in the case of *Green v. County of Fresno*, 95 Cal. 329, 332, 30 P. 544, 545, where the court held that "what compensation of an officer should be deemed in proportion to his duties is matter of fact to be ascertained and determined by the legislature, and not by the courts." To the same effect is the case of *De Merritt v. Weldon*, supra.

[2-4] In view of these express rulings of this court, we are constrained to hold that section 4236k of the Political Code, as enacted in 1925, fixing the salary of the county surveyor of the county of Sacramento at the sum of \$10 per month, is not repugnant to section 5 of article 11 or to any other provision of the Constitution of this state, but that the enactment of said section was a valid exercise of power given to the Legislature by the Constitution, and its action in that respect is not reviewable by the courts of the state.

Nor do we think the petitioner has any just cause to complain. The salary of the office of county surveyor of said county was fixed at the sum of \$10 per month more than a year before he was elected to that position. He knew at the time he became a candidate for said office and at the time he qualified and took the oath to perform the duties of the office what the salary was and would be during the term for which he was elected. The fact that he accepted the office with the salary as fixed at that time and that he has continued to discharge its duties is a conclusive answer to his contention that the Legislature by fixing the salary at this low figure

has thereby destroyed the office and that no competent person would perform the duties thereof for the amount fixed as salary. No doubt the prestige enjoyed by petitioner as county surveyor of his county and the right given him under the statute to engage in private practice are of substantial value to him. Furthermore, he is provided by the county with a suitable office, together with furniture, heat, light, and care of said office. As appears by the return of respondent, the board of supervisors has relieved petitioner of all engineering and other work required in the construction of bridges, highways, and other buildings constructed by the said county, and has engaged other engineers to perform this work. That it has this power was expressly held in the recent case of *Cope v. Flannery*, 70 Cal. App. 738, 750, 234 P. 845. It must be presumed that the Legislature in enacting said section of the Code took into consideration all of these matters, and, in the light of all the knowledge before it, fixed the salary of said officer at the amount stated in said section. As already stated, this was a matter exclusively within the jurisdiction of the Legislature and not within that of the courts.

The writ is denied.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.

SHENK, J. (dissenting). Under section 5 of article 11 of the Constitution, the Legislature is required to provide for the election or appointment in the several counties of the officers specifically mentioned and for such other county officers "as public convenience may require," and shall prescribe their duties. The same section also requires the Legislature to fix the compensation of such officers "in proportion to duties." By section 4013 of the Political Code, the Legislature has provided in effect that public convenience requires a county surveyor, for in that section a surveyor is, and for 50 years or more has been, named as one of the officers of the county. His official bond is provided for in section 4022 of the Political Code. He must be a licensed surveyor. Section 4214, Pol. Code. His duties generally are defined in sections 4214 to 4221, inclusive, of the Political Code. Other duties are required of him

by the Legislature. See St. 1905, p. 102. Sacramento county contains some 963 square miles of territory, approximately that of the state of Rhode Island, and has a population of 150,000 or more. It seems to me a palpable absurdity to say that the constitutional mandate to fix the compensation "in proportion to duties" has been complied with in the case of the surveyor of Sacramento county when said compensation is fixed at \$10 per month. The constitutional provision contemplates that the public officers therein provided for shall be justly compensated for their services. *Gwynn v. McKinley*, 30 Cal. App. 381, 389, 158 P. 1059. And when the Legislature has, as I think here, failed to comply with the purposes of the Constitution, it is the duty of the court to declare the law invalid. I cannot subscribe to the statement in the main opinion that the matter of compensation is *exclusively* within the jurisdiction of the Legislature and not within that of the courts. The case of *De Merritt v. Weldon*, 154 Cal. 545, 98 P. 537, 671, 16 Ann. Cas. 955, which is deemed to be controlling in the present case, recognizes that a limitation is placed on the legislative action to the extent that the Legislature may not fix compensation so low as in reality to destroy the office. In that case the board of trustees of the city of Ukiah evidently so framed its ordinances that the same person might act as "Executive Officer" and "Marshal" at the combined salary of \$85 per month, which was by no means an inconsiderable salary for the services rendered, in those days—25 years ago. The petitioner therein was appointed to act in both capacities, and continued so to act for several years and until the board revoked his appointment as "Executive Officer." He then complained that the ordinance fixing the salary of the marshal at \$10 per month was invalid. From the situation there presented, it could not be said that, at the time the ordinances were framed, it was intended to fix the salary of the marshal at so low a figure as in effect to destroy the office, for the reason that such salary, combined with the salary of executive officer, would be reasonable compensation for the services performed. Here we find no such situation, and in my opinion the *De Merritt* Case should not be deemed controlling.

208 Cal. 1

MERRILL v. GORDON & HARRISON et al.
(L. A. 10020.)

Supreme Court of California. Aug. 16, 1929.

1. Mines and minerals ⇨101—Finding in action for accounting that tract on which oil was produced was not included within agreement giving plaintiff share of profits from materials produced on particular tract held sustained.

In action for accounting for one-fourth of profits and income derived from oil and gas operations, evidence held sufficient to sustain finding that tract on which oil was produced was not included in agreement for division of profits, which contemplated operations for removing gravel.

2. Appeal and error ⇨101(1)—Trial court's determination of issue under conflicting evidence is not reviewable.

Where evidence is conflicting, trial court's determination of issue is not subject to review on appeal.

3. Appeal and error ⇨204(2)—Admission of testimony of defendant as to property which he desired to purchase could not be questioned on appeal, where there was no objection.

In action for accounting as to profits realized from operations for oil and gas, in which question arose as to extent of land covered by profit-sharing agreement, error could not be predicated on admission of testimony of defendant that he tried to buy only that portion of lot on which sand and gravel was located, where such testimony was admitted without objection.

4. Trial ⇨397(5)—Finding that plaintiff had no interest in proceeds of oil and gas sought to be recovered rendered findings on laches and limitations unnecessary.

In action for accounting as to profits from oil and gas operations, in which court found that plaintiff had no interest in proceeds of oil and gas, it was not necessary for the court to make findings on pleas of laches and statute of limitations.

In Bank.

Appeal from Superior Court, Los Angeles County; K. Van Zante, Judge.

Action by J. A. Merrill against Gordon & Harrison, a copartnership, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Paul C. Hill and Clyde Belford, both of Los Angeles, for appellant.

Chas. L. Chandler, John F. Poole, Wellborn & Wellborn, and Charles Wellborn, all of Los Angeles, for respondents.

CURTIS, J. This action is for an accounting and for one-fourth of the net profits and income derived from the operation and development of certain real property, and sale and distribution of oil and gas produced therefrom, and for specific performance of a

contract to convey to plaintiff a one-fourth interest in said real property. Said action is predicated upon the following contract executed by the parties hereto:

"Oct. 7, 1921.

"Contract.

"Witnesseth: That, for a valuable consideration receipt of which is hereby acknowledged, Gordon & Harrison, hereinafter designated as parties of the first part, doing business at 155 East Jefferson street, Los Angeles, Cal., enter into the following contract with J. A. Merrill, hereinafter designated as party of the second part, to wit:

"That the party of the first part agrees to compensate the party of the second part for the location of a certain piece of gravel land which the party of the first part purchased from Abel Moynier and wife, to wit:

"That as compensation, as above mentioned, party of the second part is to receive twenty-five per cent. (25%) of the capitalized stock for which said party of the second is to pay for out of the net profits of the concern in a period of two years.

"That when party of the second pays party of the first one-fourth of the purchase price of the land and equipment the rate of 7% interest on deferred payments, he will then become one-fourth owner of said land and is to derive one-fourth profits from said land from any material produced therefrom per right as owner of 25% of capital stock.

"Witness to which we hereby set our hand and our seal this seventh day of October nineteen hundred twenty and one, A. D. Gordon & Harrison, by Geo. W. Harrison, "Party of the First Part. J. A. Merrill, Party of the Second Part."

It will be noticed that the only description of the real property contained in said written agreement is "a certain piece of gravel land which the party of the first part purchased from Abel Moynier and wife, to wit." The evidence shows that Gordon & Harrison, the defendants herein, designated in said agreement as "the parties of the first part," had on or about the 24th day of September, 1921, purchased from Abel Moynier and Je-rondine Moynier, his wife, lot 7 of Moynier's tract in the county of Los Angeles, containing 17.76 acres of land, upon which there was located a deposit of sand and gravel. Parol evidence was admitted by the trial court for the purpose of identifying the property, which was the subject of the contract of date October 7, 1921. The plaintiff contended, and so testified, that the real property referred to and described in said contract was the whole of said lot 7 of the Moynier tract, while the defendants contended that only the easterly five acres of said lot was the subject of their contract with the plaintiff. The plaintiff, who was a cement contractor, testified that some time before the contract was

entered into between Gordon & Harrison and himself he located a deposit of sand and gravel upon said lot 7 of the Moynier tract and immediately thereafter secured an option from Moynier and wife to purchase the same. He mentioned these matters to Gordon & Harrison, and, as a result of negotiations thereafter had, Gordon & Harrison purchased from Moynier and wife said lot 7 of the Moynier tract, and to compensate plaintiff for his services for locating said sand and gravel deposit, they entered into the contract of October 7, 1921, and that the tract of land referred to in said contract was the whole of said lot 7. On the other hand, the defendants contended, and there was substantial evidence to support their contention, that the only portion of said lot 7 containing any sand or gravel deposit was the easterly five acres thereof; that at the time they began negotiations with Moynier and wife, which resulted in the purchase by them of said lot 7, they ascertained that the sand and gravel deposit was upon the easterly five acres of said lot, and that they endeavored to purchase from Moynier and wife said easterly five acres for the purpose of establishing thereon a sand and gravel plant, but Moynier and wife refused to sell any part of said lot less than the whole thereof; that thereupon they purchased the whole of said lot, principally for the purpose of acquiring said easterly five acres, and to compensate the plaintiff for locating said sand and gravel deposit they gave to the plaintiff the contract of October 7, 1921; and that the tract of land intended by the parties thereto to be described therein was the said easterly five acres of lot 7 of the Moynier tract.

The identity of the real property sought to be described in said contract became important for the reason that after the date of said contract Gordon & Harrison constructed a rock and gravel plant upon said easterly five acres of said lot 7 and operated the same until the latter part of the following August. The project proved a failure, and soon thereafter the plant was dismantled and the equipment and machinery removed therefrom. The plaintiff was placed in charge of said plant as superintendent thereof, and continued in that capacity until May 13, 1922, when he was discharged. Something over a year and a half after the abandonment of the sand and gravel project upon said lot 7, to be exact, on April 9, 1924, Gordon & Harrison leased said lot 7 to certain parties for the purpose of prospecting, exploring, drilling, and removing oil and gas therefrom. As a result of these explorations and developments oil was discovered upon said lot 7, but not upon any part of the easterly five acres thereof. Plaintiff now claims that he is entitled under his contract with defendants to one-fourth of the net proceeds of all oil and gas produced from said lot, and for an accounting, etc. The trial court found that the prop-

erty intended by the parties thereto to be described in said contract of October 7, 1921, was the easterly five acres of said lot 7, and that no profits, net or otherwise, had ever been realized from said property.

[1, 2] The plaintiff has appealed, and presents a number of assignments of error for our consideration and determination. One of said assignments is the insufficiency of the evidence to support the findings, and particularly the finding of the court that the real property intended to be described by the parties in the contract of October 7, 1921, was only the easterly five acres and not the whole of said lot 7. We have set forth in a general way the evidence upon the question of the identity of the real property which was the subject of said contract. We deem comment thereon unnecessary. It is apparent there was a sharp conflict in the evidence as to the property which the parties intended to describe in said contract. Such evidence would undoubtedly have supported a finding in favor of either party. The trial court having accepted the evidence in behalf of respondents and found in their favor upon that issue, its determination thereof is not subject to review by this court.

[3] Appellant further contends that the court erred in admitting testimony of the defendant Gordon that he did not want all of the property purchased and that he tried to buy only that portion of said lot 7 on which was located the sand and gravel deposit. This testimony seems to have been given without any objection thereto from the appellant. The direct question was asked Gordon whether, when considering the purchase of the sand and gravel deposit, he wanted the portion of said lot outside of the sand and gravel deposit. No objection was made to this question and the witness answered it in the negative. He was then asked whether Mr. Moynier would sell the land containing the sand and gravel deposit without selling the whole lot. An objection was interposed to this question, which was overruled, and the witness answered it in the negative. Appellant makes no criticism of this ruling of the court. The evidence of Gordon that he did not want all of the property purchased, and that he tried to buy only that part of the land containing the sand and gravel deposit, having been admitted without objection, its admissibility cannot be questioned on appeal.

[4] Appellant complains that the court failed to find upon the respondents' pleas of laches and the statute of limitations. The court having determined that the appellant never had any interest in the proceeds from the oil and gas taken from the real property in question, the pleas of the respondents, setting up laches on the part of the appellant and the statute of limitations, became immaterial issues, and it was not necessary for the court to make findings thereon. Our views as expressed above render it unnecessary for us

to consider other points made in appellant's briefs.

The trial court upon sufficient evidence having found that the appellant had no interest in the land from which the oil and gas have been produced, it follows that the appellant has failed to establish any right, title, or interest in or to said oil or gas, and therefore is not entitled to any of the proceeds therefrom, nor to any accounting thereof.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.

208 Cal. 6

In re SHATTUCK. (L. A. 11181.)

Supreme Court of California. Aug. 20, 1929.

1. Attorney and client ☞57—"Review," as used in statute relating to petition to Supreme Court to review decision of board of bar governors, means re-examination of entire case (St. 1927, p. 38).

"Review," as used in St. 1927, p. 38, relating to petition to Supreme Court in disbarment proceedings to review decision of board of bar governors, does not have limited meaning of writ of review or certiorari, as defined in Code Civ. Proc. § 1067, but means a re-examination of entire record.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Review.]

2. Constitutional law ☞48—Statute is not to be declared unconstitutional, unless it clearly so appears.

Act of state Legislature is not to be declared unconstitutional and void by courts, unless it appears that there is a clear repugnancy between terms of act and Constitution, and where reasonable doubt exists, from consideration of act as whole, as to whether it is repugnant, it should be held constitutional.

3. Attorney and client ☞56—Supreme Court orders are only orders which work disbarment, decision of Board of Bar Governors being only recommendatory (St. 1927, p. 38).

Under St. 1927, p. 38, any decision which Board of Bar Governors may be empowered to make in proceeding pending before it is merely recommendatory in character, and only orders which have effect of working disbarment of a person are final orders of Supreme Court.

4. Constitutional law ☞56—Statute creating Board of Bar Governors held not unconstitutional, as investing board with judicial powers (St. 1927, p. 38; Const. § 1, art. 3).

St. 1927, p. 38, creating Board of Bar Governors, does not violate Const. § 1, art. 3, relative to distribution of governmental power, as statute does not invest such board with judicial powers.

5. Attorney and client ☞38—Conduct of attorney in handling estate as executrix and failing to distribute same held to justify disbarment.

Where attorney, as executrix of estate, received money, but failed to distribute same, and, when removed as executrix, refused to turn over residue of estate, conduct held to justify disbarment.

In Bank.

Petition by Maud Stillwell Shattuck to review an order of the Board of Governors recommending her disbarment as an attorney. Order affirmed.

Walters & Mauk, of Los Angeles, for petitioner.

Thos. C. Ridgway, of Los Angeles, for respondent Bar Association.

Sylas S. Meyer, of Los Angeles, for respondent accuser.

PER CURIAM. The petitioner herein applies to this court for a review and reversal of the findings, resolution, and order of the Board of Governors of the State Bar of California, made and entered upon certain proceedings for her disbarment as an attorney and counselor at law, wherein and after a hearing thereon the said Board of Bar Governors ordered "that the said Maud Stillwell Shattuck, also known as Mary Maud Stillwell, be and she is hereby disbarred and precluded from practicing law in any of the courts of this state, and that her name be stricken from the roll of attorneys." In view of the fact that this is the first of a number of similar applications to be submitted to this court for its action thereon, and of the further fact that the questions, other than those of fact discussed therein, are in the main identical with those presented in the instant proceeding, we deem it advisable to devote to this a more extended discussion than will be required in later cases brought here for review.

[1] The petition herein is presented under the provisions of section 26 of the State Bar Act (Stats. 1927, p. 38), which provides that "any person so disbarred or suspended may, within sixty days after the filing of said certified copy of said decision, petition said Supreme Court to review said decision." The term "review," as used in this and in certain other portions of the act, we do not understand to bear the limited significance attributed to the "writ of review or certiorari," as the same is defined and the functions thereof stated in section 1067 et seq. of the Code of Civil Procedure. To give it such limited meaning would result, not only in narrowing the powers of this court to the single issue of jurisdiction in the board to make such order, but would also be to consider said board as being invested with judicial functions, which, under the inhibition of section 1 of

article 3 of the state Constitution, the legislative department of the state government has no power to repose in such a board. The review of the evidence, findings, and conclusions of the Board of Bar Governors which this term contemplates consists, and should consist, in a re-examination by this court of the entire record of the proceedings before said board as these are required to be kept and in due course transmitted to this court under the provisions of section 26 of the State Bar Act.

The petitioner makes a number of contentions assailing the constitutionality of the State Bar Act. Those of her contentions in that behalf, to which her counsel devotes the larger portion of his brief in support of this petition, have been answered adversely to said contentions in the two cases recently decided by this court, entitled *State Bar of California v. Superior Court*, 278 P. 432, and *In re Cate*, 279 P. 131. In addition to these the petitioner makes certain other contentions affecting the constitutionality of the act in question, which we do not deem to have sufficient merit to require a separate review. The only remaining contention of the petitioner wherein she attacks the constitutionality of said act has relation to the question as to whether or not the Legislature has undertaken by the terms of said act to invest the Board of Bar Governors of the state bar of California with judicial powers to be exercised with respect to the disbarment, suspension, or discipline of attorneys and counselors at law who are or who may become members of that organization. The insistence of the petitioner in that regard might seem to lead us in the direction of an extended and most interesting historical inquiry into the origin and development of the legal profession under the English and then later under the American systems of jurisprudence, were it not for the fact that we are confronted with the primary consideration as to whether the said act, when considered as a whole, is to be interpreted as an attempt to invest the Board of Bar Governors with any such judicial or even quasi-judicial power.

[2] It is a long-established and well-settled rule of statutory construction that an act of the state Legislature is not to be declared unconstitutional and void by the courts, unless it shall appear that there is a clear repugnance between the terms of the act and the inhibitions of the Constitution, and that where there exists a reasonable doubt from the consideration of the act as a whole as to whether it is repugnant to the Constitution the courts should hold it to be constitutional. This principle was declared by this court in the early and leading case of *Bourland v. Hildreth*, 26 Cal. 161, and has been consistently adhered to in the later decisions of this tribunal. Bearing in mind this principle, and giving the same full application to those pro-

visions of said act which purport to define the powers of the Board of Bar Governors to be exercised in the matter of the disbarment, suspension, or discipline of attorneys and counselors at law who, by virtue of their membership in said organization, are subject to the exercise of the powers with which said board is invested, we find that these are chiefly set forth in section 26 of the State Bar Act, which reads as follows:

"The Board of Governors shall have power, after a hearing for any of the causes set forth in the laws of the state of California warranting disbarment or suspension, to disbar members or to discipline them by reproof, public or private or by suspension from practice, and the board shall have power to pass upon all petitions for reinstatement. The Board of Governors shall keep a transcript of the evidence and proceedings in all matters involving disbarment or suspension and shall make findings of fact and a decision thereon. Upon the making of any decision resulting in disbarment or suspension from practice said board shall immediately file a certified copy of said decision, together with said transcript and findings, with the clerk of the Supreme Court. Any person so disbarred or suspended may, within sixty days after the filing of said certified copy of said decision, petition said Supreme Court to review said decision or to reverse or modify the same, and upon such review the burden shall be upon the petitioner to show wherein such decision is erroneous or unlawful. When sixty days shall have elapsed after the filing of said certified copy, if no petition for review shall have been filed, the Supreme Court shall make its order striking the name of such person from the roll of attorneys or suspending him for the period mentioned in said decision. If, upon review, the decision of said Board of Governors be affirmed, then said court shall forthwith make said order striking said name from the rolls or of suspension. The board shall have power to appoint one or more committees to take evidence and make findings on behalf of the board, or to take evidence on behalf of the board and forward the same to the board with a recommendation for action by the board. Nothing in this act contained shall be construed as limiting or altering the powers of the courts of this state to disbar or discipline members of the bar as this power at present exists."

[3, 4] It is the contention of the petitioner that the portion of the foregoing section which provides that "the Board of Governors shall have power * * * to disbar members or to discipline them by reproof, public or private, or by suspension from practice, and the board shall have power to pass upon all petitions for reinstatement," clearly invests the Board of Bar Governors with powers which are essentially judicial in charac-

ter. But, when the further provisions of said section come under review, it becomes manifest that the powers with which the Board of Bar Governors are invested under the earlier and foregoing clause in said section possess no finality whatever in effecting the disbarment or suspension or discipline of any person subjected to the processes of the act, since we find it to be provided therein that, "upon the making of any decision resulting in disbarment or suspension from practice said board shall immediately file a certified copy of said decision, together with said transcript and findings, with the clerk of the Supreme Court," and that it is further provided therein that any person affected by such decision may within a specified period of time petition the Supreme Court for a review of said decision, and that "when sixty days shall have elapsed after the filing of said certified copy, if no petition for review shall have been filed, the Supreme Court shall make its order striking the name of such person from the roll of attorneys or suspending him for the period mentioned in said decision"; and it is further provided that "if, upon review, the decision of said Board of Governors be affirmed, then said court shall forthwith make said order striking said name from the rolls or of suspension." The section in question closes with the significant statement that "nothing in this act contained shall be construed as limiting or altering the powers of the courts of this state to disbar or discipline members of the bar as this power at present exists."

In the presence of the foregoing and latter quoted provisions of section 26 of the act it would seem to be manifest that the only order or orders which are provided for therein, and which have or were intended to have the effect of working the disbarment, suspension, or discipline of any person who might be subjected to the powers and processes with which the Board of Bar Governors are invested, are the final orders which are to be made by this court under the provisions of said act, and that any decision which the Board of Bar Governors may be empowered or minded to make in a proceeding pending before it is merely recommendatory in character, and has no other or further finality in effecting the disbarment, suspension, or discipline of those persons who may be brought before said board for an alleged violation of the terms of the act and of the professional and ethical requirements set forth therein. If the foregoing is to be held, as we clearly think it is, to express the full measure of the legislative intent in the formulation of said section, it follows necessarily that the Board of Bar Governors created under the provisions of the act have not thereby been invested with any powers which can be said to possess the finality and effect of judicial orders, and that in that respect, at least, the Legislature in the passing of the act cannot be held to

have in any degree violated the inhibition of section 1 of article 3 of the state Constitution relative to the distribution of governmental powers.

[5] With respect to the facts underlying the present proceeding, as these are fully set forth in the record before us, we have made a careful examination of such record, and without undertaking to state in detail said facts we are fully satisfied that the petitioner in her relation to the estate of Nicholas John Steiner, both in her capacity as the executrix of said estate and of an attorney and counselor at law during the entire period of her administration thereof, has been guilty of such irregularities and of such a degree of dilatoriness and neglectfulness with regard to the affairs of said estate so grossly inconsistent with her trust and duty as such executrix, and with her oath and obligations as an attorney and counselor at law, as to justify her disbarment. The properties of said estate came into the possession of the petitioner when she was appointed executrix of the last will and testament of said decedent, to serve without bonds, in August, 1917. The estate, consisting chiefly of real property, was appraised at \$2,000 in value, and was sold by the petitioner to one of her sisters for the sum of \$2,050, which sum of money came into the possession of petitioner when the sale was confirmed by the court on December 15, 1920, subject to certain debts of the decedent and to the charges of administration.

The petitioner, as such executrix, took no action looking to a distribution of the residue of said estate and filed no account therein until the year 1924, when, upon application made by the heirs and legatees of said deceased, the petitioner was removed from her position as executrix because of her neglect of the business of the estate, and one Harold J. Turney was appointed administrator thereof with the will annexed. Since such appointment said administrator has persistently, but vainly, sought to have the petitioner turn over to him the residue of said estate, consisting of the sum of \$850.91, according to the decree of the probate court settling the petitioner's account as such executrix, which was made and entered on July 16, 1926, and from which no appeal was taken. Notwithstanding the finality of such decree, the petitioner has wholly failed to comply with the terms thereof, but on the contrary, has pursued a policy of evasiveness and delay which has thus far prevented the heirs and legatees of said estate from receiving any portion whatever of their respective shares in the residue thereof.

It was this condition of affairs which led to the application for the petitioner's disbarment presented to and heard before the appropriate committee of the Board of Bar Governors of the State Bar, which, after a quite full and careful investigation, reported its

conclusions to the State Bar and the Board of Bar Governors thereof, and which latter body, adopting said report, has recommended to this court the disbarment of the petitioner as an attorney and counselor at law. We are satisfied that such recommendation is justified by the facts of the case.

It is therefore ordered that the petitioner, Maud Stillwell Shattuck, also known as Mary Maud Stillwell, be and she is hereby disbarred from the further practice of law in this state as an attorney and counselor, and that her name be and is hereby stricken from the roll of attorneys and counselors at law of the state of California.

207 Cal. 739

PATTERSON et al. v. SPRING VALLEY WATER CO. (S. F. 12451.)★

Supreme Court of California. July 31, 1929.

Rehearing Denied Aug. 29, 1929.

1. Appeal and error ⇨882(3)—Plaintiffs trying action on other theory could not contend that they were entitled to enjoin diversion of water because of common-law appropriation.

Plaintiffs, in action to enjoin defendant from obstructing and diverting waters of creek, could not contend for first time on appeal that they were entitled to judgment because of common-law appropriation by them of waters involved, where case was tried on theory that plaintiff claimed riparian right.

2. Judgment ⇨570(6)—Plaintiffs, in action to enjoin obstruction and diversion of waters, held bound by judgment of dismissal in another action based on agreement of settlement between parties.

Judgment of dismissal in suit by water district, based on an agreement of settlement between the parties, wherein water commission under agreement made investigations and fixed terms and conditions on which water company might store and divert waters without interfering with underground supply of landowners, held *res judicata* in suit by plaintiffs to enjoin obstruction and diversion of waters of a certain stream, where plaintiffs knew of agreement, participated in its negotiations, and approved it, and one of plaintiffs was a director in the water district.

In Bank.

Appeal from Superior Court, Alameda County; H. D. Burroughs, Judge.

Action by H. H. Patterson and another against the Spring Valley Water Company. Judgment adverse to plaintiffs, and they appeal. Affirmed.

H. M. Wright, of San Francisco, for appellants.

McCutchen, Olney, Mannon & Greene, of San Francisco (Warren Olney, Jr., and Robert L. Lipman, both of San Francisco, of counsel), for respondent.

PER CURIAM. This is an appeal by the plaintiffs from a judgment against them in an action to enjoin defendant from obstructing and diverting the waters of Alameda creek. It is difficult to state the facts in detail without reference to maps and charts, and an adequate representation of all the physical features of the lands, water courses, sloughs, channels, banks, etc., which have a bearing upon this litigation would be an unnecessary extension of this opinion.

The following brief, general statement of the facts we take from the appellants' opening brief, as it is a correct general statement, in so far as it goes, of what is shown by the pictures, maps, and schedules introduced in evidence:

Plaintiffs own and operate a ranch of about 3,500 acres, raising thereon sugar beets, potatoes, and other vegetables, and also alfalfa and some hay. It lies between Alvarado and Centerville, in Alameda county, and extends in a continuous tract, separated only by county roads, from Alameda creek to the tidelands adjoining the bay of San Francisco. Plaintiffs claim no rights, however, by reason of the contiguity of a portion of their lands to the low-water channel of Alameda creek, for the reason that the defendant, years before this litigation, acquired by condemnation from its then owner the right to divert all the water of the creek.

As Alameda creek nears its point of discharge into the bay, it divides into several channels or delta mouths. The oldest channel, the one of lowest elevation, called in the record Alameda creek proper, feathers out to nothingness on the borders of Alvarado, and its waters, even in the lowest flow, spread widely before finally collecting themselves in the various salt-water sloughs of the bay shore. Two other channels of discharge, known as Crandall slough and The Splits, take off the older channel at points higher up, and at different elevations above the bottom of Alameda creek, and proceed through plaintiffs' lands to a point of discharge in a salt-water slough of San Francisco bay, locally known as Patterson slough or Coyote Hills slough. Crandall slough has existed without change of location on the ground since 1852. There is a dispute between the parties as to the length of time The Splits channel has been in existence, but the court has found that it has been in existence since 1915.

In the natural course of the flow of these two streams, the waters, which are usually in large volume, naturally spread widely on each side of their main channels because of the flatness of the country, especially along the bay shore. In 1900 plaintiffs erected a levee across Crandall slough at its terminal and also along the western boundaries of the ranch, for the purpose of keeping out the salt water of Patterson slough, and in later years other levees have been built for the same pur-

pose. The flooding caused by these levees and by the embankments of county roads and of the railroad traversing the property has not only resulted in an irrigation of about 1,200 acres of plaintiffs' land, but the heavy burden of silt carried by the winter flow of Alameda creek, especially the heavy floods, has annually fertilized the flooded area by sedimentation, and in addition, these silt-laden waters have built up and reclaimed a large area of former salt marsh by sedimentation and by leaching out the alkali from the underlying marsh soil. This process was continuous and cumulative until the acts of defendant cut down the flow of Alameda creek.

Prior to the filing of the complaint herein on October 2, 1920, defendant for many years had diverted water from Alameda creek, first at the Niles dam and later at the Sunol dam. In 1911 plaintiffs served a protest on defendant objecting to its diversions, and to threatened further diversion by the Calaveras dam of defendant, and these protests were repeated in later years. Defendant was engaged in erecting the Calaveras dam when the complaint was filed, but had not completed it, nor diverted any water by means of it, at the time of the trial. Intended diversions by defendant of other tributaries of Alameda creek, as its needs required, were admitted.

Plaintiffs claim the right to the accustomed high flow of Alameda creek under three alleged sources of title: First, as riparian proprietors along the high-water channel of discharge of Alameda creek known as Crandall slough; second, as riparian proprietors along The Splits, a similar high-water channel, flowing at a much lower stage than Crandall slough; third, as landowners overlying an underground body of water fed and maintained by Alameda creek.

The trial court found that Crandall slough was not a natural water course, as it did not have the physical characteristics of a water course, and that The Splits was an artificial and not a natural channel. The only questions presented by the appeal with reference to the first two contentions of plaintiffs is whether or not these findings with reference to Crandall slough and The Splits are sustained by the evidence.

As to the third contention of plaintiffs and appellants, with reference to underground or percolating waters, the defendant admits that the ground waters of the plaintiffs' land are in large part replenished or supplied by percolation from Alameda creek, and does not contend that it has a right to reduce or diminish the supply of underground water to the plaintiffs' lands. However, defendant claims that its operations, conducted as the defendant intended and was bound to do, would not reduce or diminish the supply of underground water to the plaintiffs' lands. The lands of the plaintiffs are within the Alameda county water district, and by agree-

ment between the defendant and the water district, acting on behalf of the owners of the land within it, there had been submitted to the state water commission the question as to what were the terms and conditions, if any, upon which the defendant might store and divert water from the creek without affecting the supply of underground water. The state water commission made its award prescribing certain terms and conditions upon which it found the defendant might store and divert water without affecting the supply of underground water. The defendant contended that operations conducted in accordance with these terms and conditions would not affect plaintiffs' underground water rights. Defendant also contended that the plaintiffs were bound by a certain judgment in favor of defendant, rendered in an action brought against it by the Alameda county water district on behalf of and as the representative of landowners within the district, among whom were the plaintiffs, to protect the ground water rights of such owners. This action was brought and prosecuted with the personal knowledge, consent, and co-operation of the plaintiffs, and with the intention on their part of relying on the judgment therein if a favorable judgment were obtained. Judgment went against the district on the ground that it had, by agreement, submitted to the state water commission the question as to the conditions upon which the defendant could store and divert water without affecting the supply of underground water for the lands within the district, and the water commission had prescribed these conditions, and the defendant was complying with them.

[1] We have examined the record for evidence upon which the findings with reference to Crandall slough and The Splits might be based, and we consider the evidence sufficient to support the findings, which concludes the first inquiry raised upon the appeal. But appellants contend that, if this court holds that The Splits is an artificial channel, created by appellants' work in 1915 and the years following, then appellants are common-law appropriators of the water contained therein, and are entitled to an injunction against all diversions by respondent from Alameda creek and its tributaries above The Splits, excepting diversions at Sunol, valid by prescription, and diversions under the Calaveras appropriation, if the latter is valid, but it is also argued that appellants' right by appropriation is superior also to the Calaveras appropriation because of respondent's failure to prosecute that work with diligence. This position is met by respondent by pointing out that the plaintiffs did not plead common-law appropriation, nor was any evidence introduced for the purpose of showing appropriation, and the case was tried upon the theory that plaintiffs claimed a riparian right, and that the contention of appropriation is

made in this court for the first time. It is well settled that this may not be done; the case may not be tried in an appellate court without pleadings or evidence directed to the issues made in argument in such court.

[2] As to the third contention of appellants that they are entitled to the water as owners of land overlying an underground body of water, fed and maintained by Alameda creek, we think the defense of *res judicata* is available to defendant. The matter has been concluded by the recent case of *Coachella Valley County Water District v. Stevens* (Cal. Sup.) 274 P. 538. Appellants seek to avoid the force of the holding in the case last cited by the claim that the judgment in the water district suit was not a judgment on the merits and therefore not a judgment in bar.

The judgment in the case of *Alameda County Water District v. Spring Valley Water Co.*, 67 Cal. App. 533, 227 P. 953, was one of dismissal, based upon an agreement of settlement between the parties. The agreement is contained in the transcript on appeal. It recites, in effect, that the lands within the district are underlaid by water bearing strata supplied from Alameda creek; that yet there are at times large amounts of water which pass down the creek and into the bay without seeping into the underground strata; and that the parties have, for want of data, been unable to agree upon any arrangement that would permit the water company to store and divert additional water from the creek without injury to the landowners. It is further recited that the parties desired to obtain, under the direction of a competent and disinterested board, the data necessary for a fair and intelligent solution of the problem, and then to have such board determine, if it could, what would be a fair and intelligent solution.

Upon the basis of these recitals, the agreement goes on to provide that the state water commission, as then constituted, should gather the necessary data, the water company bearing the expense, and, when the commission had, in its opinion, sufficient data, it should then, if it could, fix the terms and conditions upon which the water company might store and divert additional water without damage to the landowners. It was also provided that, should the commission reach such a decision, such decision was to be final and conclusive upon the parties. Pending a decision by the commission, it was agreed that the water district suit should not proceed further, and, if a decision should be reached by the commission, the suit was to be dismissed, but that, if the commission was un-

able to reach a decision, the suit should then proceed as the parties might be advised, without prejudice because of the intervening lapse of time. It was also agreed that, if the commission reached a decision, the district would use its best efforts to have the same acquiesced in and observed by all the landowners of the district. According to the findings of the trial court in the instant case, the plaintiffs herein knew of this agreement, participated in its negotiations, knew its terms, and approved of it. One of the Pattersons was a director in the water district.

The water commission made the investigations contemplated over a period of years and at the expense of the water company, and then gave a decision, fixing the terms and conditions upon which the water company might store and divert water without interfering with the underground supply of the landowners. After the decision of the water commission, the water company moved that the action between itself and the water district be dismissed on the ground that the district and its coplaintiffs were bound by the agreement to dismiss it, and this motion was granted and the action dismissed.

"It has been frequently held that a judgment or order dismissing an action based upon a stipulation or agreement of the parties settling and adjusting the claim or cause of action in suit and providing for the dismissal is a bar to another action for the same cause. Such a judgment has sometimes been said to be the equivalent of a *retraxit* at common law." 2 *Freeman on Judgments* (5th Ed.) p. 1596.

In *Crossman v. Davis*, 79 Cal. 603, 21 P. 963, it was said: "The only real question presented by the record is, whether or not a certain agreement between the grantors of the parties to this action, by which said parties compromised and dismissed an action pending between them, involving the title to this same property, was a bar to the plaintiff's claim to an interest therein. The court below found that the dismissal of the action under a special agreement involving other disputed matters was sufficient to bar the plaintiff's claim, and in this we think the court was right. *Merritt v. Campbell*, 47 Cal. 542."

The conclusions we have reached make it unnecessary to discuss other matters developed by appellants at great length in their briefs, but presented for decision only upon the assumption that one or the other of the channels involved here is a natural water course, contrary to the findings, and that the plaintiffs and appellants have riparian rights therein.

The judgment is affirmed.

BUCHANAN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6927.)★

District Court of Appeal, First District, Division 1, California. Aug. 5, 1929.

Rehearing Denied Sept. 4, 1929. Hearing Granted by Supreme Court Oct. 3, 1929.

- 1. Evidence ⇨82—Legal presumptions aid record only as to acts or facts on which record is silent.**

Legal presumptions do not come to the aid of the record except as to acts or facts touching which record is silent.

- 2. Evidence ⇨82—Where record is silent, it is presumed that what should have been done was rightly done.**

Where record as to acts or facts is silent, it will be presumed that what ought to have been done was not only done, but rightly done.

- 3. Evidence ⇨82—It will not be presumed that something different was done than record stated.**

Where record states what was done, it will not be presumed that something different was done.

- 4. Courts ⇨39—In determining whether jurisdiction appears, whole record must be consulted.**

In determining whether want of jurisdiction appears, whole record must be consulted, and, notwithstanding that portion thereof recites facts and acts done which, if record were otherwise silent, would make it affirmatively show want of jurisdiction, yet, if in another part further acts or facts not irreconcilable with former be recited which establish jurisdiction, it is sufficient to uphold judgment.

- 5. Insane persons ⇨33(2)—On certiorari to review order appointing guardian presumption is court performed duty, where petition averred that citation was issued to incompetent by court pursuant to order (Code Civ. Proc. § 1963, subd. 15).**

Where it was not only averred in petition in guardianship proceedings that citation to alleged incompetent was issued by court for him to appear at hearing to have guardian appointed for him, but that citation recited that it was issued pursuant to order of court, it must be presumed, on certiorari to review order declaring petitioner incompetent person and appointing guardian of his person and estate, that court regularly performed official duty, under Code Civ. Proc. § 1963, subd. 15, relating thereto.

- 6. Affidavits ⇨18—Affidavits, though not best evidence, are admissible regarding matters incidental to main proceedings, or as basis of preliminary action.**

While affidavits are not in their nature best evidence of issuable facts, they are as general rule admissible in evidence regarding matters which are incidental to main proceedings, or as basis of some preliminary action.

- 7. Insane persons ⇨33(1)—Evidence of physician's affidavit held sufficient to support court's implied conclusion of incompetent's inability to attend proceedings (Code Civ. Proc. § 1763).**

Where sworn statement of physician in guardianship proceedings showed alleged incompetent was under his care and in condition which rendered him unable to attend proceedings, as required by Code Civ. Proc. § 1763, evidence held sufficient to support implied conclusion of court that alleged incompetent was unable to attend.

- 8. Insane persons ⇨33(2)—Truth of physician's affidavit that alleged incompetent was unable to attend guardianship proceedings held not reviewable on certiorari.**

Where physician's affidavit showing alleged incompetent was unable to attend guardianship proceedings which was attached to citation showed that it was served upon alleged incompetent, it was prima facie evidence of that fact and question whether affidavit was true or false cannot be reviewed in certiorari proceeding by incompetent to review order declaring him incompetent and directing issuance of letters of guardianship.

- 9. Insane persons ⇨33(2)—Order appointing guardian for incompetent held not reviewable if there was any evidence before lower court on which it might act.**

While District Court of Appeal may inquire into question as to whether or not there was any evidence in guardianship proceeding to prove jurisdictional facts, its inquiry is limited to that upon which lower court acted, and, if there was evidence before that tribunal upon which it might act, its order adjudging person incompetent and appointing guardian will not be reviewed.

- 10. Certiorari ⇨64(2)—Province of certiorari is to review record and determine whether subordinate tribunal exceeded jurisdiction.**

Province of certiorari is to review record and to determine therefrom whether subordinate tribunal has exceeded its jurisdiction.

- 11. Certiorari ⇨66—On certiorari, every intentment must be made to support judgment.**

On certiorari, every intentment must be made to support judgment.

Application by Findley Buchanan by his guardian ad litem, Thos. D. Aitken, for certiorari against the Superior Court in and for the City and County of San Francisco, and another, to review an order of respondent court declaring petitioner incompetent and appointing a guardian. Writ denied.

Aitken & Aitken, of San Francisco, for petitioner.

Robert McMahon, of San Francisco, for respondents.

PER CURIAM. A proceeding to review an order by respondent court declaring petitioner, who appears herein by his guardian ad

litem, to be an incompetent person, and directing the issuance of letters of guardianship of his person and estate.

The petition for letters was filed by William Buchanan, a brother, on January 21, 1929, whereupon an order appointing Saturday, January 26, 1929, at the hour of 10 a. m., as the day and hour for hearing the petition, and directing notice thereof to be given, was made by respondent court. This order directed notice to be given "to Patrick Flannery, the person having the care of said Findley Buchanan, and to the following named relatives of Findley Buchanan residing in this city and county, to wit, William Buchanan, brother, by citation to be served on said parties at least five days before the hearing."

The petition in the present proceeding alleges that "on the same date, to-wit, January 21, 1929, a citation was issued by respondent court, directing your petitioner to be and appear in the courtroom" of the court on the day and at the hour fixed by the order. This citation, which named petitioner and directed him to show cause why a guardian of his person and estate should not be appointed, was attested by the clerk of the court, with its seal attached, and recited that the same was issued by order of the court. According to an affidavit attached to the citation, which was dated January 22, 1929, and filed therewith, the citation was personally served upon petitioner on the day of its issuance. Petitioner did not appear at the hearing, but there was filed on that date a writing, purporting to have been signed and sworn to by a physician, stating that petitioner was under his care, and treatment, and that his physical and mental condition was such that it would be impossible for him to be present.

Petitioner contends that respondent was without jurisdiction to declare him to be incompetent or to appoint a guardian of his person or estate for the following reasons, namely: That no order directing the service of a citation upon him was made, that, notwithstanding the affidavit of service, no citation was in fact served upon him, and that the sworn statement filed by the physician was insufficient to excuse compliance with the requirement of section 1763 of the Code of Civil Procedure, that an alleged incompetent, if able to attend, shall be produced at the hearing. The above section also provides that, upon the filing of the affidavit, "such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed. * * *" The order fixing the time and place of hearing contained no direction that a citation to the alleged incompetent be issued or served, and no finding appears in the order appointing the guardian that such notice was required or given. The latter order recited that the petition came on regularly for

hearing "upon due proof to the satisfaction of said court that notice has been given to the relatives of said Findley Buchanan residing in this city and county, as required by law and as directed by this court. * * *" It is contended that the above order shows what notices of the hearing were caused to be given; that consequently the rule that, when the record states what was done, it will not be presumed that something different was done, applies, and it cannot be presumed that an order was made directing a notice to the alleged incompetent.

[1-4] As was held in the leading case of *Hahn v. Kelly*, 34 Cal. 391, 407, 94 Am. Dec. 742, the rule by which inspection of the record is governed is that legal presumptions do not come to the aid of the record except as to acts or facts touching which the record is silent. In such case it will be presumed that what ought to have been done was not only done, but rightly done; but, where the record states what was done, it will not be presumed that something different was done. In determining, however, whether a want of jurisdiction appears, the whole record must be consulted, and, notwithstanding that a portion thereof recites facts and acts done which, if the record were otherwise silent, would make it affirmatively show want of jurisdiction, yet, if in another part further acts or facts not irreconcilable with the former be recited which establish jurisdiction, it is sufficient to uphold the judgment.

[5] The present is a case where the presumption that official duty has been regularly performed (Code Civ. Proc. § 1963, subd. 15) should apply, as it is not only averred in the petition that a citation directed to the alleged incompetent was issued by respondent, but the citation recites that it was issued pursuant to the order of the court. The conclusion that such an order was made would not contradict the recitals in the order of appointment, but would be reconcilable therewith. Both acts may have been done, and to so hold would not only be consistent with the record, but in accord with the presumption.

[6, 7] With regard to the sufficiency of the evidence to prove the inability of the alleged incompetent to attend the hearing, the record with the exception of the sworn statement of a physician does not disclose the evidence considered by the court on the question, and it is not alleged that no other evidence was adduced at the hearing. While affidavits are not in their nature the best evidence of issuable facts, they are as a general rule admissible in evidence regarding matters which are incidental to the main proceedings, or as the basis of some preliminary action. 2 Corp. Jur. "Affidavits," § 138, pp. 372, 373. Such was its purpose here, and we cannot say from the record that the evidence before the court was insufficient to support its implied con-

clusion that the alleged incompetent was unable to attend.

[8-11] The affidavit attached to the citation shows that the same was served upon petitioner. This was prima facie evidence of the fact; and the question whether the affidavit was true or false cannot be reviewed in this proceeding. While this court may inquire into the question as to whether or not there was any evidence whatever to prove the jurisdictional facts (*Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 P. 35), its inquiry is limited to that upon which the lower court acted (*City of Los Angeles v. Young*, 118 Cal. 295, 50 P. 534, 62 Am. St. Rep. 234; *Chambers v. Supervisors*, 57 Cal. App. 401, 207 P. 288); and, if there was evidence before that tribunal upon which it might act, its order will not be reviewed (*Miller & Lux v. Supervisors*, 189 Cal. 254, 208 P. 304). The province of certiorari is to review the record, and to determine therefrom whether the subordinate tribunal has exceeded its jurisdiction. The reviewing court is bound thereby, and every intendment must be made to support the judgment. *Roe v. Super. Ct.*, 60 Cal. 93; *Halpern v. Super. Ct.*, 190 Cal. 384, 212 P. 916. In the present instance the jurisdictional facts are sufficiently shown by the record, and the writ is accordingly denied.

100 Cal. App. 338

ADJUSTMENT CORPORATION v. MARCO.★ (Civ. 6721.)

District Court of Appeal, First District, Division 1, California. Aug. 13, 1929.

Rehearing Denied Sept. 12, 1929.

1. Judgment $\S$ 253(1)—In action on assignment for rent, it was error to award sum for rent additional to that demanded.

In action on assignment for four months' rent, trial court erred in awarding additional sum for rent accruing between commencement of action and rendition of judgment.

2. Landlord and tenant $\S$ 232—Assignment of rent transferred right to attorney's fee provided for in lease (Civ. Code, $\S$ 1084).

Where lease provided for attorney's fee in case of suit to enforce lessors' rights, party suing on assignment of rent could recover such fee, as under Civ. Code, $\S$ 1084, the transfer of a thing transfers all its incidents, unless expressly excepted.

3. Landlord and tenant $\S$ 184(2)—Where lease was in force, court properly refused to apply security deposit on rent sued for.

Where lessee deposited money as security for faithful performance of covenants of lease which provided that, if lessee faithfully performed all covenants, lessor was to apply said deposit on account of last month's rent, court

properly refused to apply deposit on rent sued for, as lease was still in force.

4. Landlord and tenant $\S$ 184(2)—If lease was terminated on lessee's default, lessor could retain only that amount of security deposit necessary to cover damages.

Default of lessee would not forfeit security deposit, but on termination of lease, lessor would be allowed to retain only amount necessary to cover damages resulting from lessee's breach.

5. Appeal and error $\S$ 1011(1)—Trial court's findings on conflicting evidence are conclusive.

Findings of trial court on conflicting evidence are conclusive.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the Adjustment Corporation against Albert B. Marco. From a judgment for plaintiff, defendant appeals. Judgment modified, and, as modified, affirmed.

Thomas P. White, of Los Angeles, for appellant.

Black, Hammack & Black, of Los Angeles (Carey McWilliams, of Los Angeles, of counsel), for respondent.

PER CURIAM. Action to recover \$2,000, being four months' rent of certain premises leased to the defendant by Frank McCoy and Florence McCoy, his wife, who by an instrument in writing assigned to the plaintiff their claim therefor. The plaintiff also asked for the sum of \$250 as an attorney's fee for prosecuting the action, the lease between the McCoy's and the defendant having provided that, if suit should be brought by the lessors against the defendant to enforce any of their rights under the lease, the defendant should become liable for a reasonable attorney's fee.

The answer of the defendant denied the material allegations of the complaint; and as a separate defense averred that he had been induced to enter into the lease by means of certain false representations, and that, after entering into possession of the premises, he discovered that they bore a bad reputation by reason of the commission thereon prior to the making of the lease of violations of the liquor laws of the United States and of acts of immorality, in consequence of which he was unable to conduct a profitable business thereon, whereupon he sought and obtained from the lessors a cancellation of the lease, relinquishing to them in consideration thereof the sum of \$500, theretofore held by them as security for performance on his part of the terms of the lease. Defendant also pleaded the same facts by way of estoppel as a third defense, alleging that by reason thereof he was induced to surrender the premises to the lessors.

A trial being had, the court filed findings of fact and conclusions of law, in which it found the allegations of the complaint to be true, and found against the allegations of the defendant's second and third defenses, and entered judgment in favor of the plaintiff in the sum of \$3,375, being \$2,000, the amount of rent sued for, \$1,125 for rent of the premises accruing between the time of the commencement of the action and the rendition of judgment, and \$250 for an attorney's fee.

The defendant has taken an appeal from the judgment and urges as grounds therefor that the court was in error in awarding to plaintiff any sum for rent additional to that demanded in the complaint; that the court also erred in allowing to the plaintiff an attorney's fee; that the court was in error in not crediting the defendant with the sum of \$500 held by the lessors as security; and, finally, that the findings in favor of the plaintiff and against the defendant, particularly on the defendant's affirmative defenses, are not supported by the evidence.

[1] The appellant's contention on the first point we think must be sustained. The only evidence in the case supporting any right on the part of the plaintiff to recover any sum whatever from the defendant is his written assignment of the sum of \$2,000, being rental for four months. The assignment reads as follows: "Los Angeles, California April 24, 1925. In consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration, receipt whereof is hereby acknowledged, we hereby assign, set over, and transfer to the Adjustment Corporation, a corporation, all right, title and interest in and to a certain claim for Two Thousand and 00/100 Dollars (\$2,000.00) against Albert B. Marco on account of rental of a certain premises near Sawtelle, California, for the months of January, February, March, and April, 1925, at the rate of Five Hundred and 00/100 Dollars (\$500.00) per month. Frank McCoy Florence McCoy." It is well settled that an assignee cannot recover in the absence of an allegation and proof of his assignment. *Read v. Buffum*, 79 Cal. 77, 21 P. 555, 12 Am. St. Rep. 131; *King v. Felton*, 63 Cal. 16; *Lapique v. Denis et al.*, 23 Cal. App. 683, 139 P. 237. There is no evidence in the record of any assignment, either oral or written, of rent accruing after the commencement of the action—even assuming that such rent could be recovered in this action. The respondent makes some contention that there was a delivery of the lease to it by the lessors, and that we should infer therefrom an oral assignment of whatever might be due to them. But there is no evidence in the record that the lease was ever delivered to the plaintiff; and, a fortiori, none as to the intention with which any such delivery was made.

[2] Coming to the appellant's second contention respecting the attorney's fee, we have

no doubt that this amount was correctly allowed. The lease by its terms provided for it in case of suit to enforce any of the rights of the lessors. The right to such fees in that event was an incident to the demand, and a valuable one. If the suit had been brought by the lessors, there is no question but that such an allowance would have been proper. Section 1084 of the Civil Code provides that "the transfer of a thing transfers also all its incidents, unless expressly excepted."

* * * No case precisely in point has been cited in the briefs, but the principle has been frequently applied quite aside from its common application in the case of notes secured by mortgage or pledge, where it is uniformly held that the transfer of the note without mention of the security carries with it the benefit of the security. Thus in *Heisen v. Smith*, 138 Cal. 216, 71 P. 180, 94 Am. St. Rep. 39, it was held that an assignment by a ward of a judgment against the guardian upon the settlement of his accounts operates as an equitable assignment of the ward's cause of action against the sureties of the guardian; and entitles the assignee to maintain an action against them upon their bond. In *Lattimer v. Capay Valley Land Co.*, 137 Cal. 288, 70 P. 82, 84, it was held that an assignment of a contract of sale of real property by the purchaser carried with it all the right which the assignor had by reason of its breach by the vendor, including the right to rescind the contract and recover money expended by the assignor. In support of its conclusion, the court said: "The assignor having parted with his interest in the land, as well as in the contract, of course there was no right left in him to recover the costs of any improvements placed on the land on a breach of the contract by appellant [vendor]. If, then, this right was not left in the assignor, what had become of it? The most satisfactory answer to this question is that it followed the contract; the assignee stands in the shoes of the assignor, and whatever right of recovery was in the assignor on a rescission of the contract passed with the contract to the assignee. We think this principle finds illustration in the well-considered case of *Oneida v. Ontario Bank*, 21 N. Y. 490, wherein it is said: 'He who sells a security and receives his pay for it necessarily sells whatever claim or right the security is understood by the parties to represent.'"

In *Duncan v. Hawn*, 104 Cal. 10, 37 P. 626, it was held that the laborers' lien given by the statute passes by the assignment of the claim by the laborer which the lien is given to secure, and may be enforced by the assignee; and in *Goldman v. Murray*, 164 Cal. 419, 129 P. 462, it was decided that, where a creditor of a corporation takes from it promissory notes evidencing its debt to him, and passes them on in the course of business to his creditor, the assignment of the notes oper-

ates as an equitable assignment of the original indebtedness, notwithstanding that the notes themselves were eventually determined to be invalid as corporate obligations.

We think it clear that the application of this principle in the present case entitled the plaintiff to recover from the defendant the attorney's fee in question in precisely the same manner as his assignors could have done.

[3] Appellant next questions the correctness of the court's refusal to apply on the amount due the plaintiff the \$500 deposited by the defendant as security for the performance of the covenants of the lease. The precise provision in question is in the following terms: "The lessee herewith deposits with the lessors the sum of \$500 as security for the faithful performance by the lessee of all of his covenants hereunder; the lessors may have recourse to said deposit upon three days' written notice to the lessee for any damage they may suffer by reason of any default of the lessee hereunder, in which event the lessee agrees to immediately restore said deposit to its original amount. If the lessee fully performs all of his covenants herein contained, the lessors shall apply said deposit or any part thereof remaining in their hands to the credit of said lessee on account of the last month's rent becoming due hereunder." Since the court found that the lease is still in force and effect, and since by its terms it had at the time of the rendition of the judgment some two years to run, the lessors were not bound to resort to it to indemnify themselves against any particular item of damage, but they could hold it for future protection, especially as, if the lessors had applied any part of it to make good a default in the payment of rent, it immediately became the defendant's duty to restore the deposit to its original amount.

[4] We are not in accord with the contention of the respondent made with respect to this deposit that upon any default by the lessee it was immediately forfeited to the lessors and became their property. We think the rule applicable in the present case is stated in 16 Ruling Case Law (Landlord and Tenant), p. 931, where it is said: "Unless it clearly appears that it was the intention of the parties that the amount deposited was to be retained by the lessor irrespective of the actual amount of damages the stipulation for its retention by or forfeiture to the lessor will be regarded in the nature of a penalty, and the deposit in the nature of a security, and the lessor upon the termination of the lease, though for the default of the tenant, will be allowed to retain only the amount necessary to cover the damage resulting from the lessee's breach of his contract."

[5] The remaining contention of the appellant is that the findings of the court are not

supported by the evidence. Only one point of the appellant's argument under this head need be noticed; namely, that the trial court refused to permit him to prove certain essential parts of his defenses. As we read the record, it does not sustain the contention of the appellant. The court did at the time defendant commenced to put in his case refer to one of the alleged false representations upon which the defendant relied in his attack upon the lease, and stated that it would not hear evidence upon it or any evidence of facts occurring before the time of the alleged cancellation by agreement. As a matter of fact, the allegations in question, even if true, would not have constituted ground for rescission by the defendant of the lease; nor did he in fact attempt a rescission. The court did eventually admit all evidence offered by the defendant tending to prove his defenses of cancellation by agreement and estoppel. The evidence of the defendant and his witnesses upon these matters was directly contradicted by the plaintiff's case, and the findings of the trial court—which are amply sustained—must therefore stand.

In view of the foregoing, we conclude that the judgment must be modified by deducting therefrom the sum of \$1,125, and, as thus modified, it will stand affirmed, the appellant to recover his costs of appeal.

100 Cal. App. 261

PEOPLE v. WHIPPLE. (Cr. 1805.)

District Court of Appeal, Second District, Division 1, California. Aug. 5, 1929.

1. Criminal law ☞9—There is no common-law crime in this state.

In view of Pen. Code, § 6, in this state, common law is of no effect, so far as the specification of what acts or conduct shall constitute crime is concerned.

2. Criminal law ☞31—There is no unwritten or common-law justification for commission of crime.

Where there is no statutory excuse or justification, there is neither common-law nor unwritten law justification for commission of a crime.

3. Escape ☞6—Escaping from an officer was not justified by unsanitary conditions of jail or fear of punishment.

Unsanitary conditions of jail, or fear of inhumane punishment inflicted by custodian, was not justification for escaping from an officer.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

H. Whipple was convicted of the crime of escaping from an officer, and he appeals. Affirmed.

W. E. Balcom and H. Wenzlaff, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of escaping from an officer (section 107, Pen. Code), and from an order denying his motion for a new trial.

It is an admitted fact that defendant, while in the custody of the sheriff under lawful judgment of imprisonment for a misdemeanor, and while working in the prison camp of San Bernardino county, made his escape from the custody of the sheriff and from said prison camp. The sole defense offered is that the conditions existing in the camp, together with the brutal and inhumane treatment of the defendant, made his imprisonment intolerable and justified the escape.

The gist of the point made on appeal herein is that the trial court committed reversible error in instructing the jury that an excuse for the escape of defendant, founded upon any alleged unsanitary conditions, or alleged harsh, brutal, or inhumane treatment received by him at the hands of his custodian, would constitute no defense in the law for the commission of the offense.

[1, 2] In this state the common law is of no effect so far as the specification of what acts or conduct shall constitute a crime is concerned. Section 6, Pen. Code; 7 Cal. Jur. 841. In order that a public offense be committed, some statute, ordinance, or regulation prior in time to the commission of the act must denounce it; likewise with excuses or justifications—if no statutory excuse or justification apply as to the commission of the particular offense, neither the common law nor the so-called “unwritten law” may legally supply it. As an illustration, section 187 of the Penal Code defines the crime of murder as the unlawful killing of a human being, with malice aforethought; section 195 lays down the law as to when or under what circumstances a homicide is excusable, and by sections 196, 197, and 198 of the same Code the conditions are specified which must exist before a homicide is justifiable. Although the “unwritten law” sometimes may be regarded by jurors as sufficient, and so accepted by them, in the law the principle is unknown and unrecognizable. The legal excuse or legal justification for murder may be found only in the statute.

Nor, ordinarily, at least, will the “law of necessity” prove sufficient as a legal excuse. For example, take the extreme case of a man burglarizing a bakery for the sole purpose of procuring bread for his starving babes. Even in such dire circumstances, so far as the particular offense is concerned, the law itself is powerless to accept the excuse. Nor yet will good faith, or the fact that the end accom-

plished is rightful, avail as a defense. The probation law (section 1203, Pen. Code) is broad and comprehensive in its scope. The relief of a defendant, who, by reason of mitigating circumstances, seeks exemption from punishment for the commission of a crime by him, must rest upon the liberal terms of that statute and the wise discretion of the trial court. In the case of *People v. Beggs*, 178 Cal. 79, 172 P. 152, it was held that one who obtained payment from a thief of the value of property stolen by him, by threatening him with an accusation and prosecution thereon unless he made such payment, was guilty of the crime of extortion, without regard to the exercise of good faith in exacting the amount justly due.

[3] Although authority exists to the effect that, generally speaking, absolute necessity will excuse the commission of a criminal offense (*Chesapeake & O. R. Co. v. Commonwealth*, 119 Ky. 519, 84 S. W. 566; *Commonwealth v. Brooks*, 99 Mass. 434), so far as the crime of escaping from a jail is concerned, the authorities are in practical accord in holding that ordinary adverse circumstances will not present such a condition as will support a legal excuse for effecting an escape. In 1 Hale, P. C. 611 (1736), it is said that “if a prison be fired by accident, and there be a necessity to break prison to save his life, this excuseth the felony.” The sole authority for such declaration of the common law is Coke’s *Second Institutes*, 590, where, without the citation of either judicial or other authority in its support, the statement occurs that if “a man imprisoned for petit larceny or for killing of a man *se defendendo*, or by misfortune, and break prison, it is no felony, because he shall not for the first offense *subire iudicium vitæ vel membri. Et sic de similibus.*” But whatever may be the common law with reference to escape, where either “*se defendendo*,” misfortune, or “first offense” is or may be invoked as a defense to the accusation for which imprisonment has resulted, so far as the decisions by the courts of sister states are concerned, neither the insubstantial condition of the jail (*State v. Davis*, 14 Nev. 439, 33 Am. Rep. 563), fear of violence from third persons (*Hinkle v. Commonwealth [Ky.]* 66 S. W. 816), nor unmerited punishment at the hands of the custodian (*Johnson v. State*, 122 Ga. 172, 50 S. E. 65) will present a situation which in the law may be accepted as an excuse for violation of the statute.

In the case of *State v. Cahill*, 196 Iowa, 486, 194 N. W. 191, the defendant was charged with escaping from a solitary cell of the penitentiary, rather than from the prison itself. He presented the defense that while in solitary confinement his food consisted of an insufficient quantity of bread and water; that the cell was infested with bugs, worms, and vermin; that the toilet was so out of repair that when it was flushed the water ran out upon the floor; that the cell was without

a chair, bed, or other reasonable comforts. He further claimed that he had been suffering from lung trouble, and that the cell was rendered unhealthful by the conditions existing and the manner in which it was kept. In deciding the particular question of whether such conditions would constitute a defense to the crime of escape, the court, in part, said: "The quantity of bread furnished appellant was inadequate if the confinement was protracted over many days, but neither this nor the other matters complained of afforded him the slightest justification for escaping from the cell, or attempting to secure his liberty from confinement."

The case of *State v. Davis*, 14 Nev. 439, 33 Am. Rep. 563, supra, was an "escape" case in which, in the absence of a proper foundation by defendant that he had exhausted the lawful means of relief in his power before attempting to effect his escape, it was held not error in the trial court to reject evidence as to "what was the condition of the jail * * * as to whether it was a filthy, unwholesome, and loathsome place, full of vermin and uncleanness. * * *" In passing upon the question there presented, among other things, the court said: "A person confined by the law should be delivered by the law; and no other means can be justified in any case, until the officers in charge, and the law, refuse him relief; and then the evidence of the necessity must be clear and conclusive, and the act must proceed no further than the emergency absolutely requires. Bishop on C. L. vol. 1, § 352."

It is manifest that to allow a prisoner to decide whether the conditions justify him in attempting to escape would be destructive of the necessary discipline which must be maintained in any well ordered prison. As was said in one case: "The escape or attempt to escape by a prisoner, whether from a local jail or a state prison, tends to the general disruption of the prison discipline, and, as often such conduct by prisoners has caused, may be the cause of the slaying or serious wounding of officers or guards of the prison from which the escape or attempt to escape is made. Hence, such an act by persons legally confined in prisons or jails before their terms of imprisonment have expired is justly regarded as among the most flagrant violations of the rules governing prison discipline."

In *re Haines*, 68 Cal. App. 522, 527, 229 P. 984, 985. Generally speaking, when a man has been lawfully convicted of a crime, and a judgment of imprisonment has been regularly entered against him, it becomes his duty to submit to the penalty. Unquestionably, it is the duty of the state and of its officers to accord to the prisoner such safety and humane treatment as may be consistent with the safekeeping of the prisoner. It is, unfortunately, possible for the conditions of imprisonment to be so unwholesome as to seriously imperil the health and life of the prisoner by exposure to infection and disease, and unhappily it is possible for prison guards to subject prisoners to abuses and serious physical injury unjustified by any disciplinary need. However, a prisoner who escapes for any such reason does so at his peril.

In the instant case—aside from the principle that what constitutes a crime is necessarily based upon statute, and so must positive law excuse or justify it—the record fails to disclose any attempt on the part of defendant to show that, before escaping, he had, in good faith or at all, endeavored to be relieved by lawful means from any alleged improper irregularities or practices which he claimed were present in the matter of his confinement. The trial court committed no error in giving to the jury the instruction to which reference has been had. However, it is with very great reluctance that we admit that, under practically all of the authorities, the foregoing opinion states the established law. The testimony of the defendant, although contradicted by that of other witnesses, might have been believed by the jury. And, if the facts were as stated by the defendant, he was subjected to brutal treatment of extreme atrocity. In a remote mountain camp, far from the sheriff's office, what relief could he obtain by telling his custodian that he wanted to see the sheriff? If the defense could be admitted at all, it should not be conditioned upon the making of a plainly useless request. The function of the court is to declare the law as it is, and we are not authorized to usurp the place of the Legislature, which has the power to make laws, and the duty to make just laws.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

CASTLE et al. v. ACME ICE CREAM CO.★
(Civ. 3821.)

District Court of Appeal, Third District, California. July 26, 1929.

Rehearing Granted Aug. 24, 1929.

1. Cancellation of Instruments ⇨12—Rescission is proper remedy for cancellation of unlawful contract (Civ. Code, § 3406).

Rescission is proper remedy for cancellation of unlawful contract, where invalidity does not appear on face of instrument under Civ. Code, § 3406.

2. Contracts ⇨137(1)—Where part of consideration for purchase of property was illegal, entire contract was void (Civ. Code, § 1608).

Where part of consideration for purchase of property was illegal, the entire contract was void, it being impossible to determine which part of the consideration was controlling factor which induced agreement, and such contract could not be made the basis of a suit for damages under Civ. Code, § 1608.

3. Licenses ⇨39—Agreement by corporation to transfer stock without authority of corporation commissioner was illegal (St. 1917, p. 673, § 3).

A contract by a corporation to exchange corporate stock without authority of the corporation commissioner to sell or transfer stock was illegal under St. 1917, p. 673, § 3 (Deering's Gen. Laws 1923, Act 3814, § 3).

4. Corporations ⇨82—Judgment for plaintiff for face value of stock agreed to be exchanged held not supported by evidence, where market value was not alleged or proved.

Where, in action for breach of contract to exchange corporation's stock, market value of stock was neither alleged nor proved, judgment for plaintiff for the face value of stock agreed to be exchanged was not supported by the evidence, as the measure of damages in such case is the market value.

5. Trial ⇨404(1)—Finding that allegations of complaint were true supported no facts not clearly and directly alleged therein.

Finding of trial court that allegations of complaint were true supported no facts beyond such as were clearly and directly alleged in complaint.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by C. H. Castle, Jr., and another against the Acme Ice Cream Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Joseph C. Meyerstein, of San Francisco, and H. K. Landram, of Merced, for appellant.

Edward Bickmore, of Merced, for respondents.

THOMPSON, J. This is an appeal from a judgment in an action for damages for the breach of a contract and for partial failure of the consideration therefor.

The plaintiffs were the owners of an ice cream business in Merced, called the Castle Ice Cream Company, valued at the sum of \$45,000, which was sold and delivered to the defendant corporation, subject to an indebtedness of \$26,679.65, which obligation was assumed by the purchaser. This sale was consummated pursuant to the terms of a written contract which was executed by the respective parties August 22, 1922. The title to the ice cream plant thereupon passed to the defendant. The balance of the purchase price agreed upon was the sum of \$1,000 in cash, which was paid, and the transfer of "common stock of the Acme Ice Cream Company in the amount of \$9,000 par value," which was delivered. In a subsequent written contract executed by the respective parties August 26, 1922, it was agreed that within two years therefrom plaintiffs might exchange one-half of the common stock which they held for preferred stock of the corporation defendant. On May 25, 1924, pursuant to the last-mentioned agreement, plaintiffs tendered to the defendant an amount of common stock of the corporation defendant of the par value of \$4,500, and demanded in exchange therefor preferred stock of an equivalent value. The defendant failed and refused to consummate this exchange of stock. Thereupon, for the first time, the plaintiff discovered that the defendant corporation had never procured an authorization from the corporation commissioner pursuant to the Corporate Securities Act of California to sell or transfer either its common or preferred stock, and that the common stock of the par value of \$9,000 which had been transferred to the plaintiffs was promotion stock which had been previously issued by authority of the corporation commissioner to C. O. Swanberg, the president of the corporation defendant, in payment of obligations due to him from the corporation, and that said Swanberg and not the corporation defendant was the owner and holder of the common stock which was transferred to plaintiffs. The plaintiffs then tendered to the defendant the entire \$9,000 issue of common stock, on the ground that its transfer to them was void, and demanded in lieu thereof the sum of \$9,000 cash, which the defendant refused. This action for damages was then commenced. Judgment for the sum of \$9,000 was rendered in favor of plaintiffs for partial failure of consideration. The court found that all of the allegations of the complaint were true, and, upon the contrary, that all of the allegations of the answer in conflict therewith were untrue. No other findings were adopted.

The appellant contends that this cause was necessarily an action for rescission, which must fail for the reason that plaintiffs omitted to restore or tender to the defendant the entire consideration paid for the ice cream business, and that a suit for damages will not lie based upon a void contract. In other words, the appellant asserts that, if the portion of the consideration for the purchase of the ice cream business relating to the transfer of corporation stock is void for lack of authorization on the part of the corporation commissioner, then the entire contract is void, and may not become the basis of an action for damages.

[1] It is conceded that this is not an action for rescission. Indeed, the necessary prerequisites to the maintenance of an action in rescission pursuant to section 1691 of the Civil Code were neither pleaded nor proved. There is no contention on the part of respondents that they restored, or offered to restore, everything of value received by them from the appellant under the contract. Rescission is the proper remedy for cancellation of a contract where it is unlawful and the invalidity does not appear on the face of the instrument. Section 3406, Civ. Code.

[2] Where a part of the consideration for the purchase of property is illegal, the entire contract is void (section 1608, Civ. Code; *Taterson v. Kehrlein*, 88 Cal. App. 34, 263 P. 285, 292; 13 C. J. 513, § 471), for the reason that it is impossible to determine which part of the consideration was the controlling factor which induced the agreement to sell. In some jurisdictions it is held that, even though a part of a consideration for the purchase of property is illegal, this will not necessarily invalidate the entire contract, provided the illegal portion of the consideration can be segregated from the balance of the consideration which is valid. 6 R. C. L. 814, § 214. But this is not the rule in California. Section 1608 of the Civil Code leaves no opportunity for such a limitation of the rule. It provides: "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." *Haas v. Greenwald*, 196 Cal. 236, 247, 237 P. 38, 59 A. L. R. 1493; *Teachout v. Bogy*, 175 Cal. 481, 166 P. 319. Since the contract is void, it may not become the basis of a suit between the original parties for damages for partial failure of consideration. In 6 *Ruling Case Law*, 817, § 215, it is said: "The general rule that no action can be based on an illegal contract is * * * not open to question. As no court of law or equity will lend its assistance in any way towards carrying out an illegal contract, such a contract cannot be enforced by one party against the other, either directly by asking the court to carry it into effect, or indirectly by claiming damages or compensa-

tion for a breach of it." 1 *Elliott on Cont.* 436, § 248.

[3] It is argued that since the 90 shares of the common stock of the defendant corporation of the par value of \$9,000 were owned individually by Swanberg, the president of the company, and that the sale and transfer of his private stock required no authorization of the corporation commissioner, the transfer of this stock was not a violation of the statute or illegal. The contract, however, was with the corporation for 90 shares of its common stock, and not with its president as an individual. The evidence does not disclose the nature of the transaction by means of which 90 shares of Mr. Swanberg's private stock was transferred to the plaintiffs in satisfaction of an obligation of the corporation. This may have been a circuitous way of avoiding the statute, but, since the burden rested on the plaintiffs to establish their claim that the stock was illegally transferred, in the absence of evidence to the contrary, we may assume that Swanberg voluntarily gave this stock to the plaintiffs without consideration to fulfill the corporation's contract. It is, however, unnecessary to decide this problem, for the subsequent agreement which is an inseparable part of the contract to purchase the Castle ice cream business did specifically provide that the corporation would exchange and transfer to plaintiffs preferred stock of the corporation for one-half of the value of the 90 shares of common stock held by plaintiffs. This part of the contract, at least, was illegal and void for lack of authority to make such exchange or to transfer the preferred stock. The California Corporate Securities Act (Stats. 1917, p. 673, § 3, Act 3814, Deering's Gen. Laws of Cal. 1923, § 3) provides: "No company shall sell, * * * or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." Section 12 of the same act renders void any securities issued in violation of the provisions of this statute.

[4] The judgment is supported by neither the evidence nor the findings, for the reason that the value of the stock was neither proved nor determined by the findings of the court. The amount recoverable for failure to deliver corporation stock is ordinarily measured by its market value which must be alleged and proved. *Peek v. Steinberg*, 163 Cal. 127, 134, 124 P. 834; 4 *Thompson on Corp.* (2d Ed.) 699, § 4172. There is no presumption that the face value of stock is its real value. 14 C. J. 718, § 1099. The *Peek v. Steinberg Case*, supra, is cited by respondents as authority for the contention that the par value of stock is prima facie its actual value. This case does not so hold.

[5] In the present case the pleadings no-

where directly allege the actual or market value of the stock. It is invariably referred to in the complaint as of the face or par value of \$9,000. Our attention is not called to any evidence of the actual or market value of the stock. The court failed to find that the stock possessed any actual specific value. It merely found that all of the allegations of the amended complaint were true. The character of these findings will support no facts beyond such as are clearly and directly alleged in the complaint. 24 Cal. Jur. 986, § 214.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

100 Cal. App. 312

LEVINGSTON v. LEVINGSTON.★
(Civ. 6814; S. F. 12031.)

District Court of Appeal, First District, Division 2, California. Aug. 8, 1929.

Rehearing Denied Sept. 6, 1929. Hearing Denied by Supreme Court Oct. 7, 1929.

Divorce §133(1)—Evidence sustained finding that wife deserted husband.

Evidence, in action by wife for separate maintenance, wherein husband set up cross-complaint, held to sustain finding of court that wife deserted husband, and that testimony of husband that wife left him without his consent was corroborated.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Carrie E. Levingston against Jacob Levingston, wherein defendant set up a cross-complaint. Findings were made in favor of the defendant, and, from an interlocutory decree based thereon, the plaintiff appeals. Affirmed.

Owen D. Richardson and Bohnett, Hill & Campbell, all of San Jose, for appellant.

Louis Oneal and Wm. F. James, both of San Jose, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant for separate maintenance. Therein she alleged cruelty on the part of the defendant. The defendant interposed an answer in which he denied the allegations of plaintiff's complaint, and he also set up a cross-complaint alleging in one count plaintiff's desertion of him and in another count the extreme cruelty of the plaintiff. The plaintiff answered the cross-complaint, and the action was tried before the trial court sitting without a jury. The trial court made findings in favor of the defendant, and from an interlocutory decree based thereon the plaintiff has appealed, and has brought up a typewritten record.

The plaintiff makes one point—there was

no sufficient evidence or corroboration of the charge of desertion upon which the decree was rendered. From the record it appears that the plaintiff and defendant intermarried at Denver, Colo., Feb. 20, 1901. They lived together until June 5, 1924. On that date they separated, and since then they have lived separate and apart. The wife has lived continuously in New York City, and the husband has lived continuously in the Western States. At the time of the separation the defendant was conducting a hotel at Waterloo in the state of Iowa. Shortly after the separation, he sold out and came to California and purchased the Hotel Vendome in San Jose. Afterwards business compelled him to sell out, and he made a sale on such terms that he had little or nothing left. A short time before the separation the plaintiff suspected that the defendant was committing acts of infidelity. The particular act arose some weeks prior to the separation. However, at that time one of the sons was in a high school. The plaintiff waited until he finished his course, and in June, 1924, she and two sons left for New York. The evidence is conflicting as to what conversations occurred between the two parties immediately before her departure. The plaintiff contends that she was waiting to be asked not to go. The defendant contends that he frequently asked her not to go, but nevertheless she proceeded to make her arrangements to depart. While those arrangements were progressing, the defendant says that she asked him whether he would make any remittances, and that he made the reply that he wished she would not go, but, if she was determined to go, he would make remittances. He continued to make remittances of \$200 per month until his business failed. When he ceased to make remittances, certain conferences between the attorneys of the respective parties were held. Those conferences led to nothing, and this action was commenced. There is no conflict in the evidence regarding the fact that the plaintiff sent for packers and had her personal belongings packed and shipped to New York; that at the same time the plaintiff and two sons left the family dwelling place; that, when they left, the defendant went with them to the depot and kissed them goodbye; that, except as we will note, from that date forward no communications, written or otherwise, were exchanged between the defendant and the members of the family in New York. The plaintiff says she wrote a note to the defendant that some of her luggage was damaged in transportation, and asked him to look into the matter. The defendant testified that he received no letter, but one of the maids in the house received a letter. The relations as just described continued down to the very date of the trial. There is some evidence in

the record that neither the plaintiff nor her son Max, while in San Jose attending the trial, communicated with the defendant in any other manner except through their respective counsel.

That the plaintiff voluntarily left the family dwelling, and took with her two of her children as recited above, was testified to by the defendant, the plaintiff, and their son Max, a young man 24 years of age. It may be that at the instant she left there was no evidence of intent to desert. However, that fact appeared very soon thereafter, and was demonstrated by the subsequent conduct of the plaintiff, which we have already recited.

The plaintiff now contends that separation by consent is not desertion. That theory was not pleaded, and the evidence thereon was distinctly conflicting. The defendant testified that he did not give his consent, and the whole story is susceptible of the view that what the plaintiff did was by reason of her own determination, and was done wholly without regard to the wishes of the defendant. There was no attempt made to plead or to prove the theories expressed in Civil Code, §§ 101 and 102. The plaintiff did attempt to plead Civil Code, § 98, but her allegations did not bring her within its provisions. She did not plead and she did not prove, or attempt to prove, a single act of bodily harm or threats of bodily harm. She does not cite any authority to the effect that the section last cited includes within its scope mental cruelty as distinguished from bodily cruelty, inflicted or threatened.

It therefore appears that there was evidence sustaining the finding of the court that the plaintiff deserted the defendant, and that the testimony of the defendant was corroborated.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a hearing herein is denied. In denying said petition, however, we disapprove that concluding portion of the opinion of the appellate tribunal reading as follows: "The plaintiff did attempt to plead Civil Code, § 98, but her allegations did not bring her within its provisions. She did not plead, and she did not prove, or attempt to prove, a single act of bodily harm, or threats of bodily harm. She does not cite any authority to the effect that the section last cited includes within its scope mental cruelty, as distinguished from bodily cruelty inflicted or threatened"—upon the authority of *Brandt v. Brandt*, 178 Cal. 548, 174 P. 55.

BOWMAN v. MOTOR TRANSIT CO.★
(Civ. 6222.)

District Court of Appeal, Second District, Division 1, California. Aug. 8, 1929.

Rehearing Denied Aug. 28, 1929. Hearing Granted by Supreme Court Oct. 7, 1929.

1. Negligence ⇨93(2)—Negligence of husband, contributing proximately to wife's injuries in car collision, was imputable to wife.

In action for injuries received in car collision, if negligence of husband in driving car contributed proximately to wife's injuries, such negligence was imputable to wife, and would constitute a defense just as effectively as if injury had resulted from her own negligence.

2. Negligence ⇨122(1)—Burden of proof of contributory negligence was on defendant.

Affirmative issue on question of contributory negligence was required to be borne by defendant.

3. Negligence ⇨135—Evidence of contributory negligence need not be such as produces conviction.

Contributory negligence may be established by a preponderance of evidence, and need not be such as produces conviction, and an instruction so requiring constitutes reversible error.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Verna M. Bowman against the Motor Transit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Kidd, Schell & Delamer, of Los Angeles, for appellant.

William L. Waters, of Fullerton, and Francis B. Cobb, of Los Angeles, for respondent.

CONREY, P. J. Plaintiff recovered judgment in damages for personal injuries received in an automobile accident alleged to have been caused by negligence of the defendant. Defendant appeals from the judgment.

Of the many assignments of error, we find it is not important to discuss more than one. We shall assume, for the purposes of the decision, that there was sufficient evidence in favor of the plaintiff, so that the jury might have found that according to the "preponderance of the evidence," as that phrase is defined in the law, the issues were established in favor of the plaintiff.

[1] At the time of the accident the plaintiff was riding in an Overland car, which her husband was driving in a southerly direction on Fullerton road in Orange county. At the same time a stagecoach of the defendant was traveling in an easterly direction on Central avenue. A collision between the Overland car and the stage occurred at the intersection of those two streets. It is the contention of

appellant, not only that the evidence was insufficient to prove negligence of appellant, but that the evidence conclusively proved that the accident was caused by the negligence of respondent's husband in driving the car. If his negligence did contribute proximately to his wife's injuries, such negligence is imputable to the wife, and will constitute a defense just as effectively as if the injury had resulted from her own negligence. *Dunbar v. San Francisco, etc., Rys.*, 54 Cal. App. 15, 201 P. 330.

We have been favored with a careful analysis by counsel on each side, setting forth the testimony of the plaintiff's witnesses and of the defendant's witnesses concerning the speed of the respective vehicles, the objects observed, and the manner in which the drivers of these two vehicles conducted themselves, so that the net result of their acts and omissions produced a collision and caused plaintiff's injuries. We are satisfied that there was evidence sufficient to establish negligence on the part of defendant's driver, both in crossing the intersection at an excessive rate of speed and in failing to observe the plaintiff's automobile when it was within plain view. We are also convinced that there was evidence sufficient to justify the court in submitting to the jury the question as to whether respondent's driver was guilty of negligence contributing proximately to the accident and injury.

[2, 3] The issue concerning alleged contributory negligence of the plaintiff's husband was supported by some substantial evidence produced by the defendant. It seems to be conceded on both sides that the obstruction to the view across the property lying between the two drivers as they approached the intersection was such that, under the provisions of the statute, the lawful speed was limited to the rate of 15 miles per hour at the intersection. The witness Hyde was a passenger on the stage. He testified that he saw the Bowman car approaching the intersection at a speed of between 35 and 40 miles an hour, and that it did not change its speed until it arrived at a point approximately 50 feet from the intersection, at which time the driver of plaintiff's car applied his brakes and locked the rear wheels, and caused them to slide the rear wheels on the pavement up to the time of the crash; that he saw where the Bowman car had slid its tires approximately 50 feet, and where the skidding stopped there was an imprint of the car, where it made a swerve in the skidding of the car after it came in contact with the bus. This testimony is positively contradicted by other witnesses. But from the evidence, as a whole, the jury might have found that, according to a preponderance of the evidence, plaintiff's driver was guilty of contributory negligence proximately causing the accident.

This brings us to the very serious error which, in our opinion, requires a reversal of the judgment. The defendant requested that

the court give the following instruction: "In civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of the evidence. By preponderance of the evidence is meant the weight of the evidence or the preponderance of probability." The court gave this instruction, but added to it the following clause: "Or that evidence which produces conviction in the unprejudiced minds of the jurors." The error assigned relates to this addition. That such an instruction defining the preponderance of evidence is erroneous seems to be beyond doubt. *Estate of Ross*, 179 Cal. 629, 633, 178 P. 510; *Campbell v. Bradbury*, 179 Cal. 364, 372, 176 P. 685; *People v. Miller*, 171 Cal. 649, 154 P. 468. That the affirmative of the issue on the question of contributory negligence was required to be borne by the defendant is, of course, not denied; but the defendant was not under any obligation to establish the fact which would prove contributory negligence by evidence producing "conviction" in the minds of the jurors, or by anything more than a preponderance of the evidence.

As suggested by counsel for appellant, the jury may have been well convinced that both vehicles approached the intersection at an unlawful rate of speed, and also that the defendant's stage entered the intersection at an unlawful rate of speed. They may not have been convinced, in the strong sense which the word "conviction" implies, that the plaintiff's automobile also entered the intersection at an unlawful rate of speed, and yet they may have been satisfied that according to the preponderance of the evidence it did enter the intersection at an unlawful rate of speed. Nevertheless, following this instruction, which was to the effect that the evidence of contributory negligence must be such as *produces conviction* in their minds, they may have been led thereby to find, as they did, that the facts constituting contributory negligence had not been proved. We are forced to the conclusion that the error is prejudicial, and that the judgment based upon a verdict so obtained should be reversed.

The judgment is reversed.

I concur: YORK, J.
HOUSER, J., absent.

100 Cal. App. 278

PEOPLE v. LEACH et al. (Cr. 1828.)

District Court of Appeal, Second District, Division 2, California. Aug. 6, 1929.

Criminal law §1134(3)—Case will not be decided where question raised had become moot.

Where question raised on appeal had become moot, the case will not be decided.

Appeal from Superior Court, Los Angeles County; Emmett H. Wilson, Judge.

Henry Leach and Forrest Huggins were convicted of contributing to the delinquency of a minor, and they appeal. Reversed.

A. Brigham Rose, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

CRAIG, J. Since the appeal and the filing of the opening brief in this case, wherein the only points raised were as to the jurisdiction of the trial court and the sufficiency of the evidence to support the judgments, appellants filed a petition for a writ of habeas corpus, also raising the question of jurisdiction. The writ of habeas corpus was granted, and appellants were discharged upon that ground. In the Matter of Leach et al. (Cal. App.) 279 P. 157. This question being decided, the other point has become moot, and nothing remains for us to decide.

Upon the authority of the decision mentioned, the judgments and orders denying a new trial are reversed.

I concur: **WORKS, P. J.**

Owing to the absence of **IRA F. THOMPSON, J.**, he does not participate in this decision.

100 Cal. App. 330

PETERSON et al. v. KAUFMAN et al.
(Civ. 6957.)

District Court of Appeal, First District, Division 2, California. Aug. 9, 1929.

1. Pleading $\S$ 245(3)—Order authorizing petition amended on day of trial, by pleading agreed value of goods sold, instead of reasonable value, was not error.

Court did not err in permitting plaintiffs to amend petition on day of trial, by pleading agreed value of goods sold, instead of reasonable value.

2. Appeal and error $\S$ 1010(1)—Where 18 days' delay was only evidence in record of agreement on account stated, finding delay was not controlling could not be disturbed.

Where defendants sent to plaintiffs an account of sales as on consignment, and at same time forwarded two checks, which plaintiffs did not cash, but 18 days later commenced action for goods sold and delivered, implied finding that 18 days' delay was not an agreement that balance was correct could not be disturbed, as no other facts appeared in record indicating agreement.

3. Tender $\S$ 15(1)—Bringing action for goods sold was sufficient objection to claim of tender.

Where plaintiff did not cash checks, but 18 days after receiving them brought action for goods sold and delivered, commencement of action was sufficient objection to any claim of tender.

4. Sales $\S$ 382—Where seller resold goods, returned by buyer in manner not provided by

law, admission of resale price in action against buyer was error.

Where plaintiffs sold grapes to defendants, title passed, a dispute arose, and plaintiffs retook possession and attempted to sell on account of defendants, in action for breach of agreement to buy grapes, admission in evidence of amount which plaintiffs received from private sale, which was not in manner provided by law, was error.

5. Corporations $\S$ 306—Corporation alone was liable, where agency was disclosed.

Where party acted as disclosed agent of corporation, the corporation alone was liable.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by C. V. Peterson and others against Harry Kaufman and others. From a judgment for plaintiffs, defendants appeal. Affirmed in part, and reversed in part.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellants.

Everts, Ewing, Wild & Everts, Dan F. Conway, and C. M. Ozias, all of Fresno, for respondents.

STURTEVANT, J. The plaintiffs commenced an action to recover on two alleged contracts of sale of certain carloads of grapes. The defendants answered, and a trial was had before the trial court sitting without a jury. The court made findings in favor of the plaintiffs, and from a judgment entered thereon the defendants have appealed.

[1] In form the first count of the plaintiffs' complaint was a common count for goods, etc., sold and delivered, for the reasonable value. The defendants answered that count by interposing certain denials, but did not plead any affirmative defenses. On the day the cause was called for trial, the plaintiffs were allowed to amend by pleading the agreed value, instead of the reasonable value. The defendants assign the order authorizing the amendment as error. The point cannot be sustained. 21 Cal. Jur. p. 195, §§ 135-137.

[2, 3] On or about the 1st of July, 1926, the plaintiffs turned over to the defendants four cars of grapes. The defendants paid the plaintiffs \$500 per car, or a total of \$2,000. On the 9th day of August the defendants transmitted to the plaintiffs documents in the form of an account of sales as on consignment, and at the same time forwarded two checks—\$286.65 and \$240.96. The plaintiffs did not cash the checks, but 18 days later they commenced this action. No interviews or correspondence took place between the parties between the date of the transmission of the documents just mentioned and the commencement of the action. It was the theory of the plaintiffs that the plaintiffs and defendants had entered into a contract to buy and sell, and they introduced evidence

to sustain their contention. It was the theory of the defendants that the parties had entered into a contract of sale on consignment, and they introduced evidence to support their contention. The defendants are emphatic in stating that they do not contend that they are entitled to question the findings based on a conflict in evidence, but they urge most earnestly that the general principles relative to an account stated and to a tender should apply, and that therefore the judgment should have been for the defendants, and not for the plaintiffs. Taking up the theory of stated accounts, one of the essentials underlying that theory is that there be an agreement that the balance is correct. An examination of the record shows nothing whatever as indicating an agreement, except the mere delay of 18 days. The findings of the trial court imply that it did not consider the delay of 18 days as controlling. No other fact appearing in the record, we cannot disturb that implied finding. Taking up the theory of a tender, certain objections are waived, if not made at the time of the tender. The entire theory is in the nature of an estoppel. 24 Cal. Jur. p. 531, § 14. As no estoppel or tender was pleaded in the instant case, under the facts above recited we are unable to state that the act of the plaintiffs in commencing their action was not in itself a sufficient objection to the tender which the defendants now claim.

[4] In their second count the plaintiffs sought to recover damages for the breach of an agreement to buy 1,790 crates of grapes; that is, two carloads. The plaintiffs introduced evidence to the effect that they sold to the defendants 1,790 crates at \$1.50 per crate, for the total sum of \$2,685. The defendants introduced evidence that the grapes were delivered to defendants to be sold on consignment. It is admitted that the grapes were packed in boxes, the boxes were loaded on cars, and the cars were shipped to the defendant Baldwin-Pope Marketing Company, Inc., that plaintiffs turned over to the defendants the bills of lading, and that the defendants delivered to the plaintiffs a check for \$750. Shortly thereafter a dispute arose. The result was that the plaintiffs received back the bills of lading and they returned to defendants the check for \$750. Nothing was said by either party about rescission. After the plaintiffs received back the bills of lading, they resold at private sale to Sweeney & Lyons, of Chicago. On the trial, for the purpose of proving damage, over the objection and exception of the defendants, one of the plaintiffs, Mr. Peterson, was allowed to testify that the net proceeds received from Sweeney & Lyons on the first car was \$459.61, and the net proceeds received from Sweeney & Lyons on the second car was \$1,083.58;

that is, a total of \$1,543.19. In making up its findings, the trial court estimated the contract price, and from that sum it deducted \$1,543.19, and awarded judgment in favor of the plaintiffs on the second count for the sum of \$1,141.81. In other words, the record shows a transaction in which the plaintiffs sold their grapes, the title passed, a dispute arose, and the plaintiffs retook possession and attempted to sell for the account of the defendants, but not in the manner provided by law.

The defendants contend that the trial court applied the wrong rule in ascertaining the damage. The plaintiffs in one part of their brief state: "In other words, title as well as possession of the grapes was, for a limited time, actually transferred to the defendants." We do not understand them to claim that title was reconveyed. However, their reply to the point made by the defendants is that the plaintiffs took the proper course; "otherwise the plaintiffs would have been precluded from making any resale at all." This is not a sufficient answer. When they sold their grapes for eastern shipment they should have considered the possible contingencies. Having made the contract in the form in which it was made, it cannot be said that they did not waive all remedies inconsistent with and inappropriate to the facts. The exact question involved is not new. It received most careful consideration in *Bennett v. Potter*, 16 Cal. App. 183, 116 P. 681. Later the question was most carefully examined into in the case entitled *Phillips v. Stark*, 186 Cal. 369, 199 P. 509. According to those decisions the admission in evidence of the amount which these plaintiffs received from the private sale to Sweeney & Lyons was prejudicial error.

[5] As to both counts the trial court rendered judgment against all of the defendants as designated in plaintiffs' complaint. Later the trial court granted a new trial as to the individual Harry Kaufman. The defendants call to our attention the record showing that Harry Kaufman was the individual who transacted the business with the plaintiffs; that in doing what he did he acted as the disclosed agent of Baldwin-Pope Marketing Company, Inc., and not otherwise. The plaintiffs concede that under those circumstances the corporation alone is responsible.

The judgment on the first count is reversed as to Harry Kaufman and Harry Kaufman doing business under the firm name and style of Baldwin-Pope Marketing Company, Inc., and on that count it is affirmed as against Baldwin-Pope Marketing Company, Inc. The judgment on the second count is reversed. The defendants will recover their costs on appeal.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 349

**KETTLE v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**
(Civ. 6652.)

District Court of Appeal, Second District, Division 1, California. Aug. 13, 1929.

1. Courts $\hookrightarrow$ 190(4)—Municipal court had jurisdiction to continue beyond 5-day period matter of justification of sureties on bond on appeal to superior court (Code Civ. Proc. § 1054, and § 986, as added by St. 1927, p. 120, § 4; and § 831d, as added by St. 1927, p. 1343).

Municipal court had authority to continue matter of justification of sureties on bond on appeal to superior court beyond 5-day period prescribed by Code Civ. Proc. § 986, as added by St. 1927, p. 120, § 4, since section 1054 permits extension of time for justification of sureties up to 30 days, and section 831d, as added by St. 1927, p. 1343, makes rules of practice in superior court applicable in municipal courts.

2. Appeal and error $\hookrightarrow$ 391(1)—New surety on appeal bond could be substituted by presenting separate document differing from original only in matter of substitution of surety.

Mode of substituting new surety on appeal bond by presenting separate document unchanged from the original document, except for the substitution, held authorized; substituted document being in point of law the original undertaking with amendment by substitution of new surety.

Application by Mabel H. Kettle for certiorari to be directed to the Superior Court in and for the county of Los Angeles, and Walter S. Gates, Judge thereof, to review an order dismissing an appeal from the municipal court to the superior court. Order annulled.

Max Schleimer, of Los Angeles, for appellant.

Robert F. Shippee, of Los Angeles, for respondents.

CONREY, P. J. The action in the municipal court was brought to recover judgment for an amount within the jurisdiction of that court. Judgment having been entered in favor of the plaintiff, the defendant appealed to the superior court. The motion to dismiss appeal was made upon the ground that the appellant at no time justified the sureties on her undertaking on appeal after exception to the same had been taken by the respondent.

According to section 986 of the Code of Civil Procedure (added to that Code in 1927 [St. 1927, p. 120, § 4]), where the undertaking on appeal from the municipal court has been filed within due time, and exception to the sureties has been taken within due time, it is provided that, "unless they or other sureties justify before a judge of the municipal court within five days thereafter, upon

notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

"The rules of pleading and practice applicable to the prosecution of civil actions and enforcement of judgments in the superior court of this state shall apply to and govern the prosecution and maintenance of civil actions and enforcement of judgments in the municipal courts of this state, except as follows. * * * Code Civ. Proc., § 831d (as added by St. 1927, p. 1343). It does not appear that the exceptions include any exceptions applicable to the case at bar. Section 1054 of the same Code contains the following language: "When an act to be done, as provided in this code, relates to * * * the undertakings to be filed, or the justifications of sureties * * * the time allowed by this code, unless otherwise expressly provided, may be extended, upon good cause shown, by the judge of the superior court in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days, without the consent of the adverse party. * * *"

The exceptions to the sureties on the undertaking as originally filed by appellant were taken on the 24th day of October, 1928. On the 5th day thereafter, October 29th, pursuant to notice given by appellant, the matter of justification of the sureties came before the municipal court. On account of the absence of one of the sureties, the court continued the matter to November 5th. To this continuance the respondent objected. On November 5th respondent again objected, although one of the original sureties and another proposed to be substituted were sworn and tendered by appellant as sureties upon the undertaking. The ground of respondent's objection was that the justification of sureties had not been accomplished within the five days provided by section 986, Code of Civil Procedure. The objection was sustained by the court, and the sureties were not permitted to justify. In offering the substituted surety in place of the one who did not appear, appellant presented the undertaking as a separate document or amended undertaking executed by the original surety together with the substituted surety. Respondent objected upon the ground that this was not an amended undertaking and that the new surety should have signed the original undertaking, which had been first filed. Thereupon the court administered the oath to said sureties, and asked the attorney for respondent if he wished to examine them. Respondent's attorney answered in the negative. Thereupon the judge stated that he would sustain the objection made by respondent's attorney.

[1, 2] It thus appears from the record that the dismissal of the appeal was based upon the ground that the court had lost jurisdiction of the appeal, first, because the court was without jurisdiction to continue the matter of justification beyond the period of 5 days specified in section 986, Code of Civil Procedure; and for the further reason that the substituted offer of the undertaking was a separate document from the undertaking as originally filed. We are of the opinion that section 1054, Code of Civil Procedure, was applicable to the case and authorized the continuance of the proceeding from October 24th to October 29th. In view of the Code sections, to which we have referred, we perceive no good reason why the power to extend the time within the limit of 30 days does not exist in the municipal court the same as in the superior court. See *Schloesser v. Owen*, 134 Cal. 546, 66 P. 726. We are likewise of the opinion that the mode of substituting a new surety by presenting a separate document in all respects the same as the original document, except in the matter of the substitution of a surety for one not appearing, is authorized by law, and that the substituted document is, in point of law, the original undertaking with amendment by substitution of the new surety. *Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 228, 229, 22 P. 594, 15 Am. St. Rep. 50.

The order of dismissal of the appeal is annulled.

We concur: HOUSER, J.; YORK, J.

LA RUE v. BARR. (Civ. 6812.)★

District Court of Appeal, First District, Division 2, California. Aug. 8, 1929.

Rehearing Denied Sept. 6, 1929. Hearing Granted by Supreme Court Oct. 7, 1929.

1. Executors and administrators ⇨221(2)—
Plaintiff suing for value of unskilled services rendered decedent had burden of proving value of services (Code Civ. Proc. § 1869).

In action to recover reasonable value of services rendered in behalf of decedent, plaintiff alleging value of services as material affirmative allegation had burden of proving value to recover under Code Civ. Proc. § 1869, though services were unskilled and unprofessional, and full details as to kind and character thereof were testified to.

2. Executors and administrators ⇨221(3)—
Invalid oral agreement to devise property to plaintiff for services held not evidence of reasonable value of services.

In action to recover reasonable value of services rendered in behalf of decedent, evidence of oral agreement by decedent to devise and bequeath plaintiff all of real and personal

property which was invalid under Civ. Code, § 1624, subd. 7, and Code Civ. Proc. § 1973, subd. 7, held no evidence of reasonable value of plaintiff's services, since not constituting agreement to pay in money.

3. Executors and administrators ⇨205(2)—
Plaintiff suing for reasonable value of services rendered decedent held entitled to no more and no less than reasonable value of services.

In action to recover reasonable value of services rendered in behalf of decedent, plaintiff was entitled to reasonable value of services no more and no less.

4. Executors and administrators ⇨221(2)—
Granddaughter of decedent suing for reasonable value of services had burden of rebutting presumption that services were rendered gratuitously.

In action to recover reasonable value of services rendered decedent, plaintiff, who was granddaughter of decedent, had burden of rebutting presumption that services were rendered gratuitously.

5. Executors and administrators ⇨221(2)—
Invalid oral agreement to devise property to granddaughter held admissible to rebut presumption that services by granddaughter were rendered gratuitously.

In action to recover reasonable value of services rendered decedent by granddaughter, oral contract by decedent to devise and bequeath real and personal property to granddaughter was admissible to rebut presumption that granddaughter rendered services gratuitously.

6. Executors and administrators ⇨451(3)—
Instruction that plaintiff suing for services rendered decedent could recover only actual value of services without reference to contract to devise or value of decedent's property held erroneously refused.

In action to recover reasonable value of services rendered decedent, requested instruction by administrator that plaintiff, if entitled to recover, could recover only actual, intrinsic value of her services for time rendered, wholly without reference to alleged contract to devise property, and without reference to value of property of decedent, held erroneously refused.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Jennie La Rue against Warden T. Barr, as administrator of the estate of Helen C. La Rue, deceased. Judgment for plaintiff, defendant's motion for new trial was granted, and plaintiff appeals. Affirmed.

Lewis H. Smith, of Los Angeles, and Archie A. Smith, of Fresno, for appellant.

Frank Kauke, of Fresno, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant as administrator of the estate of Helen C. La Rue, deceased. She pleaded her action in two counts. In the first count she set forth a purported cause of action based on the promise

of the decedent to make her will in plaintiff's favor. In her second count she sought to recover the reasonable value of her services rendered in behalf of the decedent. A demurrer was sustained to the first count. The defendant answered the second count, and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff, awarding her a money judgment as prayed. A motion for a new trial was granted, and the plaintiff has appealed from that order, and has brought up a typewritten record.

[1] The plaintiff states that there is one point before the court: "In an action for the reasonable value of unskilled and non-professional services, the fact of the rendition of the services having been proved, together with full details as to the kind and character thereof and the circumstances and conditions under which they were rendered, is it necessary, in order to sustain a verdict, that there be introduced statements of witnesses as to the value of such services?" Except as will hereinafter be noted, there was not a particle of evidence introduced proving, or tending to prove, the reasonable value of the services rendered by the plaintiff. The value of her services had been alleged by the plaintiff, and it was one of her material affirmative allegations. On her rested the burden of proving it. Code Civ. Proc. § 1869. There is authority supporting the contention of the plaintiff. *Craig v. Durrett*, 1 J. J. Marsh. (Ky.) 365, 19 Am. Dec. 103. However, the great weight of authority is against the plaintiff. 2 *Labatt's Master and Servant*, p. 1623, § 573a, pp. 1642-1644; *McDaniels v. Harrington*, 80 Or. 628, 157 P. 1068; *Winch v. Warner*, 186 App. Div. 710, 174 N. Y. S. 819; *Mizar v. Nelson*, 43 S. D. 525, 180 N. W. 960; *Heitz v. Sayers*, 2 W. W. Harr. 207, 121 A. 225; *O'Brien Boiler Works Co. v. Sievert* (Mo. App.) 256 S. W. 555; *Bronstein v. Ryan*, 78 Colo. 231, 241 P. 539; *Bardach Iron & Steel Co. v. Charleston*, 143 Va. 656, 129 S. E. 687; *Coons v. Coons*, 106 Va. 572, 56 S. E. 576, 580, 581; *Charlotte Harbor & N. R. Co. v. Burwell*, 56 Fla. 217, 48 So. 213, 218; *Dickerson v. Lankford*, 69 Fla. 127, 67 So. 807, 808; *Pierce v. Aiken* (Tex. Civ. App.) 146 S. W. 950, 952; *Johnson v. Peterson*, 166 Ill. App. 404; *Schillinger Bros. Co. v. Thompson-Starrett Co.*, 171 Ill. App. 319; *Succession of Dolsen*, 129 La. 577, 56 So. 514; *O'Meara v. McDermott*, 40 Mont. 38, 104 P. 1049; *Marandino v. Brown & Co.* (Sup.) 120 N. Y. S. 744; *McAveney v. Pasquini*, 23 App. Div. 120, 48 N. Y. S. 896, affirmed 163 N. Y. 575, 57 N. E. 1115; *Dobbin v. Dobbin* (Mo. App.) 204 S. W. 918; *Gillen v. Haley*, 185 Mo. App. 23, 171 S. W. 638; *Woodward v. Donnell*, 146 Mo. App. 119, 123 S. W. 1004; *Wood v. Barker*, 49 Mich. 295, 13 N. W. 597; *In re Davies' Estate*, 289 Pa. 579, 137 A. 728; *Rowe v. City & Suburban Land Trust*, 43 R. I. 274, 111 A. 747.

We believe the authorities are correctly summarized in 2 *Labatt's Master and Servant*, p. 1623, as follows: "In several jurisdictions it has been declared that, where no specific evidence of value has been adduced, the claimant cannot recover anything whatever; this doctrine seems to be clearly correct."

The plaintiff cites a number of cases decided in this state. Some were cases brought to recover attorney fees. They are not in point for obvious reasons. None of the rest of the cases were actions in assumpsit to recover the reasonable value of services rendered.

She cites *Cederberg v. Robison*, 100 Cal. 93, 34 P. 625. That was an action to recover damages for an alleged breach of contract. The plaintiff offered evidence of what he did in making preparations for performing the contract and how far he had performed. He did not offer evidence of the value of the services rendered by him. No attack was made on the verdict as being excessive. The court held that, unless it should appear that the amount allowed was excessive, the verdict should not be disturbed. In the instant case the defendant has, at all proper times, claimed that \$12,000 was grossly excessive. In his motion for a new trial he so contended. The motion was granted. The order recited that it was "granted on the insufficiency of the evidence." Nothing to the contrary appearing, in support of the order, we may assume that it was granted on other grounds also. 2 Cal. Jur. 700, § 403; *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, 134, 85 P. 152, 5 L. R. A. (N. S.) 1059.

The plaintiff dwells extensively on the proposition that expert evidence is not necessary. Herein she errs in assuming that all evidence regarding reasonable value is confined to the evidence of experts. 2 *Labatt's Master and Servant*, pp. 1641-1646; *Jones on Evidence*, §§ 360-363.

[2, 3] The plaintiff introduced in evidence the oral agreement by the terms of which the decedent promised to devise and bequeath all of her real and personal property to the plaintiff. It is conceded said agreement was invalid. Civ. Code, § 1624, subd. 7; Code Civ. Proc., § 1973, subd. 7. The plaintiff claims it was some evidence of the reasonable value of her services. If the agreement had been to pay in money, that claim would have support. *Offeman v. Robertson-Cole Studios, Inc.*, 80 Cal. App. 1, 251 P. 830. But the agreement was not to pay in money. It was to pay in property. The introduction of the agreement for the purpose of showing value was therefore but the creation of a false issue, because it still remained necessary to show what was the value of the property. When that value was shown, another false issue was created. Whether the property was of great value or little value was immaterial. The plaintiff under her pleading was entitled to the reason-

able value of her services—no more, no less. In *Wallace v. Long*, 105 Ind. 522, 526, 5 N. E. 666, at page 669, the Supreme Court of Indiana said: "The most that can be recovered in such a case is the value of what may have been paid or performed by one party in reliance upon such a contract, when the other refuses to perform. 2 Reed, St. Frauds, §§ 737, 761, 762; *Day v. Wilson*, 83 Ind. 463 [43 Am. Rep. 76]. Where, therefore, services have been performed or money paid in consideration of property to be conveyed, if the contract is not enforceable by reason of the statute of frauds, the action is not on the special contract, but, in the case of services performed, the action is on a quantum meruit, to recover the value of the services. *Ham v. Goodrich*, 37 N. H. 186; *Emery v. Smith*, 46 N. H. 151; *Leslie v. Smith*, 32 Mich. 64; *Seymour v. Bennet*, 14 Mass. 268; 2 Reed, St. Frauds, §§ 622, 623, and cases cited in notes; 2 Suth. Dam. 453. In such a case the value of the services performed, and not the value of the property agreed to be conveyed, is the measure of damages." And, after further discussion, the court, at page 672 of 5 N. E. (105 Ind. 531), says: "Many other cases might be cited which support and illustrate the conclusions reached, but those referred to are deemed sufficient. The value of the services are to be determined without any reference to the value of the estate of the intestate. But, in estimating the value of the services, regard should be paid to the situation of the parties, the nature of the service required or performed. Allowance should be made, too, for the fact that, under the circumstances, the presence and society of the plaintiff's ward may have been of sufficient value to compensate for her education, clothing, and support."

The rule so declared is quite general, but it does not obtain in every jurisdiction, because the statutes are different. 2 Labatt's Master and Servant, pp. 1631-1634. Be that as it may, it is certainly the rule in California. In *Fuller v. Reed*, 38 Cal. 99, at page 110, the court said: "But, in assumpsit for the recovery of money paid, or services rendered upon a void contract for the conveyance of lands, the measure of plaintiff's relief is the money he has advanced, with interest, or the reasonable value of the services rendered, without reference to, and disconnected with, the express contract; the defendant's liability in such case rests upon an implied promise or assumpsit, and evidence of the value of the land stipulated to be conveyed by the express void agreement is inadmissible as a measure of the value of services rendered by plaintiff, or the relief to which he is entitled in consideration of money advanced upon such express contract. To permit such testimony for the purpose of establishing the reasonable value of services rendered by plaintiff, or the measure of indebtedness of defend-

ant upon his implied promise to refund money advanced by plaintiff, would, in effect, allow a party in one breath to disaffirm a contract, and in the next to affirm and claim the benefit of the same contract as valid and subsisting, and substantially enable him to recover as for breach of a valid express contract in a simple action of assumpsit upon an implied contract." See authorities cited in 2 Labatt's Master and Servant, pp. 1631-1634, and see also (1906) *McGrew's Ex'r v. O'Donnell* (Ky.) 92 S. W. 301, 302; (1924) *Appleby v. Noble*, 101 Conn. 54, 124 A. 717, 719; (1910) *Appeal of Beardsley*, 83 Conn. 34, 75 A. 141, 143; (1925) *Goodrich v. Emma L. Hubbard's Estate*, 233 Mich. 346, 206 N. W. 480, 481; (1921) *Kutzner v. Stuart*, 215 Mich. 270, 183 N. W. 905.

The value of the estate of the decedent was alleged in the answer to be \$10,500. On the trial the plaintiff accepted those figures. The verdict of the jury was \$12,000. As stated by the court in *Fuller v. Reed*, supra, the result of the ruling complained of was " * * * in effect, [to] allow a party in one breath to disaffirm a contract, and in the next to affirm and claim the benefit of the same contract as valid and subsisting, and substantially enable him to recover as for breach of a valid express contract in a simple action of assumpsit upon an implied contract." The statute of frauds may not be so circumvented. No competent evidence of the value of plaintiff's services was received.

[4, 5] As the plaintiff is the granddaughter of the decedent, it was incumbent on her to rebut the presumption that she rendered her services gratuitously. For that purpose the oral contract was admissible. The trial court did not err in admitting it. But, as said in *Kutzner v. Stuart*, 215 Mich. 270, 273, 183 N. W. 905, at page 906: "The serious error of the trial court was not in admitting the contract, but in permitting the jury to use the clause [payment in property] quoted as a measure of damages." That the trial court allowed the use of the special agreement for an improper purpose is clearly shown by a consideration of the next two points made by the defendant.

The plaintiff requested, and the trial court gave, a long instruction which appears in the reporter's transcript, page 200. The closing clause is "then your verdict should be for the plaintiff for the reasonable value of such care, aid, services and companionship, having in mind all of the *circumstances* under which they were rendered." Both in the trial court and in this court (see reply brief, p. 67) the plaintiff contended that the special agreement was a "*fact and circumstance*" to be considered in fixing the reasonable value of plaintiff's services.

[6] The defendant requested, and the trial court refused, an instruction as follows: "You are instructed, if you find from the evidence, and under the instruction of the court,

that the plaintiff in this case is entitled to recover from the estate of the decedent compensation for services rendered by the plaintiff to the decedent in her lifetime, then the plaintiff is entitled to recover only the actual, intrinsic value of her services, for the time they were rendered, and according to kind and character, and wholly without reference to any alleged contract, and wholly without any reference to the value of the property of the decedent at the time of her death." It should have been given as requested. *Goodrich v. Emma L. Hubbard's Estate*, supra.

The court did not err in granting the motion for a new trial. The order appealed from is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 344

PEOPLE v. SMITH. (Cr. 1812.)

District Court of Appeal, Second District, Division 1, California. Aug. 13, 1929.

1. Criminal law ☞1159(5)—Jury's determination of whether confession was voluntarily made was final.

Where evidence regarding promises of immunity and of acts of violence was presented before jury, who were properly instructed, jury's determination of whether confession was voluntarily made without promise of immunity or reward was final.

2. Witnesses ☞274(2)—Permitting cross-examination of defendant's character witness regarding whether witness had heard what defendant did on certain occasion held not error (Pen. Code, § 288a).

In prosecution for violating Pen. Code, § 288a, permitting district attorney in cross-examining character witness presented by defense to ask questions regarding whether witness had heard what defendant did to a little girl on certain occasion held not error, where it did not appear that district attorney was not acting in good faith.

3. Criminal law ☞726—Defendant cannot complain regarding district attorney's argument in answer to inquiry of defendant's counsel.

Where remarks of district attorney in argument to jury were in answer to inquiry by defendant's counsel, defendant cannot complain that argument was prejudicial.

4. Criminal law ☞730(3)—District attorney's objectionable remarks held not reversible error, where court instructed jury to disregard statements made by counsel except so far as correctly restating evidence (Pen. Code, § 288a).

In prosecution for violating Pen. Code, § 288a, objectionable remarks of district attorney in argument regarding what defendant did to little girl on certain occasion held not reversible

error, where court instructed jury to disregard any statement made by counsel in their arguments, except so far as it correctly restated evidence in case.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Albert W. Smith was convicted of violating Pen. Code, § 288a, and he appeals. Affirmed.

James M. Burke, of Visalia, and Thomas Gould, Jr., and Jarrett G. Beckett, both of Ventura, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and James C. Hollingsworth, Dist. Atty., of Ventura, for the People.

HAHN, Justice pro tem. Defendant appeals from a judgment of conviction of the crime denounced by section 288a of the Penal Code of the state of California, with which he was charged by an information filed by the district attorney of Ventura county. The victim of the alleged unlawful conduct of the defendant was a lad of the age of seven years.

The grounds upon which the appellant urges a reversal of the judgment are, stated in brief, as follows: (1) The alleged "confession" of Smith was not voluntary, and should not have been admitted in evidence; (2) the district attorney was guilty of misconduct highly prejudicial to the defendant; (3) the trial court erred in ruling on the admission of evidence.

We do not deem it necessary to present a recital of the evidence relating to the offense, or the detailed testimony bearing on the question as to whether or not the confession was voluntary. We have carefully examined the voluminous transcript of the evidence adduced at the trial, and have concluded that there are no reversible errors appearing in the record. We will therefore briefly refer to such matters which we feel should be discussed in this opinion.

[1] The defendant testified that, while he was incarcerated in the city jail after his arrest, the father of the boy, who was the chief of police of the city of Oxnard, and in whose custody the defendant then was, promised he would not prosecute him for the offense if he would admit that he "did it." Defendant also testified as to certain acts of physical violence visited upon him by the father of the boy and one of the police officers at the time of his arrest, and also while incarcerated in the city jail, which acts of violence so instilled him with fear as to induce him to make the alleged confession. The promises of immunity, as well as all of the acts of violence, except the attack made upon the defendant by the chief of police in the home of the chief of police prior to or at the time of defendant's arrest, were all specifically denied by the chief of police and other police officers and

persons present at the time the certain incidents were alleged to have occurred. All of this evidence was presented before the jury, who were properly instructed by the court as to their power in weighing the evidence and determining whether or not the confession was made without any promises of immunity and voluntarily made without threat or duress. This court cannot, under the circumstances, disturb the findings of the jury, assuming that they accepted the confession as voluntarily made and without promise of immunity or reward. The jury's determination under the circumstances is final.

[2] The next question as to the misconduct of the district attorney relates, first, to the question asked by him in cross-examining a witness by the name of Rothert, who was a character witness presented by the defendant. After the witness in question had stated that he was acquainted with the defendant's reputation in the community where he resided, with regard to the traits of character of the defendant involved in the action, and having answered that such reputation was good, the district attorney propounded the following question to him: "I will ask you this, Mr. Rothert: Have you had occasion to hear during your residence in Oxnard, either before or after the filing of the complaint in this case, as to a certain act of perversion that the defendant in this case committed upon a little girl named Betty Culver, a music pupil of the defendant Smith, in the city of Oxnard?" The question was objected to by counsel for the defendant and assigned as improper conduct on the part of the district attorney. He also moved to have the question stricken from the record and the jury instructed to disregard the same and that the district attorney be reprimanded by the court for asking the question. The objection was overruled, and the motion of the defendant's counsel was denied by the court. It is urged with considerable force by appellant that a serious injustice was done him by the asking of this question, in that it implied that such an occurrence had taken place, and there was no evidence introduced by the district attorney either that the incident had occurred or that there was any rumor, report, or public comment of such an incident that could have come to the hearing of the witness. Whatever may be the merits of defendant's contention on this point, the question is no longer open to debate, as it has repeatedly been held in this state that it is not error for the district attorney in cross-examining a character witness presented by the defense, to ask questions of this kind, unless it appears from the record that the district attorney is not acting in good faith. *People v. Sieber*, 201 Cal. 341, 257 P. 64; *People v. Hendricks*, 71 Cal. App. 730, 236 P. 214; *People v. Moran*, 144 Cal. 48, 77 P. 777; *People v. Perry*, 144 Cal. 748, 78 P. 284; *People v. Burke*, 18 Cal. App. 72, 122 P. 435.

In the instant case there is nothing in the record, other than a total absence of any evidence as to the truth of the wrongdoing implied in the question, that would suggest that the district attorney was not asking the question in good faith.

[3, 4] The other criticism urged against the conduct of the district attorney relates to statements made by him in his argument to the jury. In his closing argument the district attorney made the following statement: "The witnesses that he called here to support his reputation, themselves, all but one, testified that they had never heard it discussed. They knew nothing about it. But one had; Rothert had. He was asked the question that Mr. Gould made much of in his argument to this jury: 'Did you hear what he did to Betty Culver—the Betty Culver whose mother, he claims, called up on the phone the week previous to that, about that little girl's music lesson.' And Mr. Gould is asking now and he asks me to state to him where I got my information about Betty Culver. I'll tell him to ask Robert Clark, the sheriff, and to ask the parents of Betty Culver in the city of Oxnard, and find out where we got our information. If he wants to ask me the question, I have answered it."

Defendant's counsel objected to this statement, and assigned the remarks as reversible error, and requested the court to strike the remarks of the district attorney and admonish the jury to disregard them. Whereupon the court made the following statement to the jury: "Of course the jury will remember what the testimony is; and any remarks that are made by counsel are not evidence in the case and if any remarks are made by any counsel in this case, which are not supported by the record, you will disregard them. You may proceed."

Whereupon the district attorney made the following statement: "Mr. Gould in his argument—I took it down at the time—wanted to know and wanted me to state to this jury what there was about this Culver business. That is why I made the statement."

The language used by defendant's attorney does not appear in the record, nor does appellant in his brief claim that the statement, made by the district attorney with regard to the Betty Culver matter in his argument to the jury, was not made in answer to the challenge of defendant's counsel in his address to the jury. We are therefore justified in assuming that the remarks complained of were elicited by the challenge of defendant's counsel, and in that case he is not in position to complain that the answer to the inquiry was prejudicial. Notwithstanding the challenge, it would have been better had the district attorney ignored the query and refrained from making any reference to the Betty Culver matter in his argument. Furthermore, it appears that the court instructed the jury to disregard any statement made by counsel in

their arguments, except so far as it correctly restated the evidence in the case.

Under the circumstances disclosed by the record, the remarks of the district attorney in his argument would not constitute reversible error.

The last ground urged by appellant on behalf of a reversal deals with several specified rulings made by the court during the trial. In several of the instances the rulings were erroneous, but they referred to relatively unimportant matters, and we are quite satisfied that they did not constitute reversible error. In the interest of brevity, we do not deem it necessary to specifically refer to each point urged in connection with these rulings.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

100 Cal. App. 302

WINTER v. KITTO. (Civ. 6730.)★

District Court of Appeal, First District, Division 1, California. Aug. 8, 1929.

Rehearing Denied Sept. 7, 1929.

1. Judgment ⇨562—Judgment, to operate as bar, must go to merits of second action in respect to matters necessary to plaintiff's recovery or in respect to affirmative defenses.

Judgment, to operate strictly as bar to a subsequent action, must go to merits of the latter action either in regard to matters necessary to plaintiff's recovery or in regard to affirmative defenses applicable to both actions.

2. Judgment ⇨585(3)—Decree quieting vendor's title, entered upon disclaimer by vendee, held not to bar vendee's action to recover purchase money based upon vendor's rescission.

Decree quieting vendor's title upon default of one defendant and upon disclaimer of vendee of property joined as defendant held not to bar action by vendee for return of purchase money upon ground that vendor had rescinded contract for purchase of property.

3. Contracts ⇨35—Where sufficient consideration for signer's agreement is shown from instrument itself, signer cannot be released because other persons failed to sign.

Fact that contract has not been signed by all the persons who were expected to sign will not release one of signers if sufficient consideration is shown from face of instrument to authorize enforcement of agreement.

4. Vendor and purchaser ⇨43(2)—Vendee held bound by contract notwithstanding failure of covendee to sign, where vendee took possession and treated contract as in effect.

Vendee held bound by contract for purchase of land notwithstanding failure of person named in contract as covendee to execute instrument, where vendee received possession of the property and acceded to terms of contract and treat-

ed contract as in effect, especially where there was no showing that vendee's signature was conditional or that there was any understanding that signing by all the parties was condition precedent.

5. Vendor and purchaser ⇨335—Where vendor, not in default, stands upon contract defaulting vendee cannot recover purchase money.

Vendee in default cannot recover purchase money where vendor who was not in default stands upon the contract.

6. Vendor and purchaser ⇨335—Vendor, on vendee's unexcused default, may retain purchase money irrespective of provisions for forfeiture or retention of payments as liquidated damages.

Vendor's right to retain purchase money upon unexcused default by vendee is independent of any express clauses in the contract for the forfeiture of vendee's rights or retention of payments as liquidated damages.

7. Contracts ⇨318—Provision in contract for forfeiture and avoidance thereof does not prevent contract from remaining in effect to protect innocent party.

Contract remains in force to protect rights of innocent party and enforce obligations of delinquent, notwithstanding provision for forfeiture and avoidance of contract on default.

8. Vendor and purchaser ⇨335—Under contract providing for forfeiture on vendee's default, notice of election to cancel put vendee in default, precluding recovery of purchase money.

Where contract for sale of land provided that, in the event of default on the part of the vendee, all sums theretofore paid should at vendor's option be forfeited and agreement become entirely void, vendor's notice stating election to cancel contract pursuant to terms thereof did not amount to technical cancellation or rescission entitling the defaulting vendee to recover back purchase money, but merely terminated vendee's rights under the contract; contract and notice being construed together.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Frank E. Winter against Margaret J. Kitto. Judgment for plaintiff, and defendant appeals. Reversed.

Lovett K. Fraser, of San Francisco, for appellant.

John L. McVey, of Oakland, for respondent.

PER CURIAM. The defendant is the owner of certain real property in Lake county. Early in 1927 the parties to the action and Fred T. Winter entered into negotiations for the sale and purchase of the property. On February 1st of that year a written agreement was drawn setting forth the terms of sale, in which the defendant was named as vendor and the plaintiff and Fred T. Winter, his brother, as vendees. The writing was signed by the plaintiff and the defendant,

but not by Fred T. Winter. The terms of sale were \$4,000, payable \$250 in cash, a like sum on August 1, 1927, and the balance in semiannual payments of the same amount, with interest. The writing further stipulated that upon the payment of the purchase price, with interest, the property should be conveyed to the vendees, but, upon default in the payment of any installment of principal or interest, time being of the essence, all sums theretofore paid should, at the option of the vendor, be forfeited and retained by her as liquidated damages, in which event it was provided that "this agreement shall then become and be absolutely void and of no effect."

It appears that the plaintiff on February 1, 1927, paid to the defendant the sum of \$600 on the purchase price, and thereupon went into possession of the property, but that Fred T. Winter neither had possession nor paid any part of the purchase price. On February 6, 1928, the defendant, through her attorney, served upon the vendees named a writing, signed by her, which, after reciting that default had been made in the payment of the installment of \$250 which was payable on February 1, 1928, contained the following: "You and each of you are hereby notified that the undersigned elects to cancel said contract pursuant to the terms thereof, and that said contract is hereby canceled and is absolutely void and of no effect." Following the receipt of the notice, the plaintiff on February 9, 1928, sent the defendant's attorney the following letter:

"Dear Mr. Perkins: Received your notice of cancellation of contract re my purchasing Lake county property from Mrs. Kitto and I am at a loss to understand why this was sent to me.

"The last part of January I wrote to Mrs. Kitto about a lot I thought she might be interested in taking as a payment which would be more substantial than the regular payment due, and if she did not want the lot to let me know and I would send the payment. Not hearing from Mrs. Kitto I naturally presumed she was considering taking the lot and of course I did not send the check.

"I have made several requests for the copy of the contract, also Mr. F. Fogal some time ago asked you to send it to him, but up to the present time it has not been received. I am entitled to a copy of this agreement, so please see that it is forwarded to me at your earliest convenience.

"Yours very truly, _____."

A letter from the attorney in reply contained the following: "I beg to remind you that at the present writing there is no contract existing between yourself and Mrs. Kitto, the contract dated February 1, 1927, having been canceled by Mrs. Kitto on February 6, 1928, by reason of your failure in the payment of the instalment of principal due February 1,

1928. * * *" The letter further stated that Mrs. Kitto would be willing to revive the contract upon receipt of the payment mentioned, but would not otherwise waive the breach.

It appears that shortly after the above correspondence the defendant went into possession of the property, but nothing further was done by any of the parties until March 5, 1928, when defendant filed an action against plaintiff and Fred T. Winter to quiet the title to the property. The latter defaulted, and the plaintiff herein having filed a disclaimer, a decree was entered adjudging Mrs. Kitto to be the owner of the property and that the vendees named and all persons claiming under them be barred from asserting any claim of right or title therein.

The present action is one for money had and received. As defenses thereto, the defendant set up the contract mentioned, alleging the default of the plaintiff and his co-vendee, and further pleaded as a bar the decree entered in the action to quiet title. The court found that the parties had agreed that their agreement should be reduced to writing and executed by each of them; that the writing mentioned was not signed by Fred T. Winter or delivered to the plaintiff, but was retained by the agent for the defendant. It was further found that the agreement was canceled by the defendant, the cancellation being acquiesced in by the plaintiff, and judgment was accordingly entered for the latter.

[1, 2] The defendant, who has appealed, contends that the judgment in the suit to quiet title was a bar to the present action and that the findings are unsupported.

As held in *Williams v. MacDonald*, 180 Cal. 546, 182 P. 29, a judgment, in order to operate strictly as a bar to a subsequent action, must have gone to the merits of the latter action, either in regard to some matter which the plaintiff must have made out in order to entitle him to a recovery, or in regard to some affirmative defense which was a defense to the second action as well as to the first.

As shown by the record, the action to quiet title involved merely the title to the land in question; all that appears on the face of the judgment to have been adjudged being the title of Mrs. Kitto, her right to have such title quieted, and that judgment was entered upon the default of one defendant and upon the disclaimer of the other (who is the plaintiff here) of any claim or title to the land. In the above respects, the facts of the present case are not distinguishable from those of *Heilig v. Parlin*, 134 Cal. 99, 66 P. 186, wherein it was held that a decree quieting the vendor's title was not a bar to an action by the vendee for the return of the purchase money upon the ground that the vendor had rescinded the contract.

[3] It appears that the contract in question was left by the plaintiff and defendant with

the latter's agent, who drew the instrument, awaiting the signature of plaintiff's brother, who, for reasons not shown, failed to sign. It has been held that, where an instrument has been executed by only a portion of the parties between whom it purports to be made it cannot be enforced against those who have executed it (*Tewksbury v. O'Connell*, 21 Cal. 60; *Barber v. Burrows*, 51 Cal. 404; *Jackson v. Torrence*, 83 Cal. 521, 23 P. 695; *Olson v. Lovell*, 91 Cal. 506, 27 P. 765); but, as the court said in *Cavanaugh v. Casselman*, 88 Cal. 543, 549, 26 P. 515, 517: "It is not the rule that a contract which on its face purports to be inter partes must invariably be executed by all whose names appear in the instrument before it shall be binding upon any. One reason why it is held in many of the cases that an agreement is not to be operative upon one until it has been signed by another, is that such signing is the consideration upon which the first signer agrees to be bound; but when a sufficient consideration for the agreement on the part of the first signer is shown to authorize its enforcement, he cannot be released therefrom unless he shall show clearly that there were other considerations for his signing the agreement than those named in the instrument." The court in the same connection quoted with approval the following from *Bishop on Contracts*, § 348: "If by parol stipulation, or, a fortiori, if by the writing itself, the contract was not to be deemed complete until other signatures should be added, it without such addition will not bind those who have signed it; but if nothing of this appears, the parties signing will be holden, though even on the face of it the signatures of others were contemplated by the draughtsman." The same rule is stated in *Kurtz v. Forquer*, 94 Cal. 91, 29 P. 413.

In *Mullarky v. Young*, 9 Cal. App. 686, 100 P. 709, 710, wherein the language of the instrument indicated that the parties intended that all should be bound or none, it was held that a contract between two named parties of the first part and two named parties of the second part, which was signed by one only of each part, did not constitute a complete contract, but the court, referring to the above rule, said: "If in the case at bar the contract had been signed by both parties of the first part, the vendors, and although not signed by the parties of the second part, had been accepted and acted upon by them, then it would be deemed complete."
* * *

[4] In the present case not only did the plaintiff receive a consideration for his signature, namely, the possession of the property, but it is manifest from his letter to the vendor's attorney that the contract was considered by him to be in force and effect notwithstanding the failure of his brother to sign. There having been an accession to its terms by the parties who signed, and part perform-

ance on both sides, neither could assert its invalidity upon the ground urged by the plaintiff. *Sparks v. Mauk*, 170 Cal. 122, 148 P. 926; *Minton v. Mitchell* (Cal. App.) 265 P. 271. Moreover, neither vendee—both being witnesses at the trial—testified that the signature of the plaintiff was conditional, nor that it was the understanding between themselves or with the vendor that the contract should not be operative unless signed by all the parties named; the only testimony in this connection being that of the defendant, who testified that the plaintiff and his brother were to buy the property but that the contract was never signed by the latter.

We are satisfied that the circumstances shown do not reasonably support the conclusion that the contract was not intended to bind the plaintiff and defendant, and that the findings in this respect are not sustained by the evidence.

Plaintiff further contends that the correspondence shows a mutual rescission of the contract which entitles him to recover the amount paid.

In *Heilig v. Parlin*, supra, cited by plaintiff in support of his claim, a demand was served upon the vendee for the possession of certain real property agreed to be sold to the latter, with a notice that, because of his failure to make a certain payment, the contract was "absolutely abandoned and determined." It is urged as the effect of that decision that the vendor by his notice elected to rescind the contract, thus giving the vendee the right to recover the payments made. We do not so understand the decision, as the court, after referring to a previous action to quiet the title to the property, wherein the question of the alleged rescission was not involved, said: "In the present case, however, the complaint directly alleges a rescission on the part of the vendor, Parlin, and this allegation is not denied in the answer. In such case the vendee is clearly entitled to recover what he paid under and in pursuance of the contract so rescinded." With the exception of the question of the effect of the previous decree quieting the title to the property, the only question involved or decided was the vendee's right to recover the payments made under the contract where its rescission by the vendor was admitted by the pleadings.

[5, 6] It has been held that, after the vendee's breach, the vendor may agree to a mutual abandonment or rescission, in which case the vendee would be entitled to recover the amounts paid. Such were the facts proved or admitted in the following cases wherein recovery was allowed: *Drew v. Pedlar*, 87 Cal. 443, 25 P. 749, 22 Am. St. Rep. 257; *Phelps v. Brown*, 95 Cal. 572, 30 P. 774; *Shively v. Semi-Tropic, etc., Co.*, 99 Cal. 259, 33 P. 848; *Merrill v. Merrill*, 102 Cal. 317, 36 P. 675; *Heilig v. Parlin*, supra; *Gaume v. Sheets*, 181 Cal. 119, 183 P. 535; *Bernardo v. Soderman*,

19 Cal. App. 161, 124 P. 866; *Smith v. Jacobard*, 20 Cal. App. 281, 128 P. 1023, 1026; *Burmester v. Horn*, 35 Cal. App. 549, 170 P. 674; *Aderholt v. Wood*, 66 Cal. App. 666, 226 P. 950. The same rule applies when there is a mutual failure to perform, the conditions of the contract being concurrent (*Clary v. Folger*, 84 Cal. 316, 24 P. 280, 18 Am. St. Rep. 187); and the vendee may also recover where the vendor is in default or refuses to be bound by the contract (*Chatfield v. Williams*, 85 Cal. 518, 24 P. 839; *Merrill v. Merrill*, 95 Cal. 334, 30 P. 542; *Duncanson v. Walton*, 111 Cal. 516, 44 P. 174; *Carter v. Fox*, 11 Cal. App. 67, 103 P. 910; *Seals v. Davis*, 25 Cal. App. 68, 142 P. 905; *Robben v. Benson*, 37 Cal. App. 227, 173 P. 766). But a vendee in default cannot recover where the vendor who is not in default stands upon the contract (*Bradford v. Parkhurst*, 96 Cal. 102, 30 P. 1106, 31 Am. St. Rep. 189; *Joyce v. Shafer*, 97 Cal. 335, 32 P. 320; *Glock v. Howard, etc., Co.*, 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17); and the right to retain the purchase money upon an unexcused default by the vendee is independent of any express clauses in the contract for the forfeiture of rights or the retention of payments as liquidated damages, such clauses being but declarations of what would have been the legal rights of the vendor without such provisions (*Glock v. Howard, etc., Co.*, supra; *Tuso v. Green*, 194 Cal. 574, 586, 229 P. 327).

[7, 8] The grounds for the claim in the present case that the vendor rescinded the contract were the statement in the notice of default that she elected "to cancel the contract pursuant to the terms thereof," and that the same "is hereby canceled and is absolutely void and of no effect," and the statement by her attorney in his letter to the vendee that the contract by reason of the latter's default had been canceled and was no longer existing. It has been held that a provision in a contract to the effect that a violation of any of its terms or conditions by either party should work a forfeiture and the contract should thereupon become void and of no effect means only that the rights of the party violating it cease, and, as to him and to that extent, the agreement becomes void and of no effect. The contract, however, remains in effect so as to protect the rights of the innocent party and to enforce the obligations of the delinquent. *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 P. 177. The contract having provided that, in the event of a default on the part of the vendee, all sums theretofore paid should at the option of the vendor be forfeited and retained by her, and the agreement thereupon "become and be absolutely void and of no effect," the notice stating that she elected to cancel the contract pursuant to the terms thereof should be construed therewith; and, when so construed, it is evident that she did not intend

a technical cancellation or rescission, but merely to terminate the vendee's rights under the contract pursuant to its provisions. Such was the view of the court in *Hyman v. Harbor View Land Co.*, 46 Cal. App. 98, 188 P. 828, wherein a vendor, in a notice to the vendees following their default, stated that he rescinded the contract, and it was held not to be his intention to make a technical rescission, but only to terminate the contract in accordance with its terms, which were that, in the event of a default of the vendees, time being of the essence, the vendor might at his option rescind the contract, and all moneys paid thereon should thereupon be forfeited and retained by him as rent and liquidated damages. Also, in *List v. Moore*, 20 Cal. App. 616, 129 P. 962, a contract for the purchase of real property made time of the essence, and provided that, in the event of his failure to comply with its terms, the vendee should forfeit all right thereto and the vendor released from all obligation to convey. In a written extension granted the vendee, it was provided that, in case of a default by the latter, the contract, which was deposited in escrow, should be surrendered to the vendor, and thereupon "be considered canceled and terminated," and also that "upon the surrender of the said contract * * * the same is to be null and void and of no further effect. * * *" The vendee having defaulted, he was notified that the contract was "at an end." The action was brought to recover the amounts paid by him on the purchase price; a rescission by the vendor being alleged. A judgment for the defendants was affirmed on appeal. In holding that the notice did not constitute a rescission, or give to the purchaser the right to recover any part of the purchase money paid, the court said: "It would be rather singular if under the circumstances the mere notice given to the contemplated purchaser by the owner of the land of a fact that was expressly provided in the agreement and of which each had knowledge, would operate to change the legal effect of said fact to the detriment of the said owner. The contract was at an end either with or without any formal notice. * * * Rescission implies, of course, the restoration of the parties to the same situation, and the same terms as existed when the contract was made. It requires the surrender of any consideration or advantage secured by either party. But the only fair interpretation of the notice here, considered in connection with the terms of the contract, is that no further affirmative action should be taken by either party to execute said contract, and that the status of each should remain as provided without further change."

While, as held in *Glock v. Howard, etc., Co.*, supra, a vendor may, "if his generosity prompts him so to do," agree with a vendee in default for a mutual abandonment and

rescission of the contract, in which event the vendee would be entitled to repayment, the facts of the present case do not fairly support the conclusion that the vendor, to use the language of the court in *List v. Moore*, supra, "was so gratuitously generous as to voluntarily surrender the valuable right secured to her by the terms of the contract."

We are satisfied the evidence was insufficient to reasonably support the findings of the trial court in this and the other respects mentioned, and the judgment is accordingly reversed.

JAMES v. FRAZEE et al. (Civ. 6948.)★

District Court of Appeal, First District, Division 2, California. Aug. 2, 1929.

Rehearing Denied Aug. 30, 1929. Hearing Granted by Supreme Court Sept. 30, 1929.

Appeal and error §699(4)—Reversal cannot be predicated on error in instructions where record does not show at whose request instructions were given.

A judgment cannot be reversed on ground of asserted error in instructions where record does not show at whose request such instructions were given, since appellate court must presume that any instruction complained of was given at request of appellant.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Stuart James against Leonard D. Frazee and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for damages resulting from an automobile collision. The cause was tried before a jury, which returned a verdict for plaintiff in the sum of \$35,000. This verdict was reduced on order of the trial court to \$17,500, and the defendant has appealed from the judgment upon typewritten transcripts.

The collision occurred at the intersection of two streets in the city of Oakland while defendant was endeavoring to make a left-hand turn through the intersection. Each party charged the other with negligence in the operation of his vehicle; the principal

act of negligence charged to the defendant being his alleged failure to give a proper signal before attempting to make the turn. The plaintiff suffered a fractured leg and other minor injuries, and on this appeal the suggestion is made that the verdict is highly excessive, but the point is not urged for a reversal of the judgment. On the merits of the case appellant concedes that the evidence is conflicting and that there is some evidence to support the verdict. For this reason no attack is made upon the judgment on that ground.

The only point urged on the appeal is that the trial judge erred in giving certain listed instructions to the jury. These instructions relate generally to the definitions of negligence and contributory negligence and to the duty of the defendant in the operation of his vehicle on the public highway as such duty is laid down by certain sections of the Motor Vehicle Act (St. 1923, p. 517, as amended). The appellant argues that these instructions cast too heavy a burden upon him and that the jury should likewise have been instructed that these provisions of the Motor Vehicle Act applied to the respondent as well.

There is considerable merit in appellant's criticism of some of the instructions listed, but we will not discuss them because the record is not in condition to enable us to give appellant any relief. The record presented by the appellant shows 63 instructions given by the trial judge and 10 instructions requested by the appellant and either given as modified or refused. The record does not disclose which party requested any of the instructions which the appellant now attacks, but it does appear that none of the instructions requested by the defendant and refused touch upon the subject-matter covered by the instructions now complained of.

The rule of the decisions is that when the record does not show at whose request certain instructions were given the appellate court must presume that any instruction complained of was given at the request of the appellant and the judgment cannot be reversed on the ground of asserted error in such instruction. *Sutter Butte C. Co. v. American R. & A. Co.*, 182 Cal. 549, 554, 189 P. 277; *Gray v. Eschen*, 125 Cal. 1, 5, 57 P. 664; *Finkelstein v. Cosgrove*, 83 Cal. App. 201, 202, 256 P. 608; *Walters v. Evick* (Cal. App.) 268 P. 1061.

For this reason the judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

VATCHER v. EGAS et al. (Civ. 5306.)

District Court of Appeal, Second District, Division 2, California. July 23, 1929.

1. Bail §74(1)—Surety held not exonerated because principal was released without date certain being specified for his appearance and because personal service of order so to appear was necessary; "process" (Code Civ. Proc. § 715).

Surety on bail bond held not entitled to be exonerated because principal was released without a date certain being specified for his appearance and because personal service of an order so to appear was necessary, in view of Code Civ. Proc. § 715, by which surety assumed the burden of paying amount specified if principal should fail to attend from time to time as might be directed; word "process" in statute signifying understanding that principal will hold himself available to process of the court.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Process.]

2. Bail §74(1)—Surety held not released from liability because absconding principal was in custody of sheriff of foreign state awaiting extradition.

Surety held not exonerated on bail bond because principal who failed to appear was indicted in the state and was in custody of sheriff of another state awaiting extradition upon order from which he appealed, since principal, by absconding and by effectively invoking legal procedure of foreign state to prevent his return, gave rise to contingency against which surety obligated itself.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by L. V. Vatcher against V. M. Egas and J. E. Roman-Checa. Judgment for plaintiff, and, from an order which forfeited a bail bond furnished by defendant Roman-Checa, the United States Fidelity & Guaranty Company, as surety, appeals. Affirmed.

John B. Haas and John D. Home, both of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

CRAIG, J. On February 20, 1925, the respondent recovered judgment upon a promissory note executed by the defendant V. M. Egas, and indorsed by the defendant J. E. Roman-Checa. On February 21, 1925, upon an affidavit reciting that execution had been issued, but that collection was impossible, although the defendants had property, and that the defendant Roman-Checa was about to depart from the jurisdiction, and to abscond and thus avoid process, he was arrested. On the date last mentioned, bail was fixed in the sum of \$1,100, the amount of said judgment, whereupon the appellant furnished in his behalf an undertaking which provided as follows:

"* * * We, United States Fidelity and Guaranty Company, a Maryland corporation, as surety hereby undertake that the said J. E. Roman-Checa will appear and will at all times hold himself amenable to the order and process of the court and will appear for such further proceedings in the above entitled action as may be had in accordance with law and the rule of the above entitled court, or if he fails to perform either of these conditions, that we will pay to the People of the State of California the sum of eleven hundred and 00/100 dollars, lawful money of the United States."

The defendant was thereupon released from custody and immediately left the state. An order for his examination in supplementary proceedings was issued, directing that the sheriff serve the same upon J. E. Roman-Checa personally, or, if he could not be found, that it be served upon the surety, which latter service was made for the reason already stated. The company appeared from time to time, and after numerous continuances an order was entered forfeiting said undertaking to the people of the state of California, for the use and benefit of the plaintiff, from which order the surety appealed.

Appellant contends that it should have been exonerated, for the reason that the defendant was released without a date certain being specified for his appearance, and that personal service of an order so to appear was necessary before the principal could legally be held in such default as to create a liability upon the undertaking. Section 715 of the Code of Civil Procedure, relied upon by appellant, provides in part:

"Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final termination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution."

[1] This section affords a complete answer to appellant's contention, because in furnishing an undertaking that he would appear and "at all times hold himself amenable to the order and process of the court and will appear for such further proceedings in the above entitled action as may be had," the surety assumed the burden of paying the amount specified if the principal should fail to "attend from time to time * * * as may be directed." Both the statute and the undertaking contemplated future proceedings, orders, and process, whereas the defendant created and the surety permitted the precise contingency for which the obligation was demanded and provided. The word "process" in the statute is singularly significant in the present instance, because it signifies the

understanding that the person released will hold himself available to the process of the court. Appellant undertook to assure the court that Roman-Checa would attend from time to time as might be directed. The fact that a date had not previously been set or personal service effected is, from the very nature of the situation, immaterial, since he was bound to obey future orders, although he rendered them impossible to serve by voluntarily placing himself beyond the court's jurisdiction.

[2] It is further urged that Roman-Checa was thereafter indicted in this state, and was in the custody of a sheriff in Louisiana awaiting extradition upon order from which he appealed, and that this also was a ground for requiring the exoneration of the surety. It has been held in certain criminal cases cited by appellant that, under a bail bond providing for the surrender and commitment of the principal, his arrest and incarceration elsewhere releases the surety from liability. However, the reasoning already employed herein applies equally in this respect, since the defendant, by absconding, and by effectively invoking such legal procedure of a foreign state as to prevent his return to hold himself amenable to the orders of local tribunals, gave rise to the contingency against which the surety obligated itself to the people of this state. *County of Los Angeles v. Maga* (Cal. App.) 276 P. 352, is squarely in point. It was there held that, the accused having voluntarily left the jurisdiction, the sureties were liable, and the fact of arrest in other proceedings did not exonerate them.

The order appealed from is affirmed.

I concur: IRA F. THOMPSON, J.

Owing to the absence of WORKS, P. J., he does not participate in this opinion.

100 Cal. App. 91

PEOPLE v. GODFREY et al. (Cr. 1796.)

District Court of Appeal, Second District, Division 1, California. July 22, 1929.

1. Criminal law ☞1023(12)—Appeal lies from order refusing motion to vacate judgment of conviction (Pen. Code, § 1237).

Order denying motion to vacate judgment of conviction is appealable under Pen. Code, § 1237 permitting appeal to be taken by defendant from order made after judgment affecting substantial rights.

2. Criminal law ☞1131(4)—Defendant's tardiness in moving to vacate judgment of conviction held insufficient ground for dismissing appeal from order denying motion (Pen. Code § 1237).

That defendant's motion to vacate judgment of conviction was presented to trial court

too late held not ground for dismissal of appeal from order denying motion under Pen. Code § 1237, since question whether motion was made in time involved consideration of merits of appeal.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Mark Godfrey and Russell Smith were charged with, and Smith was convicted of, an offense. From an order denying Smith's motion to vacate the original judgment, he appeals. On motion to dismiss the appeal. Motion denied.

See, also, 279 P. 1031.

Ernest Spagnoli and Walter F. Lynch, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for the People.

HOUSER, J. More than three years after the date of the affirmance by this court of a judgment of conviction against him, defendant made a motion in the trial court to vacate said original judgment. The motion was denied. Thereupon defendant appealed to this court from the order denying such motion. The instant proceeding is a motion made in this court by respondent to dismiss said appeal on the ground that the motion to vacate the judgment was made by defendant in the trial court "too late," and, therefore, that the order denying such motion was not appealable.

[1] By section 1237 of the Penal Code, among other things, it is provided that an appeal may be taken by a defendant "from any order made after judgment, affecting the substantial rights of the party." In several cases within this state the rule there enunciated has been followed. See *Ward v. Dunne*, 136 Cal. 19, 68 P. 105; *People v. Perez*, 9 Cal. App. 265, 98 P. 870; *People v. O'Brien*, 4 Cal. App. 723, 89 P. 438; *People v. McNulty*, 95 Cal. 594, 30 P. 963. As it is manifest that the order in question was made after final judgment, and that it affected substantial rights of defendant, the right to appeal from the order in question seems firmly established.

[2] Whether the motion to vacate the judgment was made within the time permitted by law in such cases was one of the questions which was to be determined by the trial court. If made "too late," it is manifest that other grounds, although furnishing possibly sufficient legal reasons for a denial of the motion, were at least unnecessary as a basis for the ruling. But, assuming that the only reason for a denial of the motion was that it was made "too late," the right of defendant to appeal from the ruling was just as completely assured to him by the statute and the decisions of the Supreme Court as though such denial had been based upon any other reason.

The appeal from the order of the trial court presented for review to this court each and every reason which might afford a sufficient legal foundation for the action of the trial court in the premises. In other words, the legal merits of the controversy, including the question of whether it should be dismissed because of the tardiness of defendant in instituting it, were placed before this court for its determination. To solve the problem presented by the motion to dismiss the appeal on the ground that the motion in the trial court was made "too late" would require at the hands of this court at least a duplication of the work and investigation of the facts and the law which would become necessary to reach a decision on the appeal.

In the case of *People v. McNulty*, 95 Cal. 594, 30 P. 963, 964, in ruling upon a motion to dismiss an appeal taken from an order made after final judgment in the action, among other things, the court said: "To dismiss an appeal is to refuse to consider its merits, and therefore there can be no dismissal of an appeal on the ground that it is without merit; for to reach this conclusion the merits must be considered, and the record must be examined."

It follows that the instant motion to dismiss the appeal should be denied. It is so ordered.

We concur: CONREY, P. J.; HOLLZER, Justice pro tem.

100 Cal. App. 233

PEOPLE v. GODFREY et al. (Cr. 1796.)★

District Court of Appeal, Second District, Division 1, California. Aug. 2, 1929.

Hearing Denied by Supreme Court Aug. 29, 1929.

Criminal law §998—Defendant who failed to move to set aside indictment could not have judgment vacated for illegal drawing or disqualification of grand jury (Pen. Code, §§ 990, 995).

That grand jury which presented indictment against defendant was not legally drawn or qualified held not ground for setting aside judgment under Pen. Code, §§ 990, 995, where no motion was made to set aside the indictment.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Mark Godfrey and Russell Smith were indicted, and Smith was convicted of an offense. From an order denying Smith's motion to set aside the judgment, he appeals. Affirmed.

See, also, 279 P. 1030.

Ernest Spagnoli and Walter F. Lynch, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for the People.

HOUSER, J. In brief, the history of the litigation represented by this appeal is that in the month of May, 1925, defendant was convicted of the crime of robbery. His appeal from the judgment rendered against him resulted in an affirmance of such judgment. *People v. Smith*, 76 Cal. App. 105, 243 P. 882. In the month of January, 1929, which was nearly four years after the date of his conviction, defendant presented a motion in the trial court to vacate the judgment theretofore rendered against him. In substance, the grounds of such motion were that the verdict of the jury by which defendant was found guilty of the charge preferred against him was void—first, for the reason that on the return of the verdict by the jury the clerk of the court failed to read the verdict to the jury or to inquire of the jury whether it was their verdict—all as required by section 1164 of the Penal Code, and, secondly (without going into detail as set forth in the motion) that the grand jury which presented the indictment against defendant was not legally drawn or qualified. The motion, by order of the trial court, was denied; and defendant has appealed to this court from such order.

In his closing brief appellant has expressly abandoned the point first suggested herein.

Assuming (but not conceding) that the facts as shown by the record presented herein compel the conclusion that the grand jury in question was irregularly drawn and selected, nevertheless, according to the statutes and the decisions affecting such a situation, it does not follow that in the circumstances defendant is now in a position to take advantage of such defects.

By a provision of the Penal Code, among other things, in effect it is provided that in answer to his arraignment the defendant may move to set aside the indictment or information (section 990, Pen. Code); and section 995 of the same code provides that the indictment must be set aside "where it is not found, indorsed and presented as prescribed in this code. * * *". In the case of *People v. Bawden*, 90 Cal. 195, 27 P. 204, 205, the defendant was prosecuted by information. He was convicted; and on his appeal he sought "to avail himself of the alleged fact that there was no preliminary examination and commitment of defendant by a magistrate before the filing of an information. * * *". With reference to the point presented by the appellant, in the course of the opinion the Supreme Court said: "* * * Moreover, a defendant, upon arraignment, may move to set aside the information upon the ground 'that before the filing thereof the defendant had not been legally committed by a magistrate'; and if the motion be not then made, the defendant is

★Hearing denied by Supreme Court.

precluded from afterwards taking the objection. Pen Code, §§ 990, 995, 996; *Ex parte McConnell*, 83 Cal. 558, 23 P. 1119; *Ex parte Moan*, 65 Cal. 218, 3 P. 644. See, also, *Hamilton v. People*, 29 Mich. 173; *People v. Coffman*, 59 Mich. 1, 26 N. W. 207."

The following authorities also support the rule: *People v. Lawrence*, 21 Cal. 368; *People v. Fritz*, 54 Cal. App. 137, 201 P. 348; *People v. Knight*, 63 Cal. App. 63, 218 P. 79; *People v. Lopez*, 26 Cal. 112; *People v. Stacey*, 34 Cal. 307; *People v. Parsons*, 82 Cal. App. 17, 255 P. 212.

In the case of *People v. Murphy*, 71 Cal. App. 176, 235 P. 51, a situation identical with that here presented was before the appellate tribunal, and the ruling was in accord with that hereinbefore indicated. The case of *Bruner v. Superior Court*, 92 Cal. 239, 28 P. 341, relied upon by appellant herein, contains nothing which militates against the conclusion reached by the decisions rendered in the respective cases to which reference hereinbefore has been had.

The order is affirmed.

We concur: CONREY, P. J.; YORK, J.

AHERN v. LIVERMORE UNION HIGH SCHOOL DIST. OF ALAMEDA COUNTY. (Civ. 6764.)★

District Court of Appeal, First District, Division 1, California. Aug. 9, 1929.

Rehearing Denied Sept. 7, 1929. Hearing Granted by Supreme Court Oct. 7, 1929.

1. Schools and school districts ⇨120—In manual training student's personal injury action, allegations of notice and failure to remedy dangerous condition of saw after notice held sufficient (Gen. Laws, Act 5619, § 2).

In action against school district for injury to manual training student while operating power-driven circular saw, allegations of complaint as to notice or failure to remedy dangerous condition of saw after receiving notice held sufficient, under Gen. Laws, Act 5619, § 2.

2. Schools and school districts ⇨114—School district is "public corporation" against which actions will lie directly.

A school district is a "public corporation" against which actions will lie directly.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Public Corporation.]

3. Schools and school districts ⇨117—Actions to enforce liabilities of school district may be brought against trustees, and no judgment as condition to proceeding against trustees as such need be shown (Pol. Code, §§ 1575, 1623).

Actions to enforce liabilities of school district may be brought against board of trustees as such or against them in designated name of

district, under Pol. Code, § 1575, and no judgment as condition to proceeding against trustees as such need be shown; effect of sections 1575 and 1623 being to authorize trustees to sue and be sued and make board responsible for judgments against district.

4. Schools and school districts ⇨122—Instruction that, to recover from school district for student's injury, dangerous condition, notice to defendant, and failure to remedy within reasonable time must be shown, held proper (Gen. Laws, Act 5619; Pol. Code, § 1623, as amended by St. 1923, p. 298).

In action against school district for injury to manual training student while operating power-driven circular saw, instruction that plaintiff must show dangerous condition, knowledge or notice thereof by defendant, and failure to remedy within reasonable time, held proper, under Gen. Laws, Act 5619, when read with Pol. Code, § 1623, as amended by St. 1923, p. 298, as against contention that same legal responsibility for negligence is imposed on school district as that resting on private corporations.

5. Schools and school districts ⇨122—Instruction that school district was liable for student's injury if its negligence was proximate cause and plaintiff was not contributorily negligent held erroneous (Gen. Laws, Act 5619).

In action against school district for injury to manual training student while operating power-driven saw, instruction that, if defendant or any of its officers was negligent, which negligence was proximate cause of plaintiff's injury, without any negligence on part of plaintiff proximately contributing thereto, defendant was liable, held erroneous, since school district's liability is measured by Gen. Laws, Act 5619.

6. Schools and school districts ⇨121—In action against school district by student injured while operating saw, plaintiff's testimony that guard was not in place and he had never seen guard on saw held admissible.

In action against school district for injury to manual training student operating power-driven saw, plaintiff's testimony that guard on day of accident was not in place, and that he had never seen guard on saw, held admissible as circumstance relating to instructor's knowledge of danger.

7. Trial ⇨255(4)—Defendant desiring restriction of evidence should request instruction to that effect.

If defendant desired evidence restricted, instruction to that effect should have been asked.

8. Appeal and error ⇨1051(3)—Testimony as to general practice respecting guarding of power saws, if incompetent, held harmless, where defendant conceded guard was necessary.

In action against school district for injury to manual training student operating power-driven saw, testimony of safety engineer as to general practice respecting guarding of saws, if incompetent, held harmless, where defendant conceded that guard was necessary but contended that sufficient guard had been furnished and kept on saw.

9. Witnesses ~~C~~406—In personal injury action, testimony to conversation with witness some months after accident held admissible to contradict testimony of such witness.

In personal injury action against school district, witness' testimony to conversation with instructor some months after accident held properly admitted, where offered to contradict that given on material matter by instructor while witness.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Action by Martin Ahern, by his guardian ad litem, Theresa J. Ahern, against the Livermore Union High School District of Alameda County. Judgment for plaintiff, and defendant appeals. Reversed.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and Agnes R. Polsdorfer, Deputy Dist. Atty., all of Oakland, for appellant.

Warren H. Pillsbury, of San Francisco, for respondent.

PER CURIAM. An action brought by Martin Ahern, through his guardian ad litem, to recover damages for personal injuries alleged to have been caused by the negligence of the officers and employees of defendant school district. A jury returned a verdict for the plaintiff, and, from the judgment entered thereon the defendant, following the denial of a motion for a new trial, has appealed.

[1] The plaintiff at the time he was injured was 14 years of age. He had been a student in the manual training department of the school district since August, 1925, and on December 7th of that year, while operating a power-driven circular saw therein, suffered the loss of the middle and index fingers of the right hand which came in contact with the saw blade. The complaint alleged that the injuries were sustained through the negligence of the defendant in that its officers and employees, without due regard for the safety of the children of the school, failed to have in place a guard over the saw disc; that such guard was a necessary and standard safeguard to prevent injuries from the use of the saw, which was hazardous to operate, particularly to children, without being so guarded, and which fact defendant knew or, in the exercise of proper care, ought to have known; furthermore, that an instructor of the class in which plaintiff was a student, and who was in the employ of the defendant, had authority and the ability to remedy the dangerous condition without the expenditure of school funds, that he knew for a long time prior to the injury that the saw while in an unguarded and dangerous condition was being operated by students in his absence, but that notwithstanding he neglected to remedy the condition

or to take such action as was reasonably necessary to protect the students and the plaintiff against the danger. The defendant denied that the injuries were caused by its negligence, alleged that the same were due solely to the negligence of the plaintiff, and also pleaded contributory negligence on his part.

Appellant contends that the allegations of notice or that its officers failed to remedy the dangerous condition of the saw after receiving notice contained in the complaint were insufficient to state a cause of action under section 2 of Act 5619 of the General Laws, and that, in order to recover under section 1623 of the Political Code, it was essential that judgment be first recovered against the district.

The act, which by section 1 limits the personal liability of the trustees for the acts of employees, provides by section 2 that " * * * School Districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition * * * of buildings, grounds, works and property in all cases where the governing or managing board of such * * * school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such * * * building, grounds, works or property and failed within a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition, or failed and neglected within a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." Approved June 13, 1923, St. 1923, p. 675.

Section 1623 of the Political Code, as amended in 1923, approved May 10, 1923, St. 1923, p. 298, provides that "boards of school trustees, high school boards * * * are liable as such in the name of the district for salary due any teacher on contract, and for all debts contracted under the provisions of this chapter, and for any judgment against the district on account of injury to any pupil arising because of the negligence of the district or its officers or employees, and they must pay any judgment for debts, liabilities or damages out of the school funds. * * * Members of the boards of school trustees and city boards of education shall not be held personally liable for accidents to children going to or returning from school, or on the playgrounds, or in connection with school work."

The material portions of the last section previous to its amendment were the following: "Boards of trustees are liable as such, in the name of the district, for any judgment against the district for salary due any teacher on contract, and for all debts contracted under the provisions of this chapter and they must pay such judgment or liabilities out of

the school moneys to the credit of such district," etc.

[2, 3] We are satisfied that the complaint was sufficient under the provisions of the general law, and we find no merit in the second objection. A school district is a public corporation (*Estate of Bulmer*, 59 Cal. 131; *Hughes v. Ewing*, 93 Cal. 414, 28 P. 1067; *Kennedy v. Miller*, 97 Cal. 429, 32 P. 558) against which actions will lie directly (*Barber v. Mulford*, 117 Cal. 356, 49 P. 206). Actions to enforce its liabilities may be brought against its board of trustees as such (*Hancock v. Board of Education*, 140 Cal. 554, 74 P. 44), or against the latter in the designated name of the district (section 1575, Pol. Code); and no judgment as a condition to a proceeding against the trustees as such need be shown; the effect of the last section and section 1623 of the Political Code being, as was held in *Hancock v. Board of Education*, supra, to authorize the trustees to sue and be sued and "make the board responsible for judgments" obtained against the district.

[4] Based upon the provisions of Act 5619, General Laws, appellant offered the following instruction, which was refused: "I instruct you that before you can render a verdict against the defendant in this case the following facts must be proved by a preponderance of the evidence: (1) That a dangerous or defective condition existed in public property belonging to defendant; (2) that the governing or managing board of such defendant, or an officer or person having authority to remedy such condition, had knowledge or notice of such defective or dangerous condition of such property, and (3) that such governing or managing board or officer or person having authority to remedy such condition failed or neglected within a reasonable time after acquiring such knowledge or receiving such notice to remedy such condition, or failed and neglected within a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

Respondent contends that the Code section as amended imposes the same legal responsibility for negligence upon school districts as that resting upon private corporations, and that the instruction was properly refused. It is conceded by counsel that the legislation in question followed actions against the trustees in several districts seeking to hold them personally liable for injuries to pupils. The acts were adopted at the same session. Act 5619 was approved on June 13, 1923, and was the last to pass the Legislature. The amendment to the section of the Political Code was approved on May 10, 1923, and both acts took effect on the same day. Both relate to the same subject, namely, the liability of a district for negligence. Act 5619 prescribes the conditions under which liability shall attach,

as to which the amended section is silent; while the latter, in addition to providing for the enforcement against the district of liabilities both for torts and upon contracts by actions against the trustees of the district as such, prescribes, subject to the constitutional limitation, how judgments shall be paid. Under such circumstances the acts should be read together (*Old Homestead Bakery v. Marsh*, 75 Cal. App. 247, 258, 242 P. 749), and, when so read, are not inconsistent. While the Code section refers to judgments for injuries due to negligence, and provides that the trustees as such shall be liable therefor, the provision has no other effect than to make the board responsible for such and other judgments entered against the district (*Dawson v. Tulare Union High School Dist.* [Cal. App.] 276 P. 424; *Hancock v. Board of Education*, supra) to the extent that the section directs that such judgments be paid from school funds. We are satisfied that the provisions of Act 5619, General Laws, determine the liability of a district for the negligence of its officers, and that the proposed instruction correctly stated the law.

[5] The following instruction was given at the request of the plaintiff: "If you find that defendant district or any of its officers was negligent, which negligence was the proximate cause of plaintiff's injuries while a pupil in the defendant's school without any negligence on the part of the plaintiff proximately contributing thereto then and in that event defendant is liable in damages to this plaintiff."

It being our conclusion that the responsibility of the district for the negligence of its officers or employees is measured by the above act and not by the rule applicable to private corporations, the above instruction was erroneous.

[6, 7] The plaintiff was asked over objection whether the guard on the day of the accident was in place and whether he had ever seen the guard on the saw. His answer to both questions was in the negative. Defendant contends that the questions were intended to convey the impression that the guard was customarily off the saw, and that the ruling thereon was erroneous and prejudicial.

The evidence showed a condition likely to have attracted or to have been called to the attention of the instructor, and was a circumstance relevant to the question of his knowledge of the danger. *Wigmore on Evidence*, § 252; *Dotton v. Albion*, 50 Mich. 129, 15 N. W. 46; *Noyes v. Gardner*, 147 Mass. 506, 18 N. E. 423, 1 L. R. A. 354; *Dawson v. Tulare Union High School Dist.*, supra. If appellant desired the evidence to be restricted, an instruction to that effect should have been asked.

[8] A safety engineer was permitted to testify to the general practice with respect to guarding power saws in wood-working estab-

fishments, and gave his opinion as to the dangerous character of an unguarded circular saw. It is claimed that the evidence was incompetent and tended to prejudice defendant's case in the minds of the jury. If incompetent, as claimed, the evidence was harmless, as defendant conceded throughout the trial that the guard was necessary, contending, however, that a sufficient guard had been furnished and kept on the saw.

[9] The same witness testified to a conversation with the instructor some months after the accident. This is claimed to have been hearsay and consequently inadmissible. The evidence was admitted to contradict that given on a material matter by the instructor while a witness, and was properly admitted.

Appellant contends that the evidence was insufficient to support a finding that defendant district was negligent, or that plaintiff was not guilty of contributory negligence, as alleged. After a careful review of the testimony we are satisfied that the evidence was sufficient to support a finding against the district under the rule which we believe the Legislature intended to prescribe, and that, considering the age of the plaintiff and his inexperience, the conclusion of the jury that he was not negligent was justified.

In the matter of the instructions, however, we are convinced that a broader rule respecting the liability of school districts for negligence than the law sanctions was applied by the court, and that the necessary effect of the error was to mislead the jury.

For this reason, the judgment is reversed.

100 Cal. App. 85

PONCINO v. SIERRA NEVADA LIFE & CASUALTY CO. (Civ. 6923.)

District Court of Appeal, First District, Division 1, California. July 22, 1929.

Appeal and error $\S$ 464—Where appellant attempted to give stay bond, but attorney's clerk made error in notice of justification, writ of supersedeas should be granted.

Where appellant in good faith made an honest effort to give a stay bond, but through mistake and inadvertence attorney's clerk gave notice of justification of surety on April 16 instead of April 23, writ of supersedeas should be granted on appellant's furnishing good and sufficient undertaking in sum required by law to stay execution of judgment.

Action by Alinda Poncino, administratrix, against the Sierra Nevada Life & Casualty Company. Judgment for plaintiff, and defendant appealed. On application for writ of supersedeas, prayed to be directed to the Superior Court of Alameda County, Leon E. Gray, Judge, to prevent issuance of execution

of a judgment in an action upon a policy of accident and health insurance. Writ granted.

J. Hampton Hoge, of San Francisco, for petitioner.

Edwin H. Williams, of San Leandro, for respondent.

TYLER, P. J. The record shows that a certain judgment was obtained by plaintiff against defendant, petitioner herein, for the sum of \$2,500. The action in which such judgment was rendered was one brought on an accident and health insurance policy.

Defendant moved for a new trial, which motion was denied on the 4th day of April, 1929, and thereafter it perfected an appeal to this court. For the purpose of staying execution on said judgment, appellant, on April 8, 1929, filed a surety bond in the sum of \$5,000. Respondent thereafter, on April 12, 1929, filed notice that she excepted to the sufficiency thereof. On April 15, 1929, appellant served notice on respondent's attorney that the surety on said bond would justify on the following morning at 10 o'clock; said notice being served in San Francisco, and the place set for justification being fixed at Oakland. Respondent's attorney, deeming the notice insufficient as to time, did not attend. Appellant's attorney did not discover his mistake concerning this notice until the 2d day of May, 1929, when he was served with a motion for execution to issue. Thereafter, on May 10, 1929, appellant duly filed another undertaking in the sum of \$5,136.32, being twice the amount of the judgment and costs. Notwithstanding the filing of such undertaking, the court made an order on May 13, 1929, for execution to issue. This order was stayed pending the hearing and determination of this petition.

It is claimed by petitioner herein that the notice of justification of the surety was set for Tuesday, the 16th day of April, 1929, instead of Tuesday, the 23d day of April of the same year through mistake and inadvertence on the part of a clerk in the office of appellant's attorney, and it is prayed that an order be made by this court permitting appellant to file with the clerk of this court a good and sufficient undertaking to stay execution of the said judgment during the pendency of the appeal, and that upon the filing of the same the writ prayed for issue to the court below and the officers thereof, requiring each of them to desist from executing said judgment.

We are of the opinion that the relief sought should be granted. Appellant has, in good faith, made an honest effort to give a stay bond, and the mistake or inadvertence of the clerk as to the notice of justification should not disturb the status quo until the final determination of the action, as appellant might lose the fruits of its appeal, if successful.

Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1, 76 P. 653; Segarini v. Bargagliotti, 193 Cal. 538, 226 P. 2. It is ordered that upon the filing by petitioner with the clerk of this court, within 20 days, of a good and sufficient undertaking in the sum required by law to stay execution of said judgment, and which said undertaking shall have been first approved by a judge of the superior court at a hearing upon 10 days' notice to the respondent, a writ shall issue as prayed for herein. It is further ordered that in the meantime, during said period of 20 days, execution of the judgment be stayed.

We concur: KNIGHT, J.; CASHIN, J.

100 Cal. App. 128

KINGS COUNTY PACKING CO. v. SUNLAND SALES CO-OP. ASS'N et al.★
(Civ. 6691.)

District Court of Appeal, First District, Division 1, California. July 23, 1929.

Rehearing Denied Aug. 24, 1929. Hearing Denied by Supreme Court Sept. 23, 1929.

1. Contracts ⇨147(1), 152—Contracts should be construed to effectuate intent of parties, giving common and accepted meanings to words used.

Contracts are to be construed to give the true intent of the parties, and words are to be given their common and accepted meaning.

2. Sales ⇨76—Contract for sale of raisins, based on "price quoted" by seller, referred to price quoted in general market; "market price;" "market value."

Contract for sale of raisins to packing company by co-operative association based on "price quoted by seller," required sale at price quoted in general market, and not in particular localities; "market price" and "market value" both meaning price or value of article established or shown by sales in the way of ordinary business, "market value" being price at which goods are freely offered in the market to all the world.

[Ed. Note.—For other definitions, see Words and Phrases, Second and Third Series, Market Price; First, Second, and Third Series, Market Value.]

3. Sales ⇨76—Co-operative association, contracting to sell raisins on basis of "price quoted," was required to fill orders at current quoted price, notwithstanding different price given 4 of its 17 divisional sales offices.

Co-operative association, contracting to sell raisins to packing company at "price quoted by seller," with certain deductions, was required to fill orders at general market price quoted for raisins on dates when orders were accepted, and was not entitled to set price in accordance with that stated in night telegram to 4 of the 17 divisional sales offices.

4. Appeal and error ⇨1178(6)—Case should be remanded for determination of damages, where trial court failed to consider evidence on that point (Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

Where trial court failed to consider evidence as to buyer's damages by reason of seller's breach of contract, and took view that plaintiff was not entitled to damages on that ground, judgment for damages should not be entered on appeal, under Code Civ. Proc. § 956a, as added by St. 1927, p. 583, but cause should be remanded for trial court's determination of damages.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by the Kings County Packing Company against the Sunland Sales Co-operative Association and others. From the judgment, plaintiff appeals. Reversed and remanded, with direction.

Carl E. Lindsay and Lindsay & Gearhart, all of Fresno, for appellant.

M. B. Harris and Harris, Johnson, Willey & Griffith, all of Fresno, and Harry M. Creech, of San Francisco, for respondents.

PER CURIAM. This appeal is taken by appellant from the judgment in its favor for the sum of \$250, and in favor of respondents for their costs incurred in the action, amounting to \$147.47. There are five counts or causes of action set forth in the complaint. The first four are for damages because of the alleged breach of a certain contract existing between appellant and respondents. The fifth is a cause of action for money had and received to the use of appellant in the sum of \$600. It was upon this fifth count that the court rendered judgment in favor of appellant for \$250.

Appellant states that, as the amount involved under the fifth count is so small, no attempt will be made on this appeal to question the findings or judgment in that particular, but does urge with respect to the other four counts that the findings wherein the court found appellant had breached its contract are not supported by the evidence, but, instead, the evidence shows that the contract was breached by respondents. We have referred to respondents in the plural, although the contract was signed but by Sunland Sales Co-operative Association, for the reason that it is alleged in the complaint and admitted in the answer that Sunland Sales Co-operative Association, in the matter of the making and executing the agreement and in all matters connected therewith, acted as and was the agent and broker of respondent Sun-Maid Raisin Growers' Association and Sun-Maid Raisin Growers' Association of California, and consequently, if the alleged breach of the contract was committed by the

Sunland Sales Co-operative Association, all three of the respondents are bound thereby.

The facts are without material dispute. The appellant Kings County Packing Company is engaged in the business of packing and selling canned fruits. Its plant is situated at Armona, Kings county, Cal. Several years prior to 1925 it began to pack and sell canned raisins of the Muscat type. It built up quite a large business along that line, particularly in the southern states. A few years prior to 1925 the Sun-Maid Raisin Growers took over this business, and under a contract with the Kings County Packing Company the packing company canned Muscat raisins for the Sun-Maid Raisin Growers, which in turn marketed the product. This particular branch of business was discontinued by the Sun-Maid Raisin Growers in 1924, and the Kings County Packing Company concluded to resume for its own account such enterprise. It was with that end in view that in June, 1925, the Kings County Packing Company entered into the contract in question with the Sunland Sales Co-operative Association. At that time of the year it would, of course, be impossible to determine the volume of the raisin crop maturing in September and October. The Sun-Maid Raisin Growers' organizations having control of the major portion of the product to be produced by the growers throughout the raisin districts, and the remainder of the product being divided among a number of independent packers, the Kings County Packing Company endeavored to obtain such quantity of Muscat raisins as it might need for its enterprise from the Sun-Maid Raisin Growers, and that was done or arranged for by the agreement referred to.

The agreement is simple in its terms and unmistakable in its language. The Sunland Sales Co-operative Association is therein called the "seller," and Kings County Packing Company the "buyer." The covenants of the agreement were to the following effect: The buyer agreed to purchase and to receive from the seller, and the seller agreed to sell and deliver to the buyer, the buyer's entire requirements of 1925 crop of Muscat raisins; the buyer was to pay therefor for 2-crown loose Muscats per pound the price quoted by the seller on 15-ounce seeded cartons, less 4 cents, with a minimum of $4\frac{1}{2}$ cents per pound, and for 3-crown loose Muscats per pound the price quoted by seller for 15-ounce seeded cartons, less 3 cents, with a minimum of $5\frac{1}{2}$ cents per pound. It should be mentioned, in passing, that 15-ounce seeded cartons referred to a certain pack of raisins, which were at that time being marketed, and had for a long time been marketed, throughout the country by the Sun-Maid Raisin Growers' organizations. This pack consisted of a carton containing 15 ounces of seeded Muscats. The Sun-Maid Raisin Growers' or-

ganizations marketed many other packs, but the basis for the charge to be made to the Kings County Packing Company for raisins ordered by it and delivered under the contract was the quoted price of the Sun-Maid Raisin Growers' organizations for its 15-ounce seeded carton packs. The Sunland Sales Co-operative Association, a subsidiary organization of the Sun-Maid Raisin Growers, acted as the sales agent for the co-operative association. Its sales operations extended throughout the United States, the Dominion of Canada, and other foreign countries. Its operations were explained by Ellsworth Bryce, whose deposition was read in evidence at the trial. His testimony reduced to a narrative form was substantially as follows:

I am manager of the sales administration division of the Sunland Sales Co-operative Association. In general, I direct the sales activity of the sales organization under the explicit direction of our sales counsel. I have charge of the sales personnel and the administration of the sales under the specific direction of the sales counsel. The particular business of the Sunland Sales Co-operative Association is merchandising for co-operatives, and we do merchandising for the co-operative association known as the Sun-Maid Raisin Growers of California. We handle the entire line of merchandise that they manufacture, consisting of Sun-Maid raisins and syrup and different by-products thereof. We sell for them and recommend the prices on the commodity. The recommendation is either approved or disapproved, and, if it is approved, we wire out to our divisional sales offices, making the price effective. These divisional sales officers are located in 17 cities in the United States and Canada; some of them are New York, Chicago, Pittsburgh, Boston, Atlanta, San Francisco, Los Angeles, Seattle, Vancouver, Montreal, Dallas, New Orleans, Kansas City, and Denver. We sell the Sun-Maid raisins in different styles of packages; among them was a package known as the 15-ounce seeded Muscat package; those 15-ounce seeded Muscat cartons contained seeded Muscat raisins.

Another official of the Sunland Sales Co-operative Association, Millard S. Bury, testified regarding the way in which the marketing of the products of the Sun-Maid Raisin Growers was done and the manner in which prices were quoted substantially as follows:

I am assistant to Mr. Bryce, assistant to the manager, sales administration division, Sunland Sales Co-operative Association, and have been acting in that capacity from the first part of October, 1925. Since that time I have been in charge of the contract department, as well as acting as assistant to Mr. Bryce, having supervision of sales administration in his absence. In November, 1925 we had 17 divisions and it was our practice to wire from the home office to the divisional

offices information relative to prices and withdrawals of different packs and brands of our products. We had a manager at each of these different divisions and we wired that manager. Referring to our different products we used different terms; one was "cartons." "Cartons" means a particular pack; that is, puff pack, carton puffed pack. We were then just getting into distribution of puff raisins; we had announced them a few months before that. "Package" was our term for 15-ounce seeded Muscats, the old style seeded package; wherever there is a reference to "package," and wherever that term is used, it meant the 15-ounce old-style carton seeded, not the puffed.

This witness also testified that the prices for the various packs of raisins set by the Sunland Sales Co-operative Association were not communicated by that organization directly to the trade, but that such quotation was done by the divisional offices. So it appears from the testimony of these two officials of the Sunland Sales Co-operative Association, Ellsworth Bryce, the sales manager, and Millard S. Bury, his assistant, that the manner in which prices for the various packs of raisins handled by that organization for the Sun-Maid Raisin Growers were quoted to the trade was as follows: The sales organization fixed a price for the various packs, which, when agreed to by the Sun-Maid Raisin Growers, became the established price to be quoted to the trade; thereupon the Sunland Sales Co-operative Association would wire instructions to the 17 divisional offices scattered throughout the United States and Canada, which divisional offices would then in turn issue circulars to the trade quoting the price.

It appears from the record without dispute that in September and October, 1925, it was found that Muscat grapes were not plentiful; that the crop itself was light, and, further, that because of the conditions prevailing a quantity of this variety of grapes had been sold by the producers green, which means that they were picked, boxed, and shipped to Eastern markets in an undried condition; and that the quantity of Muscat raisin grapes of the crop of that year produced and dried by the vineyardists was much less than in former years. It also appears that the Sun-Maid Raisin Growers that year were placing on the market a new variety of raisin, which they termed "puffed," prepared through a secret process, and over which Sun-Maid Raisin Growers' Association had a monopoly.

It is argued by counsel for appellant—and not without force or support in the evidence—that the price on the grapes under appellant's contract was raised to a prohibitory price, in order that respondents would not be required to make delivery and would thereby be enabled to put upon the market more of the "puffed" variety. The witness, Millard

S. Bury, assistant to the manager of Sunland Sales Co-operative Association, testified:

"Q. Well, I don't know what you did. I will withdraw that. I don't think you made any offer for seeded after that. Well, then, as a matter of fact, this direction sent by you to these four offices, Chicago, Atlanta, San Francisco, and Boston, directing your divisional agents to sell the Muscat seeded pack at 11 cents, higher than you were selling the puffed for, was to stimulate the trade in puffed? A. No; more to get in the eyes of the trade, get over in the eyes of the trade, that fact that we still had seeded. That was not to quote them. We did not want to sell seeded particularly. In other words, our major thought was on puffed.

"Q. Sure. You really did not expect that those experienced men in the East, throughout the country, jobbers and wholesale men, were going to pay you a higher price for an inferior article when they could get a superior article for less price? You did not really expect that, did you? A. *We had hoped that large sales would not be made.*

"Q. Well, I think that answers it. You had hoped that large sales would not be made. A. Because of the fact, as stated before, we wanted to get general distribution—if possible, full distribution—on puffed, because we knew, if we put puffed over, as we should, nobody else would have much of a look-in on old-styled seeded. The demand would be nil, which has later resulted."

Augmented to this are the prices quoted in bulletins received in evidence issued on various dates from and after October 21, 1925, to and including December 1, 1925. In these bulletins whenever puffed Sun-Maid raisins in 15-ounce packages and package seeded Muscats Sun-Maid in 15-ounce packages are quoted together, the price fixed for the puffed raisins is greater than the price fixed for the "old-style" package seeded Muscats. The reason for this seems obvious. The puffed raisins were a new product, which was considered superior to the old-style seeded Muscats, and which the Sun-Maid Raisin Growers were then featuring. And yet, after the order of appellant was sent in, respondent Sunland Sales Co-operative Association refused to fill the order at the quoted price, but made a price at which the seeded Muscat contracted for and ordered by appellant was quoted higher than the higher grade of puffed Muscat.

The purpose of raising the price on appellant's order for seeded Muscat raisins, however, under the view we have taken, becomes immaterial, as the sole question presented is the interpretation to be placed upon paragraph three of the contract, which provides: "Buyer shall pay hereunder for two-crown loose Muscats per pound the price quoted by seller on 15-ounce seeded cartons less four (4¢) cents, with minimum of four and one-

half ($4\frac{1}{2}\phi$) cents per pound; for three-crown loose Muscats per pound the price quoted by seller for 15-ounce seeded cartons less three (3ϕ) cents, with a minimum of five and one-half ($5\frac{1}{2}\phi$) cents per pound. Prices shall be f. o. b. sellers' plant at Fresno or Selma."

Appellant placed the two orders in dispute with respondent Sunland Sales Co-operative Association—the first, November 13, 1925, for 60 tons Muscatel, three-crown loose, lug boxes, and 40 tons Muscatel, two-crown loose, lug boxes; and the second, November 17, 1925, for 300 tons Muscat, three-crown loose, lug boxes, and 200 tons Muscat, two-crown loose, lug boxes. Having no quoted price other than that published in the market news or fruit news, the price was left blank and a letter written by Leslie S. Smith, the general manager of appellant corporation, requesting that the proper price be inserted in accordance with the conditions of the contract. These orders were accepted by respondent, Sunland Sales Co-operative Association, on the days following their respective dates, the first on November 14th and the second on November 18th, and the prices quoted on those dates were filled in both orders, namely, 8 cents a pound for three-crown raisins and 7 cents a pound for two-crown raisins. On November 14, 1925, Ellsworth Bryce, manager of the sales administration division of Sunland Sales Co-operative Association, sent a night telegram, dated November 14, 1925, to the sales offices at Chicago, Boston, San Francisco, and Atlanta as follows: "View of demand certain territories you may offer effective November 14th thirty-six fifteen ounce carton seeded to your trade at a price of eleven cents valley subject to home office confirmation." The number "thirty-six" mentioned means, according to Sales Manager Bryce, 36 cartons to the case of 15-ounce seeded.

[1, 2] The question narrows itself to what the parties to the contract intended by the use of the term "price quoted." It is so well established as not to require the citation of authority that contracts are to be construed to give the true intent of the parties and that words are to be given their common and accepted meaning. All of the dictionaries—Webster's, Century, Imperial, and Standard—concur that the definition of the term "quoted" is to name or give the current market price. "Market price means the current price." *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. 752, 753. "Market price" and "market value," when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales in the way of ordinary business. *Sanford v. Peck*, 63 Conn. 486, 27 A. 1057; *Murray v. Stanton*, 99 Mass 348; *Cliquot's Champagne*, 70 U. S. (3 Wall.) 114, 18 L. Ed. 116. "Market value" is the price at which goods are freely

offered in the market *to all the world*. *Musser v. Magone*, 155 U. S. 240, 15 S. Ct. 77, 81, 39 L. Ed. 135. It is clear, then, that the term "price quoted" in the contract was intended to mean the price quoted in the general market and not in a few particular localities.

[3] The last price quoted to the general trade for the 15-ounce seeded carton pack, when the orders of appellant were accepted, was 9 cents, and therefore respondents, in refusing to fill the orders at the quoted price, and not appellant, breached the contract. The night telegram to 4 of the 17 divisional sales offices did not establish the "price quoted" in accordance with the understanding of the contracting parties as disclosed by the evidence and the contract itself. On the contrary, it appears to be an arbitrary attempt to name a price to fit the situation confronting respondents.

If respondents could establish the price to be paid by appellant for raisins ordered under the contract by wiring a price to 4 out of the 17 of the divisional offices, raising the price in these 4 offices and maintaining the lower price in the remainder, the same result could likewise be accomplished by wiring a price to one of the divisional offices. It is too clear to admit of argument that such was not contemplated by the parties at the time they entered into the contract. The market for raisins was widespread. It covered the United States and Canada, as well as foreign lands, and therefore what was in the minds of the parties at the time of executing the contract was the general market price—not the price which might be confined to one locality. Appellant certainly did not intend by its contract to place the power in the hands of respondents to fix the price to be charged it by respondents naming the price at which raisins might be sold in one of the divisional offices.

[4] Appellant urges that we make findings and direct the entry of judgment in its favor, under the authority conferred by section 956a of the Code of Civil Procedure (as added by St. 1927, p. 583), which provides that the Supreme and appellate courts may make findings; but, as the trial court under the view it took concluded that appellant was not entitled to damages under any count of the complaint, excepting the fifth, alleging a cause of action for money had and received, and upon which it rendered judgment for appellant, and therefore did not consider evidence as to plaintiff's damages by reason of respondents' breach of the contract, we deem it proper that the trial court should hear the evidence as to appellant's damages and determine the same.

The judgment is reversed, and the cause remanded, with direction to the trial court to find appellant's damages and enter judgment in accordance with such finding.

100 Cal. App. 149

PEOPLE v. WILLIAMS. (Cr. 1547.)

District Court of Appeal, First District, Division 1, California. July 27, 1929.

1. Weapons ⇨—Steel wrench which could be fitted in leather strap and held in hand of user held to constitute a "slungshot" within statute punishing possession thereof (St. 1925, p. 542).

Flat steel wrench about six inches in length, and weighing approximately five ounces, and looped leather strap about twelve inches long, so contrived by means of wire and leather thongs as to allow the wrench to be placed in pocket at one end, while the end forming the loop could be slipped over the wrist of the user and held in the hand, and, though both were not combined at the time they were found, they were designed to be, held to constitute a "slungshot" within St. 1925, p. 542, punishing possession of a "slungshot," which is defined as a small mass of metal or stone fixed on a flexible handle, strap, or the like, used as a weapon.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Slung Shot.]

2. Weapons ⇨—Deadly weapon does not cease to be such by becoming temporarily inefficient.

Deadly weapon does not cease to be such by becoming temporarily inefficient nor is its essential character changed by dismemberment, if the parts may be easily assembled so as to be effective.

3. Criminal law ⇨1172(1)—Error in instruction in defining slungshot in language applicable to blackjack held not prejudicial, where jury disregarded instruction.

In prosecution for possession of blackjack or slungshot, error of court in defining a slungshot in the language applicable to a blackjack held not prejudicial, where jury properly disregarded instruction and found that weapon was a slungshot.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Will Williams was convicted of the possession of a blackjack or slungshot, and he appeals. Affirmed.

Martin C. Thuesen, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was charged in an information filed in the superior court in and for the county of Fresno with a felony, to wit, the possession of a blackjack or slungshot. He was convicted, and, from the judgment and an order denying his motion for a new trial, has appealed.

The information was based on section 1 of chapter 323 of the Statutes of California (St. 1925, p. 542). The section provides that "Every person who * * * possesses any

instrument or weapon * * * commonly known as a blackjack, slungshot, * * * shall be guilty of a felony and upon a conviction thereof shall be punishable by imprisonment in a state prison for not less than one year nor more than five years. * * *" As grounds for the appeal it is contended that the evidence of the character of the instrument found in defendant's possession was insufficient to justify the finding of the jury that the same was a blackjack or slungshot, or to warrant a verdict of guilty; that the verdict was contrary to law, in that there was no evidence upon which the jury could find that the defendant had possession of either a blackjack or slungshot as the same were defined in the court's instructions to the jury, and that the jury was misdirected as to matters of law.

On February 10, 1929, the defendant, with others, was arrested in a resort near Firebaugh, in Fresno county. There was found in his pocket a flat steel wrench about six inches in length and weighing approximately five ounces. In the same pocket was found a looped leather strap about twelve inches long, so contrived by means of wire and leather thongs as to allow the wrench to be placed in a pocket at one end, while the end forming the loop could be slipped over the wrist of the user and held in the hand. While the two were not combined at the time they were found, an inspection shows beyond a reasonable doubt that they were designed to be, and when joined were capable of being, used as an offensive weapon of deadly character.

Webster's International Dictionary defines a blackjack as a small leather-covered club or billy, weighted at the end, and having an elastic shaft; and a slungshot as a small mass of metal or stone fixed on a flexible handle, strap, or the like, used as a weapon.

[1, 2] Defendant claims that the articles found in his possession are not within either definition, but an inspection shows that, when combined, they were well within the last; and the question whether this was true was properly submitted to the jury (People v. McPherson, 220 N. Y. 123, 115 N. E. 515), whose verdict is fully supported. The rule is well settled that a deadly weapon does not cease to be such by becoming temporarily inefficient, nor is its essential character changed by dismemberment if the parts may be easily assembled so as to be effective. Mitchell v. State, 99 Miss. 579, 55 So. 354, 34 L. R. A. (N. S.) 1174, Ann. Cas. 1913E, 512; Hutchinson v. State, 62 Ala. 3, 34 Am. Rep. 1; Fielding v. State, 135 Ala. 56, 33 So. 677; People v. Freeman, 86 Cal. App. 374, 260 P. 826.

[3] In its instructions to the jury the court defined a blackjack or slungshot as "a small leather-covered club or billy weighted at the head and having an elastic shaft," and charged the jury that, unless they believed

that the property found in defendant's possession was a blackjack or slungshot, they must find him not guilty. As stated, the above is the definition of a blackjack as given by Webster, a slungshot being otherwise defined, and defendant claims that the instruction was consequently erroneous. Assuming this to be true, the instruction was not prejudicial to the defendant, but rather to the prosecution, and the error is not a ground for reversal. *Kirk v. Santa Barbara Ice Co.*, 157 Cal. 591, 108 P. 509; *People v. Harris*, 169 Cal. 53, 145 P. 520. The jury, however, disregarded the instruction—which they might properly do (*O'Neill v. Thomas Day Co.*, 152 Cal. 357, 92 P. 856, 14 Ann. Cas. 970)—and impliedly found, in accordance with the evidence, that the weapon was a slungshot.

The defendant was fairly tried and convicted upon sufficient evidence, and no error appears which can fairly be said to have resulted in a miscarriage of justice.

The judgment and order are affirmed.

100 Cal. App. 221

CHANDLER et al. v. BOWMAN and Consolidated Cases. (Civ. 6217; L. A. 9723.)★

District Court of Appeal, Second District, Division 1, California. Aug. 2, 1929.

Rehearing Denied Aug. 20, 1929. Hearing Denied by Supreme Court Sept. 30, 1929.

1. Covenants ⇨122—Evidence justified finding, in action for breach of warranty in sale of oil and gas, that pre-existing mineral lease was in force.

In action by purchasers of oil and gas against vendor thereof for breach of warranty on account of existence of outstanding mineral lease, evidence held to justify finding that prior lease granted to oil company was in force at time of sales to plaintiffs.

2. Covenants ⇨10—Instruments granting 1 per cent. of oil produced on land constituted conveyance of interest in realty subject to implied warranty against incumbrances (Civ. Code, § 1113).

Instruments whereby one of joint lessors of oil and gas property, who held himself out as owner of undivided interest in realty, granted 1 per cent. of oil and gas produced therefrom, "to have and to hold to the said grantees," constituted conveyances of interest in realty subject to implied warranties, under Civ. Code, § 1113, that grantor had not previously conveyed any interest in the same estate and that estate was free from incumbrances.

3. Principal and agent ⇨156—Vendor of oil property, purchased because of misrepresentations of vendor's agent that vendor's interest was free of incumbrances, was liable for resulting damages.

Where agent of vendor represented to purchaser that oil and gas property was free and clear of incumbrances, and purchaser was induced to purchase oil and gas on strength of

such misrepresentations, vendor was liable for resulting damages.

4. Covenants ⇨108(1)—Purchasers of undivided interest in oil and gas property held not estopped to assert vendor's breach of warranty by virtue of outstanding mineral lease, though purchasers permitted lessee to deduct cost of well.

Purchasers of undivided interest in oil and gas held not estopped to assert claim against vendor for damages by virtue of prior outstanding oil lease, though purchasers subsequently entered into agreement with lessee by which they gave lessee right to deduct cost of well before accounting for oil produced.

5. Covenants ⇨107—Purchaser may sue for damages for breach of warranty without making offer to rescind.

Purchaser, on discovering breach of warranty as to property sold, is not compelled to rescind or offer to accept return of purchase price, but may sue in damages for loss sustained.

6. Principal and agent ⇨115(2)—Agent authorized by vendor to fill in deeds had authority to make representations concerning vendor's title.

Agent whom part owner of oil and gas property, by instructions to escrow holder, authorized to have deeds filled in, had authority to make representations to purchasers concerning character of vendor's title.

7. Appeal and error ⇨719(4)—Ruling on demurrer in action in which no judgment was filed, and concerning which no review was asked, was not presented on appeal.

Trial court's failure to sustain demurrer to amended complaint on ground of misjoinder of parties was not presented on appeal, where no judgment was filed in the action in which the complaint was filed, and the court was not asked to review any rulings therein.

On Hearing in Supreme Court.

8. Covenants ⇨122—Evidence of misrepresentations of condition of title made by vendor's agent supported judgment for purchasers of oil and gas, suing for breach of warranty because of outstanding lease.

In action by purchasers of oil and gas against vendor thereof for breach of warranty on account of existence of outstanding mineral lease, evidence of misrepresentations relating to condition of title, made by agent of defendants to plaintiffs, held sufficient to support judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Actions by W. S. Chandler and another against George Bowman, and by J. A. W. Meiling against George Bowman. Judgment for plaintiffs in the first case, and defendant appeals. Affirmed.

L. G. Shelton, of Glendora, for appellant.
McGee, Sumner & Tilden, of Los Angeles, for respondents.

★Rehearing denied. Hearing denied by Supreme Court.

HOLLZER, Justice pro tem. Defendant Bowman appeals from a judgment rendered in a certain action in favor of W. S. Chandler and S. K. Mansfield for the sum of \$4,500. Likewise defendant Bowman appeals from a judgment rendered in another action in favor of J. A. W. Meiling for the sum of \$1,500. The first of these suits will be hereafter referred to as the Chandler Case, and the second as the Meiling Case.

These two actions, pursuant to stipulation of the parties, were tried as companion cases with two other actions, under an arrangement whereby the evidence, objections and rulings in one, so far as applicable, should be received and apply to each of the other suits.

In the Chandler Case the complaint alleged that, at all times therein mentioned, Bowman was a part owner in fee in the real property involved herein, and the owner of certain oil and gas rights in said property; that on December 5, 1922, he executed a lease to a certain company, hereinafter referred to as the oil company; that said lease conveyed to the oil company the right to drill for and produce oil and gas from said property, and further provided that the oil company should be reimbursed for the cost of drilling and placing on production of a well or wells for oil on said land, before any oil, et cetera, should be payable to the lessors, or those claiming under them. The lease, it was further alleged, was registered with the registrar of titles about December 18, 1922.

The complaint further charged that subsequently the defendant executed and delivered three certain deeds, a copy of each of which was set forth in *hæc verba*. One of said instruments purported to convey to the plaintiffs 1 per cent., another purported to convey to Chandler 1 per cent., and the third purported to convey to Mansfield 1 per cent., "of all of the oil and gas produced from said property." Each of said deeds also recited that said 1 per cent. "is a portion of all of the oil and gas produced from the above property, as reserved in deed from George Bowman to Philip A. Grohs" et al.

The answer contained no denial of any of these allegations. The defendant, however, in his answer, in addition to denying that the transaction whereby the plaintiffs acquired these deeds was a joint purchase, pleaded, by way of an affirmative defense, that he had deposited with the First National Bank of Whittier, as security for a certain note in the sum of \$600, three deeds of conveyances to 1 per cent. each of the oil and gas from said property, "with instructions to deliver the same to Philip A. Grohs, who might sell 1 per cent. for sufficient to pay said sum of \$600, and that this defendant instructed the said Philip A. Grohs that, if he could sell the remainder at the price of two thousand dollars (\$2,000) a per cent., or more, to do so, and deliver to the purchasers a deed."

The answer further charged that the plaintiffs had knowledge of said lease prior to the purchase of their respective interests, also that the defendant had withdrawn said royalty from the market, and that the plaintiffs had knowledge of such withdrawal before they purchased. In addition, the answer alleged that about December 5, 1922, the oil company had entered into a lease with the owners of said property and that defendant had signed the same, but that the oil company had abandoned said lease and subsequently had entered upon the property under a modified agreement without his consent, and had drilled a well thereon. The defendant further alleged that the lease signed by him was of no effect, and that the oil company had no right to retain any part of the oil attempted to be conveyed by him to the plaintiffs.

In the Meiling Case the complaint alleged that Bowman was the owner of certain oil royalties and oil and mineral rights in the property involved herein. In all other respects the allegations in the respective complaints in the two actions were substantially alike, and substantially similar admissions were made by the pleadings.

It is not disputed that the various deeds whereby plaintiffs acquired their respective interests were delivered to them in March, 1923; that they paid to Grohs the purchase price which he had fixed for the same; that in August, 1923, the oil company brought in a producing well at a cost of not less than \$150,000; and that the oil company refused to account to the plaintiffs for their full percentage of the oil as fixed in their deeds, but instead deducted the sum of \$1,500 against each 1 per cent. interest in the oil.

[1] The first point raised by appellant is that the above-mentioned lease granted to the oil company had been abandoned and was not in force at the time the plaintiffs acquired their respective interests. In this connection, it is argued that said oil lease was modified by a certain instrument, claimed to have been executed under date of February 9, 1923, and that the oil company was operating under the later agreement. Although a document, purporting to change some of the terms of that lease, was filed for identification, it was not introduced in evidence. On the contrary, so far as the record discloses, this instrument was never executed by the oil company, nor even by all of the lessors.

While there was evidence indicating that the oil company had not commenced drilling a well within 30 days after the execution of the lease, that delay was readily explained by the fact that the lease had not been signed by all of the owners of interests in the oil, and that the lessors had promised to furnish to the oil company, before the expiration of said 30-day period, written evidence of the approval of said lease by all of such owners as had not signed said lease, but that they had failed to comply with this part of their

agreement. On the other hand, the oil company insisted that its rights under said lease had never been modified, and it was engaged in drilling a well on the property in question at the time the plaintiffs acquired their respective interests therein. Appellant's contention, therefore, that the lease granted to the oil company was not in force at the time the sales in question were made to the plaintiff, cannot be sustained.

[2] It is next urged that the deeds obtained by the plaintiffs conveyed no interest in realty, but were merely transfers of personality, and included no warranties as to the title of the interests thereby transferred. Appellant concedes that, if these instruments can be construed as transfers of interests in oil in the ground, then they constituted conveyances of interests in realty, and hence became subject to the implied warranties specified in section 1113 of the Civil Code, to the effect that the grantor has not previously conveyed any interest in the same estate to any other person, and that the estate conveyed is free from any encumbrance suffered by the grantor or any person claiming under him.

In the present cases, however, it is contended that the language employed in the instruments delivered to the plaintiffs was not sufficient to make them conveyances of interests in oil in place, but only purported to give to them interests in such oil as might thereafter be taken from the ground. The answer to this question, therefore, depends upon the construction to be given to said deeds. Omitting such portions as are not material to the point under consideration, each of these instruments recited: "George Bowman, a single man, the registered owner, * * * does hereby grant to * * * all the real property * * * described as follows, to wit: One (1) per cent. of all of the oil and gas produced from lots * * * being a portion of all of the oil and gas produced from the above property, as reserved in deed from George Bowman to Philip A. Grohs, * * * to have and to hold to the said grantees. * * *"

The above referred to deed from Bowman to Grohs et al. contained, in addition to the provisions usually found in a conveyance of real property, a clause reading: "The grantor reserves one-eighth of all oil and gas produced on the above described property." The evidence showed without contradiction that in January, 1923, Bowman deposited with the First National Bank of Whittier the four deeds, which were subsequently delivered to the plaintiffs, and also a number of other deeds, the name of the grantee, however, being omitted in each instance. All of these instruments were similar in form, except that some of them, other than the deeds obtained by the plaintiffs, contained a recital: "Subject to matters of record." The record further discloses that the lease granted to the oil

company was executed by Bowman, Grohs, and various others, as joint lessors. No distinction was made in that lease between the interest of Bowman and that of any other lessor, except as to the amount of such interest. Thus it appears that Bowman held himself out as the owner of an undivided interest in the mineral rights in said property, or, in other words, the owner of an interest in the realty. It is not disputed that he undertook to convey undivided portions of the same interest to the plaintiffs. Having himself placed that construction upon his own rights in the property, he must expect to be bound thereby. Accordingly, we hold that under the deeds delivered to the plaintiffs, Bowman undertook to convey to them undivided interests in real property. He therefore became liable to them for any loss sustained by reason of any incumbrances suffered by him to be made against said property.

It is next argued that plaintiffs' knowledge of the condition of the title at the time of the purchase was superior to that of Bowman, and hence that the latter would not be liable for warranty of title. There are two answers to this contention. In the first place, the conveyances delivered to the plaintiffs, as already pointed out, constituted grants of interests in realty, and thereby carried with them the warranties of title defined by section 1113 of the Civil Code. The plaintiffs, as the grantees, were entitled to demand that Bowman deliver to them the kind of title called for by the deeds, and for any failure on his part in that respect he became liable to them in damages for the loss suffered thereby.

[3] In addition, the evidence disclosed that Bowman's agent, Grohs, represented to Mansfield that the property he was selling was a part of Bowman's landowner's interest in the oil and that it was free and clear. While Grohs also informed Mansfield that the latter could examine the records to verify this representation, and at that time stated he would refund the purchase price if such representation should turn out to be false, and although Mansfield did make an effort to ascertain from the recorder's office the condition of the title, he reported to Grohs that he had been unable to get the necessary information from the recorder. Mansfield further suggested that the transaction be handled through an escrow extending over a period of from 30 to 60 days. To this, however, Grohs replied that he could not wait that long, especially as there were others anxious to buy these interests. Mansfield explained to Grohs that he was a unit holder in an oil lease, the royalties in which were incumbered because the cost of the wells was first deducted, and that he wanted to be sure that this did not exist in the Bowman deal. On the promise of Grohs to refund the amount paid, if it should develop that Bowman's interest was not as represented, Mansfield paid

the purchase price and accepted the deeds for Chandler and himself.

Meiling testified that he had had only one conversation with Grohs, and that the latter informed him that he had some landowner's royalty for sale. Grohs exhibited to him a grant deed, similar to the one ultimately delivered to him, and, after making inquiry at the First National Bank of Whittier as to Grohs' authority to act for Bowman, and upon being informed that he had such authority, Meiling paid the purchase price to Grohs. From the foregoing evidence it is clear that Bowman's agent deliberately misrepresented the condition of the title to the plaintiffs, and that because thereof they were induced to purchase the respective interests obtained by them. That the principal is liable for such misrepresentation is clear.

[4] Appellant further urges that the plaintiffs became estopped to assert any claim against Bowman, because they entered into an agreement with the oil company, whereby they acknowledged the oil company's right to deduct the sum of \$1,500 against each 1 per cent. interest in the oil. By the terms of that agreement the parties thereto confirmed and ratified the lease made to the oil company on December 5, 1922, and stipulated that, upon the plaintiffs receiving the payments provided for therein, such payments were to be deemed payments in full for all claims and obligations arising out of the production of oil and the operation of the oil company on the leased premises. The moneys paid to the plaintiffs, referred to in said agreement, represented the full value of plaintiffs' percentage of the oil produced up to the date involved, less their pro rata of the cost of the well, said pro rata being calculated on the basis of \$1,500 for each 1 per cent. interest in the oil.

It will be readily seen that by this agreement the plaintiffs did nothing more than admit that they had no claim against the oil company because the latter, as it was entitled to do under said lease, had deducted the cost of the well before accounting for the oil to those who had purchased interests therein. In executing that agreement, the plaintiffs did not surrender anything which either belonged to themselves or to Bowman. Whatever rights the latter had were neither prejudiced nor affected thereby. The agreement did nothing more than acknowledge the existence of the very conditions, which Bowman created, and upon which plaintiffs have asserted the right to maintain the present suits, and by reason of which they recovered their respective judgments herein.

[5] Appellant also claims that the plaintiffs became estopped to claim a breach of warranty by reason of their alleged laches. The argument is that, inasmuch as the plaintiffs did not rescind the transaction immedi-

ately upon discovering the defect in the title—in other words, because they did not offer to accept a return of the purchase price—they thereby forfeited all right to relief. It is elementary that a purchaser, on discovering a breach of warranty, is not compelled to accept a rescission, but may sue in damages for the loss he has sustained.

[6] The appellant's contention that Grohs had no authority to bind Bowman, as principal, requires but little consideration. The evidence disclosed that at the time the deeds were deposited with the bank, Bowman gave to the latter instructions, which in part recited: "The above deeds are executed by me in blank, and you are authorized to fill in the name of the grantees upon the order of Philip A. Grohs. It is understood that no money is to pass through this escrow; as the money will be handed outside of the escrow by Philip A. Grohs, I hereby authorize and appoint Philip A. Grohs my agent, with full power and authority to instruct you to fill in the names of the grantees in the deeds, which I herewith hand you." In view of the foregoing instructions and in the light of the admissions contained in the answer with respect to Grohs' authority, it is obvious that there is no merit to this contention.

[7] The last point advanced by appellant is to the effect that his demurrer on the ground of misjoinder of parties should have been sustained to the second amended complaint in the case of Chandler & Mansfield v. Bowman, and which, in the lower court, was designated as No. 156714. Our examination of the record discloses that this action was tried upon the original complaint and answer thereto, and that no demurrer on the ground of misjoinder of parties was interposed in that case. While it appears that a demurrer on the ground of misjoinder of parties was pleaded to the second amended complaint in the case of Chandler & Mansfield v. Bowman, designated in the lower court as action No. 136985, nevertheless, according to appellant, no judgment was filed in that action, and this court is not asked to review any of the rulings therein.

For the reasons herein set forth, the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. [8] The petition for hearing, after decision by the District Court of Appeal, Second Appellate District, Division 1, is denied, upon the ground that the evidence and findings regarding misrepresentations made by the agent of defendant to plaintiffs are sufficient to support the judgments rendered.

100 Cal. App. 96

MATTSON v. MARYLAND CASUALTY CO.
(Civ. 6679.)★

District Court of Appeal, First District, Division 1, California. July 23, 1929.

Rehearing Denied Aug. 22, 1929. Hearing Denied by Supreme Court Sept. 12, 1929.

1. Insurance ⇨646(6)—In action on policy for accidental death, burden of showing loss was produced through some excepted cause was on defendant.

In action on policy covering accidental death of insured, it was sufficient for plaintiff to prove the loss and that it occurred by reason of the peril insured against, and burden of showing that the loss was produced by some excepted cause was on defendant.

2. Insurance ⇨668(11)—Defendant's motion for nonsuit should be denied, where plaintiff's testimony establishes prima facie that loss occurred by reason of peril insured against.

Where testimony in support of allegations of complaint in action on policy shows prima facie that loss occurred by reason of peril insured against, defendant's motion for nonsuit should be denied.

3. Witnesses ⇨397—Previous statement of plaintiff's witness, in action on accident policy, that vehicle which insured drove was truck, was admissible for impeachment only.

In action for accidental death, under accident policy excepting injury sustained by insured while driving automobile truck, previous statement of plaintiff's witness, at time of inquest, that insured was driving light delivery truck, while admissible for purposes of impeachment, did not constitute evidence of character of vehicle.

4. Evidence ⇨383(10)—Photographs of vehicle driven by insured held not conclusive, in action on policy excluding injuries sustained while driving truck.

In action on policy for insured's accidental death, in which defense was that insured was injured while driving an automobile truck, within exception of policy excluding injury so sustained, photographs were not conclusive on question of character of vehicle.

5. Insurance ⇨668(11)—Whether vehicle driven by insured, constructed from chassis of model T Ford, was automobile truck, within policy excluding injury suffered while driving truck, held for jury.

In action for accidental death, under policy excluding liability for injuries sustained by insured while driving automobile truck, question whether vehicle used by insured at time of death in making deliveries, having chassis of model T Ford and licensed as commercial vehicle, was automobile truck within policy, held question for jury.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Martin Mattson against the Maryland Casualty Company. Judgment for defendant, and plaintiff appeals. Reversed.

Charles L. James and C. K. Bonestell, both of San Francisco, for appellant.

John Ralph Wilson, of San Francisco, for respondent.

PER CURIAM. An action to recover on a policy of insurance issued to Alfred E. Mattson by Maryland Casualty Company, a corporation, which provided that, in the event the insured should be accidentally killed while driving an automobile during the period of one year commencing November 1, 1926, insurer would pay to the plaintiff, who was the beneficiary named therein, the sum of \$1,500. The policy provided, among other exceptions, that the same should not cover injuries, fatal or nonfatal, suffered by the insured while driving any automobile truck.

The complaint alleges that the insured was accidentally killed on November 9, 1926, while driving an automobile. The answer alleged as a defense that the insured, at the time he came to his death, was driving an automobile truck. The cause was tried before a jury, and at the close of plaintiff's case the defendant moved for an order directing a nonsuit, which was granted. The plaintiff has appealed therefrom, and from the judgment of dismissal entered thereon.

The evidence adduced by the plaintiff showed that the death of the insured resulted from a collision between the vehicle which he was driving and a telegraph pole; that the insured was employed by a concern engaged in manufacturing and repairing chairs, and at the time of his death was making deliveries, the vehicle being owned by his employers. The chassis of the vehicle was a 1920 Ford, model T, a construction used for light vehicles, such as Ford roadsters, sedans, and touring cars. Upon this chassis the employer of the deceased had constructed a seat with a body similar in shape to that of the ordinary delivery wagon or automobile. It appears that the vehicle was licensed as a commercial vehicle and was commonly used for delivery purposes. Two witnesses, both of whom were engaged in the automobile business (one a dealer in Ford products), testified that the vehicle was not a truck, and that the latter type differed in size, weight, model, and construction from the one in question. As against the foregoing, and for the purpose of impeaching the testimony of a brother of the deceased to similar effect, there was adduced by defendant the former's testimony, given at the time of the inquest upon the body of the insured; the witness there stating that the vehicle was a light delivery truck. There were also introduced in evidence by defendant two photographs of the vehicle taken after the collision. Defendant con-

tends that the only conclusion reasonably supported by the evidence was that the vehicle operated by the insured was an automobile truck.

[1-5] It was sufficient for the plaintiff to prove the loss, and that it occurred by reason of the peril insured against, and the burden of showing that the loss was produced through some excepted cause was upon the defendant. 33 Corp. Jur. "Insurance," p. 111, § 832; *Dennis v. Union Mutual, etc., Co.*, 84 Cal. 570, 24 P. 120; *Mah See v. North American, etc., Co.*, 190 Cal. 421, 213 P. 42, 26 A. L. R. 123; *Carr v. International Indemnity Co.*, 58 Cal. App. 614, 209 P. 83. The testimony in support of the allegations of the complaint was sufficient prima facie to have that result; and where this is true a motion for a nonsuit should be denied. *Berger v. Lane*, 190 Cal. 443, 213 P. 45. The previous statement of plaintiff's witness, while admissible for purposes of impeachment, was incompetent for any other purpose, and did not constitute evidence of the truth of the fact so stated by him. *Albert v. McKay*, 174 Cal. 451, 163 P. 666. Nor were the photographs conclusive on the question of the character of the vehicle. While these, in connection with other evidence, tended to support defendant's contention, nevertheless the evidence on the question, which was conflicting, was sufficient to support a contrary conclusion, and the issue should have been submitted to the jury. *Rabe v. Western Union Telegraph Co.*, 198 Cal. 291, 244 P. 1077.

The judgment is reversed.

100 Cal. App. 279

PEOPLE v. HELT. (Cr. 1830.)

District Court of Appeal, Second District, Division 2, California. Aug. 6, 1929.

1. Intoxicating liquors ⇨236(4)—Evidence held to warrant jury in believing defendant was acting in own behalf or working for another who had interest in still (St. 1927, p. 497).

In prosecution for possession, ownership, and operation of a still, evidence held to warrant jury in believing that defendant was acting in his own behalf or as agent, servant, officer, or employee of person who was owner of, or had interest in, distilling apparatus in question, under St. 1927, p. 497.

2. Intoxicating liquors ⇨137—To constitute offense of possession, ownership, and operation of still, it is not necessary to show accused intended to claim ownership.

To establish offense of possession, ownership, and operation of still, it is not necessary to show that accused intended to claim ownership, since accused might lay no claim to ownership and yet be acting for real owner, in which

event, if other elements of offense charged were established, case would be made against him.

3. Intoxicating liquors ⇨137—Requested instruction to acquit, if still was not on property over which defendant had exclusive control, was properly refused.

In prosecution for possession, ownership, and operation of still, requested instruction authorizing jury to acquit, if apparatus was not on property over which defendant had exclusive control, was properly refused, since instruction might have misled jury into believing that, in order to convict, it would be required to show defendant had exclusive control of property on which apparatus was located.

4. Criminal law ⇨829(1)—Refusal of requested instructions in liquor prosecution amply covered by instructions given, held not error.

In prosecution for possession, ownership, and operation of still, where requested instructions were included in instructions requiring prosecution to prove beyond reasonable doubt that defendant knew still was on premises and exercised control over it, and that possession denotes a distinct, personal conscious assertion of control, refusal of requested instructions was not error.

5. Intoxicating liquors ⇨239(2)—Requested instructions using word "defendants" held properly refused, where evidence as to ownership of premises where still was found involved third party.

In prosecution for possession, ownership, and operation of still, requested instructions using word "defendants" were properly refused, where evidence in regard to ownership of premises on which still was found so involved third party that minds of jury may have been confused to prejudice of prosecution, if instructions had been given.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Roy Helt was convicted of the possession, ownership, and operation of a still, and he appeals. Affirmed.

M. G. Phillips, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was charged with possession, control, ownership, and operation of a distilling device, intended and used for the manufacture and production of intoxicating liquor, and appeals from a judgment of conviction.

On the evening of January 28, 1929, two officers visited a house in the city of Los Angeles, and, while inspecting the premises, Roy Helt drove to the rear, parallel with the garage, in an automobile. In response to questions, he stated his name, denied that he resided there, or had ever been in the house, and said that he was returning the machine to the garage, that one John Marston was the owner, and had loaned it to him. Upon de-

mand therefor he produced a folder containing three keys, one of which fitted the lock on the garage, and with another the officers unlocked the front door of the house. Immediately upon entering they noticed a strong odor of whisky, and could hear a still boiling upstairs. Upon ascending to the second floor, they found the still, and large quantities of mash and whisky of more than the legal content of alcohol, fit for beverage purposes. Helt was asked to shut off the still, but stated that he could not do so, and knew nothing about it. He was then taken to the first floor, where all three sat in darkness for some time, awaiting the arrival of Marston, when the telephone rang. One of the officers testified—and it was stipulated that the other would testify likewise—as follows: "Somebody on the other end of the phone said, 'Hello Roy, is that you?' I said, 'Yes.' He said, 'How many cans did it run?' And I was at a loss to make an answer and I hung up." Shortly thereafter it rang again, whereupon the defendant was instructed to answer, and to state that he could not shut the still off, to ask the other party to "come on over," and to say that no officers were there. The witness stood near the telephone where he heard the conversation, and further testified: "He asked the defendant, 'Hello Roy, is that you?' The defendant states, 'Yes.' 'What is the matter?' And he said, 'Nothing.' 'Well, why don't you come on home?' He said, 'I can't get this shut off', meaning the still. He said, 'Why can't you?' He said, 'I don't know; there is something the matter with it.' And they asked him whether there was the law there." Within five or ten minutes the telephone rang a third time, as to which the officer testified: "There was a lady on the other end of the phone talking and asking him, said: 'Hello, Roy, is that you?' He said, 'Yes.' She said, 'What is the matter?' He said, 'Nothing.' She said, 'Why don't you come home?' Then she asked if the law was there and who it was, and he denied the law being there." The defendant testified in his own behalf that he had been connected with an ice company for about five years, where he had met Marston, and that he had been to the house but once before. He admitted that the telephone rang as stated, denied that he knew any of the parties who had called, or that any one said "Hello Roy," or asked when he was coming home, how much liquor ran off, or that he shut off the still. He testified that in these conversations he told the parties to send Marston over, believing that they must have known him. When cross-examined concerning his testimony at the preliminary examination, it appeared that he had then sworn that Marston was one of the parties telephoning, and that the latter did tell him to "shut off the still and get out of there"; that "he said he saw lights there while they were there."

Upon the trial, appellant testified that the

occasion of his previous one visit to the house in question was to see Marston. In his testimony at the preliminary he stated that he had merely driven past, and had seen Marston in the yard, but that there had been only one such occasion. This state of the record indicated that there had been two, and he then swore that he believed he had testified at the preliminary that he had been there twice before. He denied that anything had been said on the telephone about the lights. The officers' testimony reveals that appellant in driving parallel to the garage could not have driven in the doorway, and that he indicated no intention of so doing. Marston did not appear upon the night in question, nor did he materialize at the preliminary examination, or at the trial. Appellant knew nothing of his whereabouts, but testified that he had heard indirectly that Marston had gone to Salt Lake City. Finally, he refused to say that he might not have testified at the preliminary contrary to his testimony upon the trial, as disclosed by the record.

[1] It is contended that there is not only no evidence in support of the verdict and judgment, but that the evidence positively shows that appellant had no interest in the premises, automobile, distilling apparatus, or liquor, and that he had no knowledge thereof. However, as observed, his own statements on the telephone, to the officers, at the preliminary examination, and upon the trial, were in sharp conflict and many of them were contrary to the positive testimony of one officer and the stipulated testimony of the other. The position of the automobile, possession of the keys to the house and garage, telephone calls for some person of the same name, Roy, within a short time after his arrival, in spite of the fact that Marston's first name was John, and his conflicting statements indicating difficulty in accounting for the situation and circumstances, with no apparent effort to aid in bringing Marston to his rescue, all doubtless had much weight with the jury. It also appears, and is admitted, that he told the officers if they would go to his home Marston might come there. The jury were invested with the right and duty of choosing between the alternatives of accepting as true the testimony of the officers, which, unexplained, furnished strong evidence of guilt, or that of the defendant that he had no knowledge of the existence of the distillery. We cannot say as a matter of law that they were not justified in accepting straightforward, unimpeached evidence, and in rejecting a mass of contradictory statements upon important matters, none of which was corroborated in any way. The citation of authority as to the province of juries in such cases is unnecessary.

Appellant seeks to rely upon *People v. Hurley*, 60 Cal. 74, 44 Am. Rep. 55, wherein the defendant was charged with the theft of cer-

tain cattle merely because some hides were found in his barn. Four witnesses testified that Hurlley had killed his own cattle, and it appeared from the hides in controversy that they were nothing like the animals which had been stolen. Further, it was said: "If the property were in a locked-up room or box, of which he kept the key, it would be a fair ground for calling upon him for his defense." As to the defendant's showing in that case, it was said that there was "no conflict in the evidence upon any material point," and that the people had failed to make out a case. We think the evidence here such that the jury were not unwarranted in believing that appellant was "acting in his own behalf or as the agent, servant, officer or employee" of a person who was the owner of or had an interest in the distilling apparatus in question. St. 1927, c. 277, § 1.

[2-4] Lastly, it is urged that the trial court committed prejudicial error in refusing to give four requested instructions. The first of these is objectionable, in that it indicated that to establish the defendant's guilt it must be shown that he intended to claim ownership of the still. Of course, this is not the law. He might lay no claim to ownership, yet be acting for the real owner, in which event, if other elements of the offense charged were established, a complete case would be made against him. The third instruction refused also contains a statement which might well be interpreted by the jury as requiring proof of an element not legally required to convict. By it they would have been instructed that, if they should find certain facts, it would be incumbent upon them to acquit. One of these is that the apparatus "was not upon property over which the defendants had exclusive control." This statement, coupled with other facts indicated as necessary, might well have misled the jury into the belief that, in order to convict the defendant, it would be necessary to show that he had exclusive control of the property upon which the still was located. As to the second and fourth instructions under consideration, it is clear that each of them, as well as those parts in the first and third which were not objectionable as above explained, were amply covered by those given. In that behalf the jury were directed that the prosecution must prove beyond a reasonable doubt that the defendant knew that the still was on the premises and that he exercised some dominion or control over it, and that possession denotes a distinct, personal conscious assertion of control. Further, the jury were charged fully as to circumstantial evidence and the law of principal and accessory, and aider and abettor.

[5] Throughout these refused instructions the word "defendants" is used. Ordinarily this might be inconsequential and considered as an oversight, but in this instance, whether

intentional or not, it is quite objectionable. Evidence was introduced to show, and the contention was made on behalf of the defendant, that one Marston was the owner of the premises, and that the latter exercised control over the property and apparatus in question. The evidence in that regard so involved Marston that, had the court adopted and given instructions repeatedly referring to "the defendants," it is obvious that the minds of the jury might have been confused in such matter as to have vitally prejudiced the prosecution.

The judgment is affirmed.

I concur: WORKS, P. J.

Owing to the absence of Justice IRA F. THOMPSON, he does not participate in this decision.

100 Cal. App. 325

O'BRIEN v. UNITED BANK & TRUST CO. OF CALIFORNIA et al. (Civ. 6634.)

District Court of Appeal, First District, Division 2, California. Aug. 9, 1929.

1. Insane persons ⇐73—Agreement with incompetent under guardianship to open survivor bank account held void (Civ. Code, § 40).

Agreement made with incompetent after guardian was appointed for her to open purported survivor account with bank held void under Civ. Code, § 40, providing that, if one's incapacity has been judicially determined, he can make no contract until restoration to capacity, though judicial determination thereof was had pursuant to Code Civ. Proc. §§ 1763-1767, which deal with persons who are insane or from any cause mentally incompetent, and Civ. Code, § 38, relating thereto, being limited to persons entirely without understanding, and section 39 applying to person of unsound mind but not entirely without understanding.

2. Insane persons ⇐2—Evidence held sufficient to show determination of incapacity of deceased was established.

Proof that petition was filed to obtain decree determining incapacity of deceased and appointing guardian for her, that hearing was had, and that she was present at hearing, that bond was duly given, and that application was denied to one applying to be appointed guardian, and that finding was made in favor of guardian appointed, held sufficient to establish incapacity of deceased.

3. Insane persons ⇐26—Rejecting proof as to whether decedent, adjudged incompetent at time survivor account was opened, was of sound mind, held not error.

In suit to recover deposit, court did not err in rejecting proof as to whether decedent, who had been adjudged incompetent, and had a guardian appointed at time survivor bank account between plaintiff and decedent was opened, was of sound mind or otherwise, since in

collateral proceeding probate decree adjudging incompetency could not be attacked by that line of proof.

4. Trial $\Rightarrow$ 396(3)—Under allegations that from November 1, 1905, until death decedent was "incompetent," finding that from August 27, 1903, until death decedent was "incapacitated," held not erroneous.

Where it was alleged that from November 1, 1905, until death decedent, whose bank account was sought to be recovered by purported survivor in interest from bank and administratrix, was "incompetent," trial court's finding that from August 27, 1903, until her death decedent was "incapacitated" was not erroneous, two expressions being synonymous.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Incapacitated; First, Second and Third Series, Incompetent; Incompetency.]

5. Statutes $\Rightarrow$ 158—Repeals by implication are not favored.

Repeals of laws by implication are not favored.

6. Statutes $\Rightarrow$ 224—Statutes relating to incapacity of incompetents to contract and statute relating to survivor bank accounts will be construed together (Civ. Code, §§ 38-40; Bank Act, § 15a).

Civ. Code, §§ 38-40, relating to the incapacity of incompetents to contract, and Bank Act, § 15a (St. 1921, p. 1367), relating to surviving bank accounts, will be construed together and force and effect given to provisions of each, nothing to the contrary appearing.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Marie G. O'Brien against the United Bank & Trust Company of California, formerly known as the Sacramento Bank, and Cosette D. Allan, as administratrix of the estate of Margaret J. Allan, deceased, in which the last named defendant filed a cross-complaint. Judgment for the last named defendant, and plaintiff appeals. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for appellant.

El. B. Power and R. L. Chamberlain, both of San Francisco, for respondent.

STURTEVANT, J. The plaintiff sued the defendants to recover a bank deposit. The bank appeared and answered. The defendant Cosette D. Allan, as administratrix of the estate of Margaret J. Allan, appeared and answered and filed cross-complaint. The cross-complaint was answered, and on the issues so framed a trial was had before the court sitting without a jury. The court made findings in favor of the defendant administratrix, and, from the judgment entered thereon, the plaintiff has appealed, and has brought up a bill of exceptions.

On the 27th day of August, 1903, Margaret

J. Allan was adjudged incompetent, and a guardian was appointed. She was never restored to competency, and her guardian continued to act down to the date of Mrs. Allan's death. Subsequent to August 27, 1903, the plaintiff and deceased opened a purported survivor account with the defendant bank. By the terms of that purported agreement, upon the death of either the survivor would own absolutely, and be entitled to, the whole of the residue of the deposit. Mrs. Allan died on the 12th day of July, 1919. Shortly thereafter the plaintiff made a demand on the bank, and her demand was refused. This defendant, as administratrix, also made a demand which was refused. Later this action was commenced.

[1] The plaintiff contends that the purported agreement under which the plaintiff and Margaret J. Allan opened and maintained the survivor account constituted a valid and enforceable contract. The defendant opposes that contention, claiming that the purported agreement was void, and she cites section 40 of the Civil Code: "After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity." The plaintiff replies that the judicial determination was had pursuant to sections 1763-1767 of the Code of Civil Procedure, and that those sections deal with persons who are "insane, or from any cause mentally incompetent," and that the Civil Code refers to "a person of unsound mind." The plaintiff argues that the Civil Code section, therefore, refers to a different class than the class mentioned in the sections of the Code of Civil Procedure. We think the point cannot be sustained. By its terms section 38 of the Civil Code is limited to persons entirely without understanding. Section 39, by its terms, applies to a person of unsound mind, but not entirely without understanding. And section 40 is unlimited, and applies to a person of unsound mind—whether entirely or partly without understanding. There is nothing on the face of the statutes to warrant the construction contended for. The rule declared in our Civil Code obtains in the most of the jurisdictions. 32 C. J. p. 731. We find no case in which it has been limited, as plaintiff contends.

[2] The plaintiff contends that the judicial determination of the incapacity of Margaret J. Allan alleged in the complaint was not established by the evidence. She cites and relies on Harper v. Rowe, 53 Cal. 233; Wickersham v. Johnston, 104 Cal. 407, 38 P. 89, 43 Am. St. Rep. 118. Where, as here, the attack on a judicial decree is collateral, the manner of proving the decree is not as contended by the plaintiff. Simmons v. Threshour, 118 Cal. 100, 50 P. 312; Page v. Garver, 5 Cal. App.

383, 385, 90 P. 481. The decree on which the defendant relied was burned April 18, 1906. However, the defendant introduced proof that to obtain the decree a petition was filed, that a hearing was had, and that the deceased was present at the hearing. She also introduced a copy in evidence. She also introduced proof that a bond was duly given, and she introduced that bond in evidence. After the decree was entered, this plaintiff made an application to be appointed guardian of the deceased. That application was denied. The trial court made a finding in favor of the defendant. We are unable to say that, when the foregoing facts, together with the presumptions applicable, are all considered, the proof was insufficient. 22 Cal. Jur. p. 640; 34 C. J. p. 540; Hibernia Savings & Loan Soc. v. Boyd, 155 Cal. 193, 197, 100 P. 239; Estate of Schandoney, 133 Cal. 387, 389, 390, 65 P. 877; Johnson v. Canty, 162 Cal. 391, 395, 123 P. 263.

[3] After the defendant had introduced her proof showing the entry of the decree finding the deceased incompetent, the plaintiff called witnesses and attempted to elicit proof as to whether the decedent, at the time the survivor account was opened, was of sound mind or otherwise. That proof was rejected. In rejecting the proof, the trial court did not err. In a collateral proceeding, the probate decree could not be attacked by that line of proof. 32 C. J. p. 646; Van Fleet's Collateral Attack, § 526; Hodgdon v. S. P. R. Co., 75 Cal. 642, 648, 17 P. 928; Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235, 238.

It is claimed that the fourth and fifth findings of fact are really conclusions of law, and should have been so found. The point is not argued. Three citations are given, but no one of them supports the contention.

[4] It is next claimed that the court erred in failing to find on the issues raised by paragraph IV-a of the cross-complaint. The point rests on a misconception of the record. In her cross-complaint the defendant, among other things, alleged that from November 1, 1905, until her death the decedent was incompetent. The trial court's finding, among other things, was that from August 27, 1903, until her death the decedent was incapacitated. The two expressions are synonymous. Cent. Dict. The point cannot be sustained.

[5, 6] Finally the plaintiff asserts that the agreement executed by the plaintiff and Margaret J. Allan conclusively established the right of plaintiff as survivor to recover the amount credited to the cotenancy account. She cites and relies on section 15a of the Bank Act (St. 1921, p. 1367). There is nothing in the statute showing that the Legislature was addressing itself to agreements attempted to be executed by insane or incompetent persons. Repeals by implication are not favored, and, nothing to the contrary appearing, sections 38, 39, and 40 of the Civil Code

will be construed together with section 15a of the Bank Act, and force and effect will be given to the provisions of each.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 109

SAM WONG v. STUYVESANT INS. CO.*
(Civ. 6629.)

District Court of Appeal, First District, Division 1, California. July 25, 1929.

Rehearing Denied Aug. 24, 1929. Hearing Denied by Supreme Court Sept. 23, 1929.

1. Insurance ⇨115(4)—Lessee had insurable interest in building erected on leased premises, as he was owner under provision of lease.

Where lease provided that improvements erected on premises by lessee might be removed at end of term, if all rent due was paid and lessee erected building and, having paid all rent, remained in possession after expiration of lease, but without formal renewal, lessee as owner had an insurable interest in building.

2. Insurance ⇨646(5)—Insurer, insuring property on leased premises and accepting premium without misrepresentations by insured, is presumed to have insured property with knowledge of title (St. 1909, pp. 404, 406).

Where lessee had insurable interest in property erected on leased property, and without fraud and in good faith applied for insurance on same and made no actual misrepresentations or concealment of his interest therein, and insurance company made no inquiry concerning same and issued a policy in standard form required by St. 1909, pp. 404, 406, and accepted and retained premium, company was presumed to have knowledge of condition of title, and to have insured property with such knowledge, and to have waived statutory provision requiring sole and unconditional ownership by insured; statute not changing the law relating to waiver and estoppel.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by Sam Wong against The Stuyvesant Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Miller & Thornton, of San Francisco, for appellant.

Sans & Hudson, of Watsonville, for respondent.

TYLER, P. J. Action to recover upon an insurance policy, issued by defendant company, for a fire loss. The facts show that one L. Ollason was the owner of the land upon which the building destroyed was situated. Some time prior to the year 1908 he had leased the land to a Chinaman, who erected thereon an apple-evaporating plant. The lease

was subsequently assigned and the business transferred to one Wong Wah, under the trade-name of Sang Yuen Company; Wong being the sole owner thereof. The assignment carried the building which had been constructed on the premises. On June 20, 1908, Ollason entered into a written agreement with Wong Wah, whereby he leased the premises for a term to expire June 1, 1914; said lease being taken in the name of Sang Yuen Company. The lease provided, among other things, that any improvement erected on the premises by the lessee might be removed at the end of the term provided that all rent due under the lease was paid in full. The rents were paid, and after the expiration of the lease no formal renewal was had, the lessee remaining in possession under the same terms and conditions as provided for under the original lease. Upon acquiring the property Wong Wah had insured the evaporating plant during the period he owned the same. In the year 1918, about five years prior to his death, Wong Wah, being aged, retired and turned his business, including his leasehold interest, over to his son, Sam Wong, plaintiff herein. The son continued in possession of the property, kept the building insured, and paid the premiums on the policies. On the 2d day of October, 1926, plaintiff insured the building with defendant company. No written application for the insurance was ever made by the insured, and the policy was issued by defendant company on application of its agent. While this policy of insurance was in effect, the building was destroyed by fire. Immediately after its destruction, and before any proof of loss or claim could be made upon defendant company, it instructed its agent to return the premium to defendant, as it had elected to refuse to pay the policy on the ground that the building was not owned by the insured, and on the further ground that the building was situate on leased property. The policy was in the standard form required by our statute (St. 1909, pp. 404, 406), which statutory form contains the following provisions: "Unless otherwise provided by agreement indorsed hereon or added hereto, this entire policy shall be void, * * * (B) if the interest of the insured be other than unconditional and sole ownership, or (C) if the subject of insurance be a building on ground not owned by the insured in fee simple." Upon refusal of the company to pay, plaintiff brought this action.

[1, 2] At the trial defendant relied upon the conditions contained in the statutory policy and also certain provisions of the Civil Code of like import (sections 2551, 2587, 2588). Plaintiff contended that the building was his property and that the owner of the land had no interest or title therein. Plaintiff was corroborated by the owner of the land in this contention. The trial court found plaintiff to be the owner of the building. It

further found that the allegations contained in defendant's answer that it discovered for the first time, immediately after the fire, that plaintiff was not the owner of the property were untrue. Additional findings were to the effect that at the time the policy of insurance was issued and delivered by defendant to plaintiff the said plaintiff did not sign any written application therefor; that the insurance was solicited by the local agent of defendant company, and there was no discussion between plaintiff and the said agent, or between plaintiff and any other person, regarding the ownership of the property on which the destroyed building was situate; that the agent did not inquire of plaintiff regarding the ownership of the land; that the policy was issued at the request of the agent, and that plaintiff made no misrepresentations or concealment of any fact in this particular. As conclusions of law from the foregoing facts, the court found that defendant had waived the provisions in said policy requiring plaintiff to present proof of loss, and had likewise waived the provision that the entire policy should be void if the subject of the insurance be a building on ground not owned by the insured in fee simple; that defendant was estopped from relying upon said provision in the policy. Judgment followed in favor of plaintiff for the sum of \$1,000, the amount of the policy and costs.

Appellant appeals, and it contends that the insured was not the owner of the building nor did he have any interest therein. In support of this contention it is argued that, after the expiration of the original lease, the building not having been removed, it became a part of the land, and the mere fact that the tenant remained over as tenant at will did not alter or change the situation, as a new lease was thereby created, and, no agreement having been entered into with reference to the removal of the building under this new lease, it became the property of the owner of the land, and plaintiff had no title or interest therein.

The contention is without merit. The case does not present a situation of a controversy between the owner of the land and his tenant. Here the ownership of the building was conclusively established to be in the plaintiff. The landlord so testified, and he disclaimed any right, title, or interest therein. Moreover defendant is in no position to set up as a defense lack of ownership or that the insured did not own the ground on which the building was situate, as it waived objection to the form of the policy and is estopped from denying liability thereunder by issuing the policy and accepting the premiums therefor without any written application having been made by the insured, and also without any discussion having been had relative to either title to the buildings or the title to the property on which the same was situate. Plain-

tiff herein, as owner, had an insurable interest in the building, he being in possession and operating the same as a dryer. 14 Cal. Jur. p. 465; 14 R. C. L. 915.

Prior to the adoption of the standard form of policy in this state it was held that, where the assured had an insurable interest in property, and without fraud in good faith applied for insurance upon the same, and made no actual misrepresentation or concealment of his interest therein, and the insurance company made no inquiry concerning his interest, and issued a policy to him, and accepted and retained the premium, the company must have been presumed to have knowledge of the condition of the title, and to have assured the property with such knowledge. *Raulet v. Northwestern, etc., Ins. Co.*, 157 Cal. 213-228, 107 P. 292; 14 R. C. L. pp. 926-932. After the adoption of the standard form of policy, the law of waiver and estoppel remained the same as before upon this subject. *Kavanaugh v. Franklin Fire Ins. Co.*, 185 Cal. 307, 315, 197 P. 99; 14 R. C. L. p. 932.

It follows that the court below rightfully determined that defendant had waived the provisions in question contained in the policy. The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

100 Cal. App. 168

DANIELSON v. DANIELSON. (Civ. 6229.)

District Court of Appeal, Second District, Division 1, California. July 30, 1929.

1. Divorce ⇨37(3)—One who intends bringing cohabitation between husband and wife to an end commits desertion, entitling other to divorce.

One who intends bringing cohabitation between husband and wife to an end commits desertion entitling other to divorce, and it is immaterial which of married parties leaves marital home.

2. Divorce ⇨133(3)—Evidence held to establish wife's wilful refusal to live with husband without cause, constituting desertion, entitling husband to divorce.

In action for divorce, evidence held to show that wife wilfully and without cause refused to live with husband against his will and without his consent, constituting desertion, entitling husband to divorce.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action for divorce by Carrie Danielson against Charles B. Danielson, in which defendant filed a cross-complaint for divorce on the ground of desertion. Judgment for de-

fendant on the cross-complaint, and plaintiff appeals. Affirmed.

I. Henry Harris, of Los Angeles, for appellant.

George C. Watson, of Los Angeles, for respondent.

HOLLZER, Justice pro tem. This is an action for divorce. The trial court granted the husband, who is the defendant herein, a decree of divorce on the ground of desertion. Plaintiff appeals, claiming that the evidence is insufficient to sustain such decree.

The gist of plaintiff's contention is that the finding of desertion rests wholly upon her alleged refusal to reside in the home selected by the defendant. As to such finding, it is insisted that there is no evidence showing that the defendant had actually selected some particular place as the home, or that he had offered a definite home to her and requested her to follow him, or that such home was a reasonable place of abode.

Appellant argues that, in the absence of such a showing, she could not be found guilty of desertion. The case of *Bibb v. Bibb*, 39 Cal. App. 406, 179 P. 214, is cited in support of appellant's position.

The answer to appellant's contention lies in the fact that neither the pleadings nor the decree herein restrict the case to so narrow an issue. The cross-complaint upon which the decree was granted, in addition to setting forth the necessary statistical facts, alleges in paragraph V: "That on or about the 21st day of February, 1924, the cross-defendant, Carrie Danielson, disregarding the solemnity of her marriage vow, wilfully and without cause, deserted and abandoned the cross-complainant, and ever since has, and still continues to, so wilfully and without cause desert and abandon said cross-complainant, and to live separate and apart from him, without any sufficient cause or any reason, and against his will and without his consent." The trial court found that the allegations of the complaint were not true, and that the allegations of the cross-complaint were true.

The record on this appeal was prepared under what is known as the alternative method. Although the reporter's transcript contains many pages of testimony relating to the issue of desertion, only the most meager excerpts of the evidence pertaining to the same are to be found in appellant's brief.

Our examination of the record discloses testimony tending to prove the following facts: Defendant was in the oil business, and for many years maintained his headquarters at Bakersfield. For the period of about eight years prior to 1920 plaintiff had resided with her husband in Bakersfield during the winter months. Thereafter she resided in Los Angeles, where defendant visited

her from time to time. In February, 1924, the husband, being dissatisfied with this arrangement, had a conversation with his wife wherein he requested her to make her home with him in Bakersfield. Plaintiff declined to do so, claiming that she was in poor health and that it would be injurious for her to move to Bakersfield. In this same conversation, according to the defendant, his wife informed him that she did not want him as a husband, that there were other people who meant more to her. On the evening following this conversation, the husband discovered his wife at a public dance hall, accompanied by a man in no way related to her and who was a stranger to the husband. Shortly prior to this incident the wife collected \$1,150 in settlement of personal injuries which she had sustained several months previously, and appropriated this entire sum to her own use.

Very soon after the above-mentioned conversation occurred, defendant returned to Bakersfield and rented, for a period of two weeks, one-half of, or one side of, a dwelling-house, located on Nineteenth street, near A street, in that city. Thereupon, under date of February 25, 1924, he wrote to his wife, stating, in substance, that it would be better for her to come to Bakersfield, and that they should take rooms and go to housekeeping, as he did not wish to be separated from her.

To this the wife replied in writing, stating that defendant knew her health would not permit her to live in Bakersfield, and that he should never again ask her to live in a place that would kill her. The letter makes some further comments about her health, and requests the defendant to send her some money, although, as previously indicated, she had secured \$1,150 only a few days prior thereto in settlement of her personal injury claim.

Shortly thereafter the husband came to Los Angeles for the purpose of discussing with his wife the conditions existing between them. Upon arriving at the apartment where his wife had resided for a considerable period, defendant learned that she had moved away, without leaving any information as to new address. In fact, plaintiff took pains to keep her whereabouts unknown to her husband, and in that connection admonished her married daughter, who lived in an adjoining suburb, not to tell her father where she had moved. Thereupon defendant returned to Bakersfield and wrote to his wife, in care of this married daughter, requesting her to meet him and the married daughter at a certain hotel in Los Angeles, on a date specified, for the purpose of talking things over. This letter was delivered to the plaintiff, but the latter informed her son-in-law that she would not keep the appointment requested. The husband, also the married daughter and son-in-law, waited for plaintiff at the hotel for several hours, but she failed to appear.

Plaintiff's son-in-law testified that she told him that she did not want anything to do

with her husband, and would not live with him under any circumstances whatsoever. On the Thanksgiving preceding the separation of the parties, the plaintiff had dinner with her married daughter and son-in-law, and on the same evening she went to a dance with the man in whose company her husband saw her in February, 1924. The son-in-law also testified that he had visited plaintiff more than a dozen times during a period of about a year following the separation, and that at no time during that period was she confined to her bed or even ill.

Plaintiff did not deny that she had been going out to dances, but insisted that her doctor had prescribed dancing as a means of recovering her health. However, no medical testimony was offered in support of this contention. Likewise her daughter testified that, while the family lived in Bakersfield, her mother got along pretty well. So far as the evidence discloses, the plaintiff's home, while she resided in Los Angeles, consisted simply of an apartment in one of the hotels of that city and for which she paid a rental of about \$55 per month.

These facts readily distinguish the action at bar from the case of *Bibb v. Bibb*, 39 Cal. App. 406, 179 P. 214, 216. While the court there holds that, in order to prove desertion on the ground of the refusal of the wife to follow the husband to a new home, the evidence must show that he has chosen a particular abode and offered it to her, and must further show that it was a reasonable place for the family abode, that decision must be read in the light of the peculiar facts upon which it rested. As pointed out in the opinion rendered in the *Bibb* Case, for an indeterminate but considerable time immediately subsequent to the wife's refusal to follow her husband to a suburb of the city in which she was then residing, the parties continued their customary matrimonial cohabitation as man and wife at the old abode. "By this equivocal conduct," said the court in the concluding sentence of its opinion, "he failed to present to her, clearly and definitely, the alternative of a compliance with his will to move to Hollywood, or be deemed guilty of wilful desertion." There was no such conduct or acquiescence on the part of the husband in the present suit.

The case of *Vosburg v. Vosburg*, 136 Cal. 195, 68 P. 694, cited in the *Bibb* Case as the authority for the general rule announced in the latter decision, also arose out of a very different state of facts. In the former case the evidence showed that the parties had lived for years in a suitable home belonging to the wife, among her friends, and that the husband's choice of a different home was not made in good faith, and that his offer of a home elsewhere was not made until, as the court expressed it, "long after the lapse of time which ripened his desertion of her into a cause of action for divorce."

[1] Bishop, in the second volume of his work on Marriage and Divorce, at page 597, says: "It is immaterial which of the married parties leave the marital home, the one who intends bringing the cohabitation to an end commits the desertion."

In *Hudson v. Hudson*, 59 Fla. 529, 532, 51 So. 857, 21 Ann. Cas. 278, at page 279, 29 L. R. A. (N. S.) 614, 616, 138 Am. St. Rep. 141, 143, the Supreme Court of Florida, in applying the foregoing doctrine, said: "The party who drives the other away is the deserter, and a wife may drive her husband away."

[2] So, in the instant case it can be said that the wife drove her husband away. The evidence leaves little, if any, doubt that the wife had thrown off everything like allegiance and duty to her husband. In a sense, it might be said that the wife forced the separation because the husband would not permit her to usurp his rights. In the light of the testimony before it, the trial court might very well have concluded that the excuse offered by the wife for not residing with her husband in Bakersfield, namely, her alleged poor health, was a mere subterfuge. When in the spring of 1924 she left the apartment which up to that time had been her place of abode, and deliberately concealed her new address from her husband, the wife demonstrated in unmistakable fashion that she was determined to assert her complete emancipation and independence of her husband. His efforts to induce her to reside with him following her secret change of residence only resulted in strengthening her determination to separate from him. The evidence establishes a clear case of desertion on her part.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

100 Cal. App. 295

PEOPLE v. HANEY. (Cr. 1083.)

District Court of Appeal, Third District, California. Aug. 7, 1929.

1. Intoxicating liquors ⚡216—Information charging defendant sold minor intoxicating liquor stated offense without alleging liquor contained one-half of 1 per cent. alcohol and was fit for beverage; "intoxicating liquor."

Information charging that defendant sold intoxicating liquor to minor stated facts sufficient to constitute offense, though not alleging that liquor contained one-half of 1 per cent. or more of alcohol and was fit for beverage purposes, in view of section 1, tit. 2, National Prohibition Act (27 USCA § 4), defining "intoxicating liquors," and term "intoxicating liquor" being understood to include any liquor intended for beverage that will produce intoxication.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Intoxicating Liquor.]

2. Intoxicating liquors ⚡215—Information charging sale of intoxicating liquor to minor charged offense without alleging delivery; "sale" including delivery.

Information charging that defendant unlawfully and knowingly sold intoxicating liquors to minor stated facts sufficient to constitute an offense, though not alleging liquor was delivered to minor, since in common parlance retail "sale" of intoxicating liquor includes delivery thereof to bearer.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Sale.]

3. Indictment and information ⚡71—Allegation that sale of intoxicating liquor to minor would tend to make him delinquent held sufficiently certain (Juvenile Court Law, § 1, subds. 8, 11).

Allegations that sale of intoxicating liquor to minor would cause him to come within Juvenile Court Law, § 1, subds. 8, 11 (St. 1915, p. 1225), held made with sufficient certainty.

4. Criminal law ⚡603(9)—Denying continuance of liquor prosecution on date of trial was not abuse of discretion, affidavits not indicating witness could be secured.

In prosecution for selling intoxicating liquor to minor, denying motion when case was called for trial for continuance on ground of absence of material witness held not abuse of discretion, where no reason was given by defendant for waiting until case was called for trial to move for continuance, and affidavits to support motion did not indicate to court that witness could ever be secured.

5. Criminal law ⚡1172(1)—Instruction that sale of intoxicating liquors to minor need not have certain tendency to cause delinquency held not prejudicial (Juvenile Court Law, § 1, subds. 8, 11).

In prosecution for selling intoxicating liquors to minor, having tendency to cause and encourage him to come under provisions of Juvenile Court Law, § 1, subds. 8, 11 (St. 1915, p. 1225), instruction that it is not necessary that defendant's acts should have absolute certain tendency to cause delinquency held not prejudicial, where minor was 17 years of age, and selling and furnishing of bootleg whisky to him would manifestly have tendency to bring him under Juvenile Court Law.

6. Criminal law ⚡1160—Weight of evidence in prosecution for selling minor intoxicating liquors held for jury and trial court (Juvenile Court Law, § 1, subds. 8, 11).

Where there was ample evidence in prosecution for selling intoxicating liquors to minor, having tendency to cause him to come under provisions of Juvenile Court Law, § 1, subds. 8, 11 (St. 1915, p. 1225), to support verdict and judgment of conviction, weight thereof was for jury and trial court.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Ray Haney was convicted of selling intoxicating liquor to a minor, and he appeals. Affirmed.

J. T. Sharp, of Alturas, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information herein charges: "That * * * the said Ray Haney did, willfully, unlawfully and knowingly sell intoxicating liquor to one Kelton Blurton, which said act then and there tended to cause and encourage said Kelton Blurton to come under the provisions of subdivision 8 and subdivision 11 of section 1 of the Juvenile Court Law; and then and there tended to cause and encourage said Kelton Blurton to become a person who habitually uses intoxicating liquors and tended to cause and encourage said Kelton Blurton to become one who would lead an idle and dissolute life; that said Kelton Blurton was then and there a minor under the age of twenty-one years."

The defendant demurred to the information on the grounds that it "does not state facts sufficient to constitute a public offense" and that it contains "matters which if true would constitute a legal defense." The second ground may be dismissed from consideration as manifestly without merit. The demurrer was overruled, and the defendant was found guilty. This appeal is from the judgment and the order denying a new trial.

[1] Appellant contends that the information fails to state facts sufficient to constitute an offense because it does not allege that the liquor in question contained one-half of 1 per cent. or more of alcohol, that the liquor was fit for beverage purposes, or that it was delivered to the minor. Section 1 of title 2 of the National Prohibition Act (27 USCA § 4) defines the phrase "intoxicating liquor" as including all liquors "containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes." If that act governs, as appellant seems to contend, it was unnecessary to set forth in the information the statutory definition of the term "intoxicating liquor" used therein. *People v. Norcross*, 71 Cal. App. 2, 6, 234 P. 438. "In the absence of a statutory definition, the term 'intoxicating liquor' is understood to include any liquor intended for use as a beverage or capable of being so used which contains such a proportion of alcohol that it will produce intoxication when imbibed in such quantities as it is practically possible for a man to drink." 33 C. J. 491. It thus appears that appellant's first two objections to the information are without merit.

[2] The word "sale" is not of "fixed and invariable meaning." *W. F. Boardman Co. v. Petch*, 186 Cal. 476, 482, 199 P. 1047, 1050. It is sometimes so used as to include delivery. *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 24 S. Ct. 151, 48 L. Ed. 254. In common parlance, a retail sale of intoxicating liquor in-

cludes the delivery thereof to the buyer. The minor was permitted, without objection, to testify that the liquor was delivered to him by the defendant and that it was in fact used for beverage purposes and was intoxicating. There is nothing in the record to indicate that the defendant was misled or in any manner prejudiced by the alleged defects in the information.

[3] The tendency of the defendant's alleged act to cause the minor to come under the provisions of the Juvenile Court Law (St. 1915, p. 1225) is alleged with sufficient certainty. *People v. Hemma* (Cal. App.) 270 P. 457; *People v. Perfetti*, 88 Cal. App. 609, 264 P. 318; *People v. Cohen*, 62 Cal. App. 521, 217 P. 78.

[4] March 19, 1929, the case was set to be tried commencing April 1. When the case was called for trial on the latter date, the defendant moved for a continuance on the ground of the absence of a material witness, Harvey White. At the preliminary examination, the minor testified that White was present at the delivery of the liquor. Defendant's affidavits used on the motion for a continuance stated that White had said that he was not so present. The sheriff made affidavit that White had said that he knew of the alleged sale of the liquor by the defendant to the minor. As soon as the case was set for trial, counsel for the defendant placed a subpoena in the hands of the sheriff for service on White. The sheriff was unable to locate White, and on March 22 he sent a subpoena to the sheriff of Tehama county for service on him. March 26 the sheriff of the latter county returned the subpoena, stating: "I have made diligent search, and am unable to find him (White), or any one who knows of him in this county." The sheriff of Modoc county then telephoned the sheriff of Shasta county, and the district attorney made a trip to Redding in an endeavor to locate White, but without success. It appears that the district attorney instructed the sheriff to secure the attendance of White "if at all possible." No reason was given by counsel for defendant for waiting until the case was called for trial to move for a continuance. As stated by the trial court in denying the motion, "there is nothing in these affidavits to indicate to the court that this man Harvey White can ever be secured as a witness." This is a sufficient reason for the denial of the motion. *Ford v. Superior Court*, 17 Cal. App. 1, 10, 118 P. 96. Under all the circumstances, it cannot be held that the denial of the motion was an abuse of discretion.

Appellant complains of certain instructions given by the court. All of them appear to be accurate statements of the law, except the italicized part of the following: "It is not necessary that the acts of the defendant should be the sole cause of a minor's delinquency in order that such defendant may be guilty of contributing to the delinquency of

the minor; it is sufficient if such acts tend to contribute thereto. *Nor is it necessary that they should have an absolutely certain or unmistakable tendency to cause delinquency.*"

[5] It may be conceded that, as an instruction to a jury, the italicized words tend to confuse and the use thereof should be avoided, but, under the facts of this case, the defendant was not prejudiced thereby. The minor was of the age of but 17 years. The selling and furnishing of bootleg whisky to a minor of that age so manifestly tends to cause him to come within the alleged provisions of the Juvenile Court Law that doubtless the jury would have so found without the giving of the objectionable part of the instruction. Other instructions, given or refused, have been carefully examined, and no error appears in the action of the court in relation thereto.

[6] Appellant argues the weight of the evidence, but, there being ample evidence to support the verdict and judgment, the weight thereof was for the jury and the trial court. Complaint is made of certain rulings of the court in admitting and rejecting evidence, and the district attorney is charged with misconduct in his argument to the jury. None of these contentions appear to have merit, and it would serve no useful purpose to enumerate and discuss them specifically.

The judgment and the order are affirmed.

We concur: ROLFE L. THOMPSON, J.; PLUMMER, J.

100 Cal. App. 93

PEOPLE v. LEAVITT. (Cr. 1798.)

District Court of Appeal, Second District, Division 1, California. July 22, 1929.

1. Criminal law $\S$ 520(2)—**Confession held inadmissible under evidence indicating officer told defendant it would be much better for him to make confession.**

In prosecution for burglary, testimony concerning purported confession of guilt held inadmissible, under evidence tending to show that police officer told defendant it would be much better for him to make confession.

2. Criminal law $\S$ 531(1)—**Prosecution must show that confession is voluntary, not induced by promise or threat.**

Burden is on prosecution to show that confession sought to be proved in criminal case was voluntary act of defendant, not induced by promise or threat.

3. Criminal law $\S$ 511(2)—**Competent testimony connecting defendant with crime, in addition to that of accomplice, is necessary to convict.**

In prosecution for burglary, defendant cannot be convicted, in absence of competent evi-

dence, in addition to that of accomplice, tending to connect defendant with commission of crime.

4. Criminal law $\S$ 1169(12)—**Admission of confession, not shown to have been voluntary, held prejudicial, in view of evidence supporting conviction.**

Admission of confession, not shown to have been voluntarily made, was prejudicial error in prosecution for burglary, where other evidence, except that of accomplice, was insufficient to support conviction.

Appeal from the Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Ralph A. Leavitt was convicted of burglary in the second degree, and he appeals. Reversed.

C. Morton Booth, of Los Angeles, and Proctor K. Perkins, of Beverly Hills, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was convicted on five counts, contained in two informations. In each instance the conviction is of burglary in the second degree.

The corpus delicti of each crime was fully established. The failure of the court, on certain occasions during the trial, to admonish the jury as required by section 1122 of the Penal Code, was an irregularity, but not shown to have been prejudicial to any right of the defendant.

The admission in evidence of the photograph, People's Exhibit 8, does not appear to have had any important bearing on the merits, even if, as claimed, it should not have been admitted.

[1, 2] The principal grounds of appeal are that the court erred in admitting in evidence the testimony of one Liebhart, a police officer, concerning a purported confession of guilt, made to him by appellant; that, without this evidence of a confession, there is no evidence tending to connect appellant with the commission of any of the alleged burglaries, except the testimony of an accomplice, one Curryer; that for these reasons, if the confession be excluded, the evidence is insufficient to support the verdicts.

Several witnesses testified to the effect that Liebhart, prior to obtaining the confession told the defendant that it would "be much better for him" to make a confession. Liebhart, when examined about the same matter, was asked directly if he made the said statement to the defendant. When pressed for an answer, he finally said: "I wouldn't say positive whether I made it or not. It is possible." On the foregoing facts, we are satisfied that the court erred in admitting in evidence the said confession. In *People v. Barrie*, 49 Cal. 342, prior to obtaining a confession from the defendant, it appeared that the

sheriff, or his deputy, or some one in their presence, said to the defendant: "It will be better for you to make a full disclosure." The Supreme Court said that "the rule is without exception that such a promise made by one in authority will exclude a confession." The burden is on the prosecution to show that a confession, sought to be proved in a criminal case, was the voluntary act of the defendant, not induced by promise or threat. We have read some of the later cases, where statements rather close to those made in this case have not been held sufficient to require the court to reject evidence of confessions. *People v. Haney*, 46 Cal. App. 317, at pages 322, 323, 189 P. 338; *People v. Castello*, 194 Cal. 595, 599, 229 P. 855. But we are satisfied that in the present case no proper exception to the rule is present.

[3, 4] Without the evidence of a confession made by the defendant, he could not have been convicted, unless there was yet other evidence, in addition to that of the accomplice, tending to connect the defendant with the commission of the crimes charged. That additional evidence, while possibly it is technically sufficient to support the verdicts, is not such as to clear the case from doubt as to what verdict should have been rendered. It follows that the error of the court, in admitting in evidence the purported confession, was a prejudicial error, which reasonably may have resulted in a miscarriage of justice.

The judgments and order are reversed.

We concur: HOUSER, J.; HOLLZER, Justice pro tem.

100 Cal. App. 173

NORTHWESTERN PAC. R. CO. v. CURRIE.*
(Civ. 6633.)

District Court of Appeal, First District, Division 1, California. July 30, 1929.

Rehearing Denied Aug. 29, 1929. Hearing Denied by Supreme Court Sept. 26, 1929.

1. Counties ⇨144—County is liable for damages from construction work injuring adjacent property, where contractor properly performed it according to plans and specifications.

Where county contracts for doing of construction work according to plans and specifications theretofore adopted, and contractor performs work with proper care and skill, and in conformity with plans and specifications, but work thus planned and specified results in injury to adjacent property, liability, if there is any, for payment of damages, is on county under its obligation to compensate damages resulting from exercise of its governmental power.

2. Counties ⇨144—County's contractor departing from contract, plans, or specifications, or performing work improperly, carelessly, or negligently, injuring adjacent property, is responsible.

Where contractor departs from contract for construction work for county according to plans and specifications, or goes beyond them, or performs work planned and specified in an improper, careless, or negligent manner, which results in injury to adjacent property, contractor is responsible in damages for tort committed.

3. Highways ⇨115—Complaint founded on contractor's negligent acts in performing highway construction work outside work contract with county required, injuring plaintiff's property, stated cause of action.

Where allegations of complaint showed that plaintiff's cause of action was founded on alleged negligent acts committed by defendant as contractor in performing certain highway construction work for county outside of work required to be done under terms of contract, which injured property of plaintiff, cause of action was stated against contractor.

4. Trial ⇨396(3)—Finding that contractor's work for county conformed to contract would not entitle him to judgment, where complaint alleged unnecessary negligent acts injuring plaintiff's property.

Where allegations of complaint were to effect that specific acts and negligence causing injury to plaintiff's property were not such as defendant contractor was required to perform under highway construction contract with county, finding that work was performed in conformity with contract and plans and specifications would not entitle defendant contractor to judgment.

5. Trial ⇨404(1)—Findings must be liberally construed to support judgment.

Findings are to be liberally construed in support of judgment, and read and considered together and reconciled so as to prevent conflict on material points.

Appeal from Superior Court, City and County of San Francisco; J. T. B. Warne, Judge.

Action by the Northwestern Pacific Railroad Company against James Currie. Judgment adverse to defendant, and he appeals. Affirmed.

J. W. Coleberd, of South San Francisco, for appellant.

Orrick, Palmer & Dahlquist, of San Francisco (Christopher M. Jenks, of San Francisco, of counsel), for respondent.

KNIGHT, J. Defendant appeals from an adverse judgment in the sum of \$481.88, in an action to recover damages for the alleged negligent injury to plaintiff's right of way fence, committed by defendant while performing certain highway construction work under a written contract with the county of Marin. The appeal is taken on the

judgment roll alone, and the points urged for reversal are that the complaint does not state facts sufficient to constitute a cause of action, and that the findings do not support the judgment. As will hereinafter appear, both points are based upon the single legal contention that the liability for the injury, if any there was, was upon the county of Marin and not the defendant as contractor.

In paragraph II of the complaint it was alleged, in substance, that defendant, "while purporting to act under and pursuant to a contract theretofore entered into" by him with the county of Marin, constructed certain improvements, fills, and paving upon the highway adjacent to and parallel with plaintiff's right of way, along which plaintiff maintained a fence. And in paragraph III of the complaint it was alleged that in performing said construction work defendant willfully and negligently piled dirt and other materials against plaintiff's fence, and did thereupon and thereafter willfully and negligently remove, bend, and otherwise injure said fence to plaintiff's damage in the sum of \$481.88.

Besides denying many of the allegations of the complaint, the answer sets up a separate defense (paragraph V) alleging that "the improvement work and fills mentioned in Paragraph II of plaintiff's complaint and all work performed by plaintiff upon the road or highway mentioned in plaintiff's complaint were done and performed under and pursuant to that certain contract entered into between the County of Marin, State of California, and said defendant, a copy of which contract is marked 'Exhibit A' annexed hereto and made a part hereof, and that all said work was performed under the direction and to the satisfaction of the County Surveyor of said County of Marin." In this connection the contract provided that defendant should furnish all the labor and materials, and perform the work therein mentioned "in a good and workmanlike manner, under the direction and to the satisfaction of the County Surveyor of said County of Marin * * * and in accordance with and located at the places and in the manner specified in the plans and specifications * * * which are made a part of this contract."

The trial court found as follows: "That all the allegations of the complaint herein are true and that all the denials in the answer are untrue. That all the allegations contained in paragraph V of said answer are true."

[1,2] Where a county contracts for the doing of construction work according to plans and specifications theretofore adopted, and the contractor performs the work with proper care and skill, and in conformity with the plans and specifications, but the work thus planned and specified results in an injury to

adjacent property, the liability, if any there is, for the payment of damages, is upon the county under its obligation to compensate the damages resulting from the exercise of its governmental power (*Elliott v. County of Los Angeles*, 183 Cal. 472, 191 P. 899; *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 39 P. 610, 46 Am. St. Rep. 237); but, where the contractor departs from the contract, plans, or specifications, or goes beyond them, or performs the work planned and specified in an improper, careless, or negligent manner, which results in injury to adjacent property, then he is responsible in damages for the tort he has committed (*Shaw v. Crocker*, 42 Cal. 435; *Reardon v. San Francisco*, 66 Cal. 492, 6 P. 317, 56 Am. Rep. 109; *Eachus v. Los Angeles*, 130 Cal. 492, 62 P. 829, 80 Am. St. Rep. 147; *Norton v. Ransome-Crummey Co.*, 173 Cal. 343, 159 P. 1177; *Perkins v. Blauth*, 163 Cal. 782, 127 P. 50).

[3] A fair analysis of the allegations of the complaint herein shows that plaintiff's cause of action is founded upon alleged negligent acts committed by defendant outside of the work required to be done under the terms of the contract, and therefore, under the authorities cited, a cause of action is stated against the contractor.

[4,5] Defendant's point that the findings do not support the judgment is based upon the contention that in finding the allegations of paragraph V of the answer to be true the trial court in effect found that the work which defendant was required to do under the contract was performed by him in conformity therewith and with the plans and specifications, and that therefore the county and not the defendant as contractor is liable. But there is no allegation in paragraph V of the answer to that effect; and, even though there was, and the court found the same to be true, such finding would not have entitled defendant to judgment, because, as pointed out, the allegations of the complaint are to the effect that the specific acts of negligence causing the injury were not such as defendant was required to perform under the contract. The trial court found those allegations to be true, and there is nothing before us to show to the contrary because the plans and specifications were not made part of the record.

As held in *Haight v. Haight*, 151 Cal. 90, 90 P. 197, "we must continually bear in mind the well-settled rule that findings are to be liberally construed in support of a judgment, that all of the findings are to be read and considered together and, if possible, are to be reconciled so as to prevent any conflict on the material points; and that unless the conflict is clear and the findings incapable of being harmoniously construed, a judgment will not be reversed on the ground of a conflict in the findings." Citing cases.

Applying the foregoing rules to the present

situation, we find no ground for reversal. The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

100 Cal. App. 252

PEOPLE v. PAGE.

Appeal of NATIONAL SURETY CO.

(Civ. 6631.)

District Court of Appeal, First District, Division 2, California. Aug. 5, 1929.

1. Bail $\S$ 55—Penal Code sections applicable and in force when bail bond was executed formed part thereof; amendments thereto affecting substantive rights and effective after bond was executed being inapplicable (Pen. Code, $\S\S$ 1287, 1305, 1306, as amended by St. 1927, pp. 1385, 1386, 1388).

Where bail bond was executed on May 6, 1927, before amendments to Pen. Code, $\S\S$ 1287, 1305, 1306, passed April 29, 1927 (St. 1927, pp. 1385, 1386, 1388), became effective, and amendment to section 1287, incorporating by express reference sections 1305, 1306, provided that undertaking should contain agreement for consent judgment, which was amendment as to substantive rights and was not concerned merely with procedure, Code sections, as they stood prior to amendment and in force when undertaking was executed, entered into and formed part of bond; amendments being inapplicable.

2. Contracts $\S$ 167—Laws applicable and in existence when contract was made, form part thereof.

All laws applicable and in existence when contract was made form part of it.

3. Bail $\S$ 77(2)—Bondsman on bail bond held entitled to have action commenced against it before judgment could be entered on bond (Pen. Code, $\S$ 1305).

Under Pen. Code, $\S$ 1305, in force when bail bond was delivered, and providing that action should be commenced against bail before judgment could be entered on bond, bondsman was entitled to be served with summons and complaint, to have an opportunity to appear and answer and to have trial at which bondsman could interpose any defenses it might have, and it was error to enter judgment against bondsman before it had its day in court.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Proceeding by the People against the National Surety Company, to forfeit bail bond of Frank Page. From a judgment forfeiting bond, the bondsman appeals. Reversed.

Joseph L. Taaffe and John J. Taaffe, both of San Francisco, for appellant.

Matthew Brady, Dist. Atty., and M. L. Choynski and August L. Fourtner, Deputy Dist. Attys., all of San Francisco, for the People.

STURTEVANT, J. On a complaint charging that the defendant had committed a felony, the police court made an order holding him to answer before the superior court. An order was made admitting him to bail "in the sum of one thousand dollars by bond or by the deposit of five hundred dollars in coin." On May 5, 1927, the defendant furnished a bond executed by the National Surety Company in words and figures as follows: "An order holding to answer having been filed in the Superior Court of the State of California, in and for the City and County of San Francisco, on the 6th day of May, A. D. 1927, by the judge of the Police Court of said City and County, charging Frank Page with the crime of felony, to-wit, violation of Sec. 112 State Vehicle Act and he the said Frank Page having been duly admitted to bail in the sum of one thousand dollars (\$1000), we National Surety Company, a New York corporation, having its principal place of business at New York, New York, authorized under the provisions of Act of Congress approved August 13, 1894, as amended by the Act of Congress, approved March 23, 1910, to become sole surety upon recognizances, stipulations, bonds or undertakings, and licensed by the State of California, and by occupation a surety corporation, hereby undertake that the above named Frank Page will appear and answer the charge above mentioned in whatever court it may be prosecuted and will at all times render himself amenable to the orders and process of the court, and if convicted will appear for judgment and render himself in execution thereof; or if he fails to perform either of these conditions that we will pay to the People of the State of California the sum of one thousand dollars (\$1000)." An information was filed, and the defendant was arraigned and pleaded not guilty. His case was set for trial on October 22, 1927. On that date the case was called, but the defendant did not appear. On that date the trial court directed the said fact to be entered in its minutes, declared defendant's bail forfeited, and directed that a bench warrant should issue for the arrest of the defendant. Thereafter the forfeiture was not discharged, but the district attorney did not proceed by action against the bail upon its undertaking. Nevertheless, on June 18, 1928, the trial court (when no action except the criminal case was pending before it) entered a judgment against National Surety Company, the bondsman, for the sum of \$1,000. From that judgment the National Surety Company has appealed and has brought up a bill of exceptions.

The appellant claims that the trial court erred in entering a judgment against it without allowing it to have its day in court. The respondent replies that the judgment was not entered until more than 90 days elapsed

after the date the forfeiture was ordered and that the appellant could have appeared and could have made any motion it was entitled to make before the judgment was entered, and the respondent cites Penal Code, § 1305, as amended April 29, 1927 (St. 1927, p. 1386), and *People v. Hodges* (Cal. Sup.) 271 P. 897. The amendment to section 1305, Penal Code, had not taken effect when the appellant delivered its bond. The *Hodges* Case speaks of a set of facts which occurred after the amendments to the Penal Code took effect. Neither authority is in point.

[1] April 29, 1927, amendments to sections 1287, 1305, and 1306 of the Penal Code were passed. Stats. 1927, pp. 1385, 1386, 1388, cc. 734, 735, and 739. All of the amendments took effect on July 29, 1927. The undertaking in suit was executed May 6, 1927. The amendment to section 1287 incorporated by express reference sections 1305 and 1306, and it provided that the undertaking should contain a new sentence which, in effect, is a stipulation for a consent judgment. *People v. Hodges* (Cal. Sup.) 271 P. 897. The amendment last mentioned is clearly an amendment as to substantive rights and is not concerned merely with procedure, and there is nothing showing that it was intended to be applicable to contracts theretofore made. *Montecito County Water Dist. v. Doulton*, 193 Cal. 398, 403, 224 P. 747.

[2] It is settled law that all laws applicable, in existence when a contract is made, form a part of it. *Marshall v. Wentz*, 28 Cal. App. 540, 542, 153 P. 244; 13 C. J. 560, § 523. Hence the Code sections as they stood May 6, 1927 (the day the undertaking was executed), entered into and formed a part of the bond delivered by the appellant.

[3] The law in effect at the time appellant delivered its bond provided that an action should be commenced against the bail before a judgment could be entered on the bond. Pen. Code, § 1305. The corollaries flowing from that proposition are that the appellant should have been served with summons and complaint, that it should have had an opportunity to appear and answer, and should have had a trial. To enter a judgment against the sureties before they had had their day in court was error. *Robinson v. Gordon*, 85 Ga. 559, 11 S. E. 844; *Pinckard v. People*, 1 Scam. (Ill.) 187; *Johnstons v. State*, 3 Ark. 524; *Wright v. State*, 51 Ga. 524; *State v. Robb*, 16 Ind. 413; *State v. Dunbar*, 10 La. 99; *Wash v. State*, 3 Cold. (43 Tenn.) 91; *Waughop v. State*, 6 Tex. 337. It is settled law that the sureties in such an action may interpose certain defenses, some of which are stated in the following authorities: 6 C. J. 1059; *People v. Hunter*, 10 Cal. 502; *People v. Love*, 19 Cal. 676; *People v. Cabannes*, 20 Cal. 525; *People v. Ebner*, 23 Cal. 158; *Mendocino County v. Lamar*, 30 Cal. 627; *People v. Budd*, 57 Cal.

349; *San Luis Obispo v. Kyal*, 175 Cal. 34, 163 P. 1; *San Francisco v. Hartnett*, 1 Cal. App. 652, 82 P. 1064; *County of Merced v. Shaffer*, 40 Cal. App. 163, 180 P. 342. It is not necessary nor appropriate for us to surmise what defense or defenses the appellant may interpose, but, from the record before us, it is patent that we are unable to say that the appellant has no defense.

The judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 798

The PEOPLE of the State of California, Plaintiff and Respondent, v. Frank PAGE, Defendant; NATIONAL SURETY COMPANY (a New York Corporation), Bondsman and Appellant. (Civ. 6630).

District Court of Appeal, First District, Division 2, California. Aug. 5, 1929.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Joseph L. Taaffe and John J. Taaffe, both of San Francisco, for appellant.

Matthew Brady, Dist. Atty., and M. L., Choynski and August L. Fournier, Deputy Dist. Attys., all of San Francisco, for the People.

STURTEVANT, J. In this case the information so pleaded the facts as to state a different offense under a different statute. Otherwise all of the facts are the same as those involved in *People v. Page* (No. 6631) 89 Cal. App. —, 279 P. 1059, this day filed.

For the reasons stated in that case, the judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 231

BOYD v. CUSTOM FURNITURE & LAMP STUDIO, Inc. (GELBERG, Intervener). (Civ. 5642.)

District Court of Appeal, Second District, Division 1, California. Aug. 2, 1929.

Corporations — 407(5)—Plaintiff held entitled to recover for services under agreement with general manager of defendant corporation.

Plaintiff suing for money due for services under agreement with general manager of defendant corporation, who was also majority stockholder and president, held entitled to recover.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action for services by Leonard H. Boyd against the Custom Furniture & Lamp Studio,

Inc., in which E. R. Gelberg intervened. From the judgment, defendant appeals. Affirmed.

Milton M. Cohen and Jerome H. Kann, both of Los Angeles, for appellant.

Charles H. Sherrick and Rembert M. Trezevant, both of Los Angeles, for respondent.

Samuel De Groot, of Los Angeles, for intervenor.

YORK, J. Judgment was rendered for the plaintiff against the appellant corporation for certain sums found to be due for services rendered under an oral contract, and certain sums as damages through loss of employment; the total judgment being the sum of \$1,688.

There was evidence which showed that at the time such agreement was made the general manager of said corporation, who was also the majority stockholder and president thereof, made the agreement with the plaintiff, upon which the court predicated its judgment. There was evidence that no stock was owned by any one excepting the man who made this agreement, except certain qualifying shares. It was somewhat uncertain as to how many shares were really issued, but M. Leland Stanford, the man who was so acting as general manager, really held 5,520 shares, and various other persons held some 400 shares; it being shown that approximately 5,900 shares had been issued.

There was sufficient evidence to support the findings of the trial court in spite of the contradictory evidence introduced by the appellant, and this court cannot, therefore, disturb the judgment herein, which is drawn in accordance with said findings.

The judgment appealed from is affirmed.

HOUSER, J. I concur in the judgment.

CONREY, P. J. I concur in the judgment. As there is no bill of exceptions and only a "reporter's transcript" of the proceedings at the trial, we are obliged to look to appellant's brief in our search for a specification of errors relied upon as grounds for reversal of the judgment. There is no direct specification of errors, and no pointing out of any particular finding not sustained by the evidence.

My search through appellant's brief leads me to think that the errors complained of are the following: That the evidence is insufficient to sustain the findings, in this, that the plaintiff sued upon a written contract, whereas the evidence shows that no writing was executed by the parties; and in that the board of directors of defendant never passed upon the contract sued upon, and there was no resolution authorizing the execution of such contract; and in that there is no evidence showing that Stanford, the president, had authority to act for the corporation in making the alleged contract; and in that

there is no evidence tending to prove the monthly amounts of sales deliveries upon which the compensation of the plaintiff as sales agent was computed and allowed by the court. Also that the court erred in sustaining objections to questions propounded to the plaintiff on his cross-examination, in reference to the compensation he received prior to the alleged making of the contract. Also that the court erred in permitting the introduction in evidence of the memorandum Exhibit one.

The contract does not appear to have been one which the law requires to be in writing. Stanford was not only president of the corporation, but, with full knowledge and at least implied consent of the directors, was acting as general manager, and as such apparently had authority to make a contract of the character of that in question here. There is some evidence covering the amounts of sales deliveries upon which the amount of compensation was computed. The two alleged errors in rulings upon evidence were not of sufficient importance to have had any appreciable effect upon the result of the action.

100 Cal. App. 249

PODESTA et al. v. DELUCCHI et al.*
(Civ. 6819.)

District Court of Appeal, First District, Division 2, California. Aug. 5, 1929.

Rehearing Denied Sept. 4, 1929. Hearing Denied by Supreme Court Oct. 3, 1929.

1. Appeal and error $\S$ 1075—Question of insufficiency of evidence, waived on motion for new trial and appeal, and not assigned in bill of exception, cannot be reviewed.

Where plaintiffs, on motion for new trial and on appeal, waived claim that evidence was insufficient to support verdict for defendants, and failed to incorporate in bill of exceptions any assignment of insufficiency, question could not be discussed on appeal.

2. Appeal and error $\S$ 928(5)—Appellate court must presume that error in instructions was cured by other instructions or was not prejudicial, record omitting other instructions.

Where appellant complained simply of giving of listed instructions, and other instructions were omitted from record, District Court of Appeal must presume that, if error arose, it was cured by other instructions, or at least that claimed error was not prejudicial.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Anthony Podesta and another against Eugene Delucchi and others, copartners doing business under the name and style of the Stockton City Realty Company, and W. L. Wolf and another, copartners doing busi-

ness under the name and style of Wolf & Nelson. Judgment for defendants, and plaintiffs appeal. Affirmed.

See, also, 277 P. 364.

A. D. Schaffer and Anthony Podesta, both of San Francisco, for appellants.

Edward F. Sullivan, George Harry Sullivan, and Sullivan & Sullivan, all of San Francisco, for respondents Wolf and Nelson.

Gumpert & Mazzera, of Stockton, and Frederick M. Shipper, of San Francisco, for respondents Delucchi and Pierano.

NOURSE, J. Plaintiffs sued in two causes of action, charging conspiracy and fraud in the sale and exchange of real property. The action was tried before a jury, and resulted in a verdict for defendants. Plaintiffs have appealed on a bill of exceptions.

[1] The theory of the complaint is that the plaintiffs employed the three first-named defendants, doing business under the name of Stockton City Realty Company, to effect the exchange of plaintiffs' ranch property situated near the city of Stockton for hotel property situated in the city and county of San Francisco; that their agents, in turn, employed the firm of Wolf & Nelson as their agents to carry on the negotiations with the owner of the hotel property; and that Wolf & Nelson secretly connived to defraud plaintiffs, by purchasing the hotel property themselves for \$64,000 and turning it over to plaintiffs in exchange for the ranch property at a valuation of \$85,000. The prayer of the complaint was for \$21,000, which was alleged to be the secret profits thus obtained, and for general relief. Evidence was offered supporting the allegations of the complaint concerning the activities of Wolf & Nelson, and on their behalf it was shown that the value of the ranch land was far less than they had assumed it to be, and that they had profited but \$274 out of the entire transaction. On the motion for new trial, and on this appeal, the plaintiffs have waived the claim that the evidence is insufficient to support the verdict, and have failed to incorporate in the bill of exceptions any assignment of insufficiency. This question is, therefore, not open to discussion on this appeal. *Schultz v. City of Venice*, 200 Cal. 50, 54, 251 P. 913.

This leaves nothing but the various attacks upon certain instructions given by the trial judge. Here, too, the record is not in a condition for an examination of the points raised. The appellants have included in the bill of exceptions certain instructions which they claim to be error, but the parties have stipulated that, in addition to the instructions incorporated in the bill, "many other instructions were offered on behalf of the plaintiffs in said action, a portion of which were given by the court and a portion of which were refused by the court."

[2] Appellants complain simply of the giving of these listed instructions, but it is apparent that we cannot determine whether the claimed error was prejudicial, without having before us the other instructions, which have been omitted from the record. If we could ascertain by an examination of the record, or through stipulation of counsel, that the included instructions were all that were given in respect to the propositions covered by the instructions complained of, we might consider the propositions of law involved in these instructions, but we are unable to do this.

With this state of the record, we must presume that, if error arose, it was cured by other instructions, or at least that the claimed error was not prejudicial. *Goldman v. Dahlberg*, 79 Cal. App. 380, 249 P. 536, where cases are cited; *Barrington v. Pacific Electric Ry. Co.*, 83 Cal. App. 100, 103, 256 P. 567.

For these reasons the judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

100 Cal. App. 268

MURPHY et al. v. ZWIEG. (Civ. 6956.)

District Court of Appeal, First District, Division 2, California. Aug. 6, 1929.

1. Appeal and error ⇨933(4)—Appellate court must assume, where no reference was made to insufficiency of evidence in order granting new trial, that court found evidence sufficient (Code Civ. Proc. § 657).

Where motion for new trial was made on all grounds on which a new trial could be granted under Code Civ. Proc. § 657, but order granting it made no reference to insufficiency of evidence to support verdict, appellate court must assume trial court found evidence sufficient to support verdict.

2. Appeal and error ⇨301—Failure to assign improper argument as misconduct in motion for new trial is deemed waiver, and forecloses question on appeal (Const. art. 6, § 4½).

Where argument of counsel is not assigned as misconduct in motion for new trial, failure to do so is waiver thereof, and forecloses question on appeal, especially in view of Const. art. 6, § 4½, emphasizing necessity of showing prejudicial error on motion for new trial as well as on appeal.

3. Appeal and error ⇨301—Counsel's misconduct of prejudicial nature, or so persistent that instruction will not cure error, is not waived by failure to assign misconduct in motion for new trial.

Rule that failure to assign as misconduct improper argument of counsel on motion for new trial is deemed waiver of misconduct and forecloses question on appeal is inapplicable, where misconduct is of such prejudicial nature or is so persistent that instruction covering it would be deemed insufficient to cure error.

4. Appeal and error — 882(16)—Argument of defendant's counsel regarding collection of insurance and that insurance company was real party held not ground for complaint by plaintiff.

In action to recover damages for death resulting from automobile collision, plaintiff held not entitled to complain of argument of defendant's counsel referring to fact that plaintiff had already collected insurance under Workmen's Compensation Act (St. 1917, p. 831), as amended, and that real party in interest was insurance company, where matter of payments of insurance was in record through evidence offered and received without objection.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Adele Murphy and another against Walter Zwieg. From an order granting a new trial after verdict for defendant, defendant appeals. Reversed, with instructions.

J. Hampton Hoge, of San Francisco, for appellant.

James F. Brennan, of San Francisco, for respondents.

NOURSE, J. Plaintiffs sued to recover damages for the death of William Murphy, the husband and father of plaintiffs, resulting from an automobile collision. The cause was tried before a jury, which returned a verdict for defendant. Plaintiffs' motion for a new trial was granted, and the defendant appeals from that order upon a typewritten record.

[1] Though the motion for a new trial was made upon all legal grounds, the order granting it made no reference to insufficiency of the evidence to support the verdict, and we must therefore assume that the trial court found the evidence sufficient. See section 657, Code Civ. Proc. It is apparent from the record that the only ground upon which the motion was granted was the asserted misconduct of the attorney for defendant during his argument to the jury, and to determine whether this was sufficient to sustain the order it will be necessary to refer but briefly to the facts of the case.

The collision occurred at about 4:30 p. m. of the 6th day of April, 1926, at the intersection of Cabrillo street and the Park-Presidio drive, in San Francisco. Murphy was proceeding west on Cabrillo street, driving a Ford coupé; the defendant was proceeding north on the drive, operating an Oldsmobile. Another car passed the intersection immediately ahead of Murphy, also going west, and traveling at a high rate of speed. Murphy was following this car on its right, and was also traveling beyond the legal rate of speed. The defendant had first approached the intersection and was crossing at a legal rate, slowing up to let the first car pass him. When he

was in the middle of the intersection, "at the button," he saw Murphy's car coming on at about 30 miles per hour, and the defendant turned his car sharply to the left to avoid the collision. Murphy continued without slackening his speed or swerving from a direct course, and hit the right front fender of defendant's car with such force that the Murphy car turned over twice, causing injuries to him which resulted in his death. As evidence of the reckless speed at which the Murphy car was driven at the time, it was shown that his car, after turning over twice, was brought to a standstill on the extreme northwestern sidewalk of the intersection, badly wrecked, while the defendant's car was stopped at the point of impact, with no damage other than a slight dent in the right front fender. The foregoing evidence, upon which the defendant relied to negative the charge of negligence on his part, and to prove his defense of contributory negligence on the part of Murphy, was contradicted in some particulars by evidence introduced by the plaintiffs; but, from the jury's verdict and the order of the trial judge, we must assume that these are the facts which were proved.

The asserted error lies in the statement of counsel for the defendant in his argument to the jury, referring to the fact that Mrs. Murphy had already received \$5,000 from the Royal Indemnity Company by way of compensation under the Workmen's Compensation Act (St. 1917, p. 831, as amended), and that the real party in interest in this case was the insurance company, which was prosecuting the case to recover the indemnity it had paid her. Assuming that the statement was improper, the single question before us on this appeal is whether it justifies the order granting a new trial.

The appellant advances several reasons why the order cannot be sustained. No objection was taken at the time of the statement to the jury, and no assignment of error or request that the jury be instructed to disregard it was made; it was based upon evidence which was received without objection, and a portion of which was brought out by questions put by plaintiffs' counsel; and it related to an issue which the plaintiffs raised, and upon which the trial judge, at the instance of the plaintiffs, instructed the jury.

[2] The rule is uniform that the failure of counsel to assign as misconduct an improper statement made to the jury by his adversary is deemed a waiver, and forecloses the question on appeal. The appellant cites *Grossetti v. Sweasey*, 176 Cal. 783, 800, 169 P. 687; *Scott v. Times-Mirror Co.*, 181 Cal. 345, 368, 184 P. 672, 12 A. L. R. 1007; *Mohn v. Tingley*, 191 Cal. 470, 490, 217 P. 733; *Miller v. Murphy*, 88 Cal. App. 601, 263 P. 1031, to the general rule. Many more could be cited to the same effect. We find no California cases

holding that the same rule applies on motions for a new trial, but the great weight of authority from other jurisdictions is all that way. See *Birmingham Ry. Co. v. Gonzalez*, 183 Ala. 273, 61 So. 80, Ann. Cas. 1916A, 543, and annotation on page 555. Upon our review of these authorities, we would hold that the same rule applies on a motion for new trial, and particularly because of the provisions of section 4½ of article 6 of our Constitution, which emphasizes the necessity of showing prejudicial error upon a motion for new trial as well as on appeal. If no assignment of error was made, and no request for an instruction, how could the trial court say that an error of law occurred which was prejudicial? The Idaho court stated the principle in *Hurt v. Monumental Merc. M. Co.*, 35 Idaho, 295, 302, 206 P. 184, 186: "Counsel cannot sit quietly by, knowing that error has been committed, and await the verdict of the jury, and then upon motion for new trial urge such error as a ground for new trial."

[3, 4] There is a well-accepted qualification of this general rule in cases where the misconduct of counsel is of such a prejudicial nature, or is so persistent, that an instruction covering it will be deemed insufficient to cure the error (*People v. George*, 72 Cal. App. 124, 130, 236 P. 934, and cases cited); but this is not the case here. The matter of payments of compensation by the insurance company was all in the record through evidence offered and received without objection. Conceding that this evidence was inadmissible, and should have been excluded if an objection had been made, the record discloses that plaintiffs were responsible for it, and actually made an issue of it. Thus we have a case where they not only failed to object to the alleged misconduct, but actually invited it.

The order is reversed, with instructions to the trial court to enter judgment in favor of defendant on the verdict.

We concur: KOFORD, P. J.; STURTEVANT, J.

100 Cal. App. 195

BARNABY v. BARNABY. (Civ. 5363.)

District Court of Appeal, Second District, Division 2, California. Aug. 1, 1929.

1. Divorce §331—Pleadings in wife's action for unpaid alimony based on foreign decree, held to raise issue of fact concerning law of foreign state.

Where wife, in action to recover unpaid alimony, alleged that court of foreign state rendering decree was one of general jurisdiction, and that order made had force and effect of judgment for payment of money, and husband adopted language of wife as sufficiently putting in issue fact concerning law of foreign state

and denied allegation, court should have treated allegation and its specific denial as raising issue of fact concerning law of state granting decree.

2. Pleading §121(3)—Defendant cannot deny, for insufficient information, averments presumptively within knowledge, or where he can ascertain truth.

A defendant has no right to deny, for lack of information sufficient to form belief, those averments which are positively within his knowledge, or where he has means of ascertaining their truth.

3. Divorce §331—Defendant might deny on information and belief jurisdiction of court of foreign state to render decree for alimony.

It was sufficient for defendant to deny, in wife's action for unpaid alimony, for lack of information sufficient to form belief on subject, general jurisdiction of court of foreign state rendering decree, which wife alleged was of general jurisdiction.

4. Appeal and error §1107—Amendment to statute allowing courts to take judicial notice of laws of sister state could not affect appeal perfected prior thereto (Code Civ. Proc. § 1875, as amended by St. 1927, p. 110).

Where after judgment was rendered and months after appeal was perfected therefrom, Code Civ. Proc. § 1875, was amended by St. 1927, p. 110, allowing courts of California to take judicial notice of laws of sister state, amendment could not affect such appeal.

5. Appeal and error §925(2)—Appellate court cannot assume trial court considered counsel's affidavit that defendant had information and belief, as contradicting or overcoming answer's sufficient denial.

District Court of Appeal cannot assume that trial court considered affidavit of counsel that defendant had information and belief of facts alleged by plaintiff as contradicting or overcoming any sufficient denial of answer of defendant.

6. Appeal and error §916(1)—Appellate court must presume trial judge considered denials insufficient, where rendering judgment on pleadings.

Where court ordered motion to strike portion of answer, and granted motion for judgment on pleadings, District Court of Appeal must presume that trial judge considered that denials as they stood were insufficient in form and substance.

7. Divorce §331—That agreement for alimony was contra bonos mores could not be raised in wife's action on decree for unpaid alimony.

That agreement forming basis of decree for divorce and alimony by court of foreign state was contra bonos mores could not be raised in action on decree by wife for unpaid alimony.

8. Judgment §822(1)—Judgment of court of sister state with jurisdiction is final and conclusive.

Judgment of court of sister state is final and conclusive, provided only that court had jurisdiction of cause and of the parties.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Elizabeth Lindner Barnaby against William Ernest Barnaby. Judgment for plaintiff, and defendant appeals. Reversed.

Earl S. Patterson, of Los Angeles, for appellant.

M. M. Holman, of Los Angeles, for respondent.

IRA F. THOMPSON, J. This is an appeal from a judgment on the pleadings. The plaintiff filed a complaint alleging that she had, prior to March 31, 1920, maintained an action for divorce against the defendant in Minnesota; that the plaintiff and defendant signed a stipulation that, if the court should award a decree, it should incorporate therein an order for the defendant to pay plaintiff the sum of \$75 per month as alimony so long as she should remain unmarried; that the court granted the decree and made the order for the payment of the monthly allowance; that the order was by stipulation of the parties modified temporarily, but that, giving the defendant credit for payments made by him and the sums remitted by the temporary modification, there yet remained unpaid \$1,680, which the plaintiff sought to recover. There was the further allegation that the court which rendered the decree and in which the defendant personally appeared after service of process was a court of general jurisdiction, and that the order made has the force and effect of a judgment for the payment of money.

The defendant responded to the complaint by an answer, in which he denied for lack of information and belief the general jurisdiction of the court, his personal appearance therein, the rendition of a decree of divorce, that the plaintiff has not remarried, or that the copy of the stipulation modifying the allowance was correct. He admitted the making of the stipulation for the payment of alimony, to become effective only upon a decree being rendered, but alleged that the agreement, as well as the subsequent one founded upon it, was contra bonos mores. He denied that the decree or judgment of the court has, under the laws of Minnesota, the force or effect of a judgment at law for the payment of money, and denied that there was due or owing the sum of \$1,680, or any other sum.

The plaintiff interposed a demurrer, a motion to strike portions of the answer, and a motion for a judgment on the pleadings; the last motion being based upon the ground that the answer was sham, false, and a dilatory and evasive plea. The motions were accompanied by an affidavit of counsel setting forth that he had discussed the subject-matter of the action with the defendant, and that the latter had knowledge of the things denied by

him in his answer for lack of information and belief. The court, as already indicated, granted this motion and rendered a judgment for the plaintiff.

The appellant assigns four reasons for a reversal of the judgment. They are as follows: (1) The decree of the Minnesota court was not final, and therefore could not support an action in California; (2) issues of fact were raised by the answer of the defendant; (3) the court failed to assume the truth of the allegations of the answer, but considered the affidavit of counsel as sufficient to overcome the allegations of the answer; (4) that the basis of the decree of the Minnesota court was an agreement which was contra bonos mores.

[1] Turning to appellant's first contention, we have now to determine whether an action will lie upon a decree for alimony which is not final and also whether the defendant put in issue the question of fact concerning the state of the law in Minnesota. A very succinct and yet comprehensive statement of the law upon the first branch of this question is found in *Sistare v. Sistare*, 218 U. S. 1, 30 S. Ct. 682, 686, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061, as follows: "First, that, generally speaking, where a decree is rendered for alimony and is made payable in future instalments, the right to such instalments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the instalments, since, as declared in the Barber Case [21 How. 582, 16 L. Ed. 226], 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' Second, that this general rule, however, does not obtain where, by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the instalments ordered by the decree to be paid, even although no application to annual or modify the decree in respect to alimony had been made prior to the instalments becoming due."

It is patent from the quotation just made that, had the defendant alleged that the law of Minnesota was such as to fall within the exception to the general rule, such allegations would have raised an issue of fact under the law as it stood when the pleadings were filed, which it would have been necessary for the court to try. *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 P. 862. It is equally obvious that the plaintiff in the instant cause anticipated the defense which it was possible to interpose, and sought to avoid it by alleging the final character of the decree under the

laws of Minnesota. Under the pleadings thus drawn, started by the plaintiff and answered by the defendant in kind, had a trial been had and judgment rendered upon a finding that the laws of Minnesota were such as to give to a decree for alimony the force and effect of a money judgment, the defendant could not have successfully attacked the allegation of the complaint and the finding, without having first interposed a demurrer directed to the point.

Even though we assume that the allegation is a conclusion of law, and even though it is lacking in precision and clarity, nevertheless it is clear that the plaintiff intended to allege the fact that the law of Minnesota was such as to render the decree for alimony of a character giving the plaintiff the absolute right to demand and receive the payments named therein. In *Ryan v. Jacques*, 103 Cal. 280, 37 P. 186, 187, it is said: "There are in the complaint several matters stated which are purely conclusions of law, and some of the facts are not stated with the clearness and precision which good pleading requires. Whether a demurrer for ambiguity would have been sustained, it is not necessary to consider, as no such objection was taken. If, however, facts are stated showing the liability of the defendants, the complaint must be sustained, notwithstanding they are imperfectly stated. *Brown v. Weldon*, 71 Cal. 393, 12 P. 280; *Tehama Co. v. Bryan*, 68 Cal. 57, 8 P. 673; *Harnish v. Bramer*, 71 Cal. 155, 11 P. 888." And in *Ohio Electric Car Co. v. Le Sage*, 182 Cal. 450, 188 P. 982, 983, a similar enunciation reads: "It is true that, where the objection is not made good until after judgment, the complaint will be liberally construed, and if the necessary facts appear by implication only, or as a conclusion of law, the complaint will be upheld."

The defendant adopted the language of plaintiff as sufficiently putting in issue the fact concerning the state of the law in Minnesota and denied the allegation. It would be a strange situation if the plaintiff might rely upon his imperfect pleading, and yet take advantage of the defendant's acceptance thereof. We think that the plaintiff cannot profit by putting the defendant in such position. The trial court should have treated the allegation and its specific denial as raising an issue of fact concerning the law of Minnesota.

[2, 3] The next assertion may be very briefly answered by the observations that a defendant has not the right to deny for lack of

information sufficient to form a belief those averments which are presumptively within his knowledge, or where he has the means of ascertaining their truth. *Crosby v. Fresno Fruit Growers' Co.*, 30 Cal. App. 308, 158 P. 1070. However, this does not apply to public records of sister states, and it has been held to be sufficient to deny, as was done in the present instance, the general jurisdiction of a court of a sister state for lack of information sufficient to form a belief upon the subject. *Donian v. Danielian* (Cal. App.) 266 P. 817.

[4] We have not overlooked the fact that since this judgment was rendered, and months after the appeal was perfected, section 1875 of the Code of Civil Procedure was amended (St. 1927, p. 110), allowing the courts of this state to take judicial notice of the laws of a sister state, but that cannot affect the present appeal.

[5, 6] We cannot assume that the court considered the affidavit of counsel as contradicting or overcoming any sufficient denial of the answer. The affidavit was properly presented to the court for its consideration in connection with the motion to strike. The court having ordered the motion to strike off the calendar and granted the motion for judgment on the pleadings, we must presume that the trial judge considered that the denials as they stood were insufficient in form and substance.

[7, 8] The last assertion of appellant's counsel, that the agreement forming the basis the decree was *contra bonos mores*, can hardly be raised in an action upon the decree. It is too well settled to require extended notice that the judgment of a court of a sister state is final and conclusive, provided only that the court had jurisdiction of the cause and of the parties. *Estate of Hancock*, 156 Cal. 804, 106 P. 58, 134 Am. St. Rep. 177. A somewhat similar contention was involved in *McCormack v. McCormack*, 175 Cal. 292, 165 P. 930, 931, and the court there said: "With this, however, we are not concerned, since, whether erroneous or not, the final judgment of the superior court of Washington declaring the marriage null and void—there being nothing to show want of jurisdiction—is, under section 1, article 4, of the federal Constitution, entitled to the same consideration and weight as though rendered by a court of this state."

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

100 Cal. App. 235

PEOPLE v. DE HOOG. (Cr. 1850.)★

District Court of Appeal, Second District, Division 2, California. Aug. 2, 1929.

Rehearing Denied Aug. 16, 1929. Hearing Denied by Supreme Court Aug. 29, 1929.

1. Burglary $\S$ 41(6)—Evidence in prosecution for burglary held sufficient to identify defendant, especially in view of instruction leaving identity to jury.

In prosecution for burglary, evidence held to sufficiently identify defendant, especially in view of instructions leaving entirely to jury question whether identity was proved beyond reasonable doubt.

2. Criminal law $\S$ 1166½(12)—In burglary prosecution, court's cross-examination regarding witness' acquaintance with defendant's sister-in-law and wearing of fur coat taken held not prejudicial error.

In prosecution for burglary, questions propounded on cross-examination by court, regarding witness' acquaintance with defendant's sister-in-law and wearing of sealskin coat which was stolen, held not misconduct nor prejudicial to defendant's case, where answers to questions were stricken and court instructed jury to disregard evidence and remarks which had been stricken.

3. Indictment and information $\S$ 129(2)—Burglary and theft occurring in same house within 30 minutes constituted two offenses, and were properly charged and proven separately.

Where burglary and theft occurred in same house within about 30 minutes, they constituted two offenses, and were properly charged and proven separately.

4. Criminal law $\S$ 825(4)—Failure to more fully instruct on identity in burglary prosecution was not error, where court had given instruction and no further instruction was requested.

In prosecution for burglary, where court orally instructed jury upon law as to proof of identity and no further instruction on issue of identity was requested, failure to instruct more fully on such issue was not error.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Roy De Hoog was convicted of burglary, and he appeals. Affirmed.

Josiah Coombs, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant and one Walter Dayly were charged by information, consisting of three counts, filed by the district attorney of Los Angeles county, with having, on or about January 23, 1929, feloniously and burglariously entered the house of Abram Zacharonsky, with intent to commit theft, with having robbed said Zacharonsky, and also with having robbed Elizabeth Zacharon-

sky. Dayly testified for the people, admitting that he and another man committed all three offenses, but exonerating De Hoog from any participation therein. Both defendants were convicted, and the last-named defendant appealed.

It appears that on the date mentioned, at about 6:45 p. m., two men drove in an automobile to the residence in question, went upon the porch, cut the front screen door, and rang the bell, to which Zacharonsky responded. As the door opened, each of them thrust a revolver in the proprietor's face, and said, "Throw up your hands; turn around; shut your eyes," and the door was quickly closed. Mrs. Zacharonsky entered the front room, and, as she did so, the intruders compelled her and her husband to proceed to a room adjoining, sat them on a bed, and, tearing a sheet into strips, placed gags in their mouths, tied their feet, and bound their hands behind them. Dayly demanded their rings, to which they replied that they had none. Zacharonsky testified that Dayly stated: "We know what you have got; we came for them and we are going to get them." Being threatened with torture unless she should reveal the whereabouts of her valuables, Mrs. Zacharonsky accompanied Dayly's companion to a dresser in another room, where she had left her jewelry and \$110 in money in her purse, all of which he took; he then returned her to the bed, where he menaced her and her husband with a revolver, while Dayly demanded of Mr. Zacharonsky a diamond ring which he pretended to know all about, and, when told there was none, stated that he would proceed to torture them. He removed one of Zacharonsky's shoes, and began cutting the latter's sock with a large knife about 6 inches in length, in search of the ring. His victim was ill, in a weakened condition, and badly frightened, and, in spite of Dayly's threats of violence if he did not "shut up," he repeatedly fell back on the bed, and continued to groan. Mrs. Zacharonsky, facing the pistol held by the other man, and fearing for her husband's safety, advised him that he had "better tell." The latter then indicated that he had thrown the ring under the bed, whereupon Dayly, upon his hands and knees, recovered and took possession of this piece of jewelry, which contained a diamond valued at about \$3,200. As the strangers were about to depart, Dayly indicated a lady's coat hanging by the door, and asked, "Is that the \$1,500 coat?" to which his companion replied, "Yes, that is sealskin." A young man by the name of Patrick Oslo, returning home from a store, had noticed the men in a parked automobile as he passed, saw them approach the Zacharonsky home, and walk upon the porch. He heard a noise which he characterized as a "zoom" when they cut the screen, and, as they rang the bell and the door opened, he saw each of them

thrust his hand forward, and enter. Becoming suspicious, he noted the license number of the machine, with which police officers thereafter located Dayly's room, where they found Dayly, De Hoog, one John Golden, and two others, all of whom were arrested. On the next day following the robberies, the victims visited the jail and viewed the prisoners, spoke to them, and heard them talk, in a shadowbox.

[1] Although Osio testified that the defendants were of about the same build, and one somewhat taller than the other, and the Zacharonskys swore that they were the men who entered their home and robbed them, appellant strenuously insists that the identification of himself wholly failed. It is truthfully said in his briefs that Osio admitted his inability to identify them, because he had not seen their faces. Zacharonsky testified that each wore a handkerchief covering his features below the eyes, that he saw only their foreheads and eyes, except upon one occasion when Dayly's mask dropped down; that he observed about one-third of the area of their hair, and noticed that Dayly's confederate spoke with a slight Swedish accent, and had quite a heavy bass voice. Attention is further called to the fact that Mrs. Zacharonsky remembered this man's voice as "not very strong, rather weak," and that she noticed no foreign accent. Her husband also testified that he was sure neither of the men had lost a finger, whereas during his cross-examination it was shown that Dayly had lost a portion of one finger. These, and other minor discrepancies in the testimony of the complaining witnesses are assigned as "a bundle of contradictions from the first to the last."

* * * A case of guessing on the part of Zacharonsky when he swore positively that the defendant De Hoog resembled in a general way the person who helped Dayly rob him." However, in view of all the circumstances, and in conjunction with the very positive testimony to the contrary, we are unable to say as a matter of law that the jury were more unjustly impelled toward conviction than were appellant's counsel in his favor by the fact, as it is asserted, that "these people were menaced by guns in the hands of the persons committing the robbery; and it is reasonable to suppose, reading the testimony of Zacharonsky, that he was excitable, nervous and felt in danger." Notwithstanding a most exhaustive and technical cross-examination of the witnesses Zacharonsky, they were unwavering. During persistent efforts to draw from Zacharonsky an admission of doubt as to whether Dayly's companion in crime on the night in question was De Hoog or Golden, he was positive that it was the appellant, and swore that he eliminated Golden at once when he saw them both. He testified repeatedly in no uncertain terms that when he saw De Hoog at the jail he "pointed him out immediately,"

that he was "very positive" it was De Hoog, and that he had never intimated that it might have been Golden. His testimony in this respect was: "I was positive right from the start that it was Dayly and De Hoog." A police officer, who questioned Dayly within De Hoog's hearing, testified that Dayly offered to restore the stolen property if De Hoog could be permitted to "go back on parole"; and, further: "I asked Dayly why he should take such an interest in De Hoog, when De Hoog claims he did not know him. He says, 'Maybe De Hoog thinks he can beat the case.' That was in that same conversation. I asked him where he met De Hoog, and he said he met him in Folsom." Again: "Lieutenant McCaleb said, 'De Hoog, you heard what Dayly had to say?' De Hoog says, 'yes.' He said, 'He would do well if he would take care of his own business and not be messing in mine.' That is all that the defendant De Hoog said. I also said, 'You heard what Dayly said in there?' He said, 'Yes.'" Mrs. Zacharonsky, when asked upon the stand as to the identity of Dayly and De Hoog, replied: "I am very positive." Defendant Dayly in his testimony stated that Osio had told practically the true story as to occurrences outside the house. He denied, with the same degree of positiveness, that De Hoog participated in the transaction, or that he had known him, although he admitted having seen him in Folsom prison. Dayly acknowledged under oath, and recognized the fact that officials from other jurisdictions were present to prove by their records that he had previously been convicted of felonies in the states of Oregon, Idaho, Montana, and California. Though denying the purpose assigned by the prosecution therefor, he admitted having attempted to bargain with the police officers for De Hoog's release.

The jury were instructed as to the credibility of witnesses and the weight to be given to their testimony, as to the presumption of innocence, and reasonable doubt. They were charged that "In this case the matter of the identity of any defendant here on trial with any person who may have taken part in the commission of the offense charged against him is a matter which is left entirely to the jury, and in this connection I charge you that the jury are the sole judges of the weight to be given to any evidence bearing upon the question of the identification of such defendant, as to whether same has been proved beyond a reasonable doubt." With all of the evidence before them, the jury, under the admonitions of the trial judge, may well have disbelieved all of Dayly's testimony except that which was corroborated by an abundance of other evidence. We think appellant's identity was sufficiently established in spite of Dayly's denials, and we are not disposed to devote extended consideration to conflict in this respect.

[2] Certain questions propounded by the trial court to Mrs. Zacharonsky, during her cross-examination, are assigned as misconduct and prejudicial, as suggestive of new evidence not disclosed by either counsel. In response to questions of appellant's attorney, she testified that she was acquainted with, and had for some time known, his sister-in-law, Mrs. Marie De Hoog; that the latter called her upon the telephone two or three days after the robbery, but she denied that she had called Mrs. De Hoog, or that they had more than one conversation. The witness said that Mrs. De Hoog felt very badly about the occurrence, and "wanted to know why I didn't phone her about it, and I said: 'I didn't want to, Marie.' I knew she wasn't to blame for it in any way." Objections to further questions as to hearsay and immaterial matters were sustained, whereupon the following occurred:

"The Court: Had Mrs. De Hoog been a visitor at your home? A. Well, she and her mother visited me, oh, some about three years ago.

"Q. You had not seen her for some time? A. I visited her mother's place. I have seen her there two or three times.

"The Court. All right. Go ahead. Had you worn this sealskin sack out there? A. Yes.

"Mr. Eddie: I object to the question of the court on the ground it is incompetent, irrelevant and immaterial.

"The Court: Very well, strike it out. The jury is instructed to disregard it.

"Mr. Eddie: Ask that the jury be instructed to disregard it.

"The Court: You may disregard it, ladies and gentlemen of the jury."

It is contended that, without provocation and in order to "supply the groping minds of the jurors" with an unfounded insinuation that De Hoog's sister-in-law furnished him with information as to the Zacharonsky's wealth, the trial judge went outside his province; that, upon learning that the witness had not seen Mrs. De Hoog for a period of three years, he persisted in following up the inquiry about a sealskin coat. It is characterized as inexcusable, and prompted by "a zeal incompatible with the dignity of the court to supply a connecting link between the defendant and Mrs. De Hoog." As heretofore observed, Mr. Zacharonsky had testified regarding the sealskin coat, which the men apparently recognized. His testimony in this respect was as follows: "But my wife's sealskin coat was hanging in her dressing room, and Dayly walked up to it, and felt of it, and

he says, 'Is that that \$1,500 coat?' My wife shook her head then this way [indicating]. De Hoog says, 'Yes, that is sealskin.' * * * Hanging in my wife's dressing room, right on the edge—well, just on the edge of the door." These questions by the court appear to have emanated from an effort to eliminate immaterial matters and to expedite the examination, rather than from injudicious zeal or caprice. They followed a somewhat persistent endeavor to elicit telephonic conversations to which objections by the district attorney were sustained, after the witness had so testified as to intimate that there might have been visits at the De Hoog residence within the three-year period. The answer of Mrs. Zacharonsky regarding the wearing of her coat was stricken out, and the jury were twice admonished to disregard it; and, in the charge, they were instructed to disregard evidence and remarks which had been stricken out. Mrs. De Hoog was absolved by this witness from any blame, and, as to whether the questions by the court or by counsel in this regard contemplated disproof of the defendant's guilty knowledge, or proof of his observations during visits between appellant and his sister-in-law, that might appear was suggested by his own counsel, and is not properly attributable to ulterior motives of the court; whose object is not apparent. We find no error in this behalf.

[3] It is also urged that burglary and theft occurring, as here, in the same house within about 30 minutes, they constituted but one offense. The rule has been otherwise announced in former decisions, and they were properly charged and proven separately. *People v. Snyder*, 74 Cal. App. 138, 239 P. 705; *People v. Sharp*, 58 Cal. App. 637, 209 P. 266.

[4] Appellant complains that the jury should have been more fully instructed upon the law as to proof of identity where such question is in issue. As already observed, the trial court did instruct them upon this subject. It was stipulated that the court should orally instruct the jury, and no further instruction in this respect was requested. We find no error in this regard. *People v. Weber*, 149 Cal. 325, 86 P. 671.

Other assignments of alleged error consist of questions by the district attorney to which no objection was interposed, or upon matters already opened up by the defense, and similar points which do not require further discussion.

The judgments are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

100 Cal. App. 113

PEOPLE v. SEITZ. (Cr. 1763.)★

District Court of Appeal, Second District,
Division 2, California. July 25, 1929.

Rehearing Denied Aug. 9, 1929. Hearing
Denied by Supreme Court Aug. 22,
1929.

1. Criminal law $\S$ 1116—Contention that district attorney had no authority to include in information offense not covered by commitment held unavailable, in view of incomplete record.

Contention that district attorney had no authority to include in information an offense not covered by magistrate's commitment held not available on appeal, where record did not disclose for what offense or offenses defendant was bound over by committing magistrate, since, in absence of proper record, reviewing court must indulge all presumptions in favor of judgment.

2. Indictment and information $\S$ 159(1)—Judgment held not sustainable as to count in amended information, where it did not appear that district attorney was authorized to amend in any particular (Pen. Code, $\S$ 1009).

Judgment held not sustainable as to count in amended information, demurrer to which was sustained and to which defendant did not plead under Pen. Code, $\S$ 1009, where it did not appear that district attorney was authorized or permitted to amend in any particular.

3. Witnesses $\S$ 380(3)—Rejecting in entirety testimony to show that witness, deceased since preliminary examination, had claimed testimony given at preliminary was false, held not error (Pen. Code, $\S$ 686).

Where witness testified at preliminary examination that defendant had attempted to induce witness to commit a crime, and between time of preliminary examination and trial witness was murdered, and, under Pen. Code, $\S$ 686, testimony of such witness given at preliminary hearing was read in evidence, rejecting in its entirety testimony of defendant that such witness had said on many occasions that testimony given was utterly false, held not error.

4. Criminal law $\S$ 696(3)—Refusing to strike testimony of accomplice who would not name and describe person who aided in robbery, and would not state what his real name was, held not reversible error.

In robbery prosecution, refusal to strike testimony of accomplice that crime was instigated by defendant because accomplice refused to name and describe the person who aided in the robbery, or to state what his real name was, held not reversible error, in view of evidence and accomplice's testimony that he was serving a life sentence in the penitentiary.

5. Criminal law $\S$ 469—Permitting expert to state the numbers which had appeared on revolver held not error.

In prosecution for robbery, permitting witness who qualified as an expert to state the numbers which had appeared on barrel of revolver, and which had been scratched off, which pistol accomplice testified had been given him by

defendant on ground that jurors with aid of a high-powered microscope could not discern the numerals on the revolver, held not error; objection going to weight of evidence rather than admissibility.

6. Criminal law $\S$ 511(1)—Evidence held to sufficiently corroborate accomplice's testimony and to sustain conviction for robbery.

Evidence held to sufficiently corroborate accomplice's testimony and to sustain conviction for robbery.

7. Criminal law $\S$ 427(5)—Evidence of conspiracy to commit robbery held sufficient for jury so as to warrant admission of statements of coconspirators.

Evidence of conspiracy to commit robbery held sufficient for jury so as to warrant admission in evidence of statements of coconspirators.

8. Criminal law $\S$ 427(5)—Conspiracy may be proven as any other fact or shown by circumstances.

Conspiracy may be proven as any other fact or it may be shown by circumstances sufficient to satisfy jury of its existence.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Evan B. Seitz was convicted of robbery, attempt to commit robbery and burglary, and he appeals. Reversed in part, and affirmed in part.

See, also, 277 P. 1069.

Paul W. Schenck, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J. The defendant was found guilty and sentenced on three charges of robbery, two counts of "attempt to commit robbery," and one of burglary. He appeals from the judgments pronounced upon the verdicts and from the order denying his motion for a new trial.

Inasmuch as it is one of appellant's contentions that error was committed by the court in permitting the district attorney to amend the information, we shall, before reciting any of the testimony, examine that question. The original information consisted of fifteen counts containing not only the charges upon which the appellant was convicted, but ten others, the nature of which ten it is unnecessary to state at this time. A demurrer and a motion to set aside the information as to each count except the first one, which accused the defendant of robbery, were interposed, the latter on the ground that the defendant had not been committed by a magistrate for any offense except that alleged in count 1. The motion was denied. The demurrer was sustained as to counts 6, 12, 13, 14, and 15; the only one in which we are interested being the sixth, which contained the charge of burglary upon which the appellant

was convicted. The defendant entered his plea of "not guilty" to all the counts remaining. This was on February 9, 1928. On February 21, 1928, an amended information was filed containing count 6, in the same words as in the original information. A new demurrer and motion to strike based on the same grounds as before were interposed, and on September 11, 1928, the demurrer was overruled and the motion to strike denied. At the same time the defendant's motion for a separate trial from his codefendant was granted. The defendant was not required nor did he plead to the amended information.

[1, 2] The appellant assigns two reasons why the action of the trial court was erroneous: First, as already suggested, the district attorney had no authority to include in the information an offense not covered by the magistrate's commitment; second, that the district attorney had no authority to amend after demurrer sustained without an order of court therefor. The record does not disclose for what offense or offenses the appellant was bound over by the committing magistrate. Appellant asserts that the opinion of the trial judge, delivered when denying the motion to strike, evidences the fact that the magistrate only held him to answer for the offense of robbery contained in count one. Even though we were entitled to consider the opinion, we would not find the support which is claimed for it. Therein it appears that it is conceded that the information contains charges for which the defendant was not committed, although it "embraces charges for which the" defendant was committed. It is to be noted that the word "charges" is in the plural, and we have no way of ascertaining which were embraced in the order and which were not. If it were desired to raise the objection on appeal, the record should have been made to reflect the situation. Without such record we must indulge all the presumptions in favor of the judgment. It should be presumed, in the absence of a contrary showing, that the charges not covered by the order are the remaining nine counts with which we are not here concerned. The same reasoning, however, does not apply to the second point presented. We do not need to concern ourselves with the first five counts which were identical with the first five counts of the original information, the demurrer to which was overruled, and to which the appellant pleaded, but only with count 6, the demurrer to which was sustained and to which he did not plead. The order sustaining the demurrer appears in the record, and, from it, it does not appear that the district attorney was authorized or permitted to amend in any particular. Section 1009 of the Penal Code in the chapter on demurrers reads: "If the court does not permit the information to be amended, nor direct that an information be filed, or that the case be resubmitted, as provided in the preceding section, the defendant, if in cus-

tody, must be discharged, or if admitted to bail, his bail is exonerated, or if he has deposited money instead of bail, the money must be refunded to him." It is apparent that, had the demurrer to the entire information been sustained without permission to amend, the defendant would have stood discharged. It must likewise follow as to the single count. The entire situation as respects count 6, inclusive of appellant's failure to plead thereto, is such that the judgment responsive thereto cannot be allowed to stand.

[3] We have concluded that the opinion will advance more logically if we consider certain other claims of error before proceeding to test the sufficiency of the evidence. Accordingly, the next argument to which we will turn is that relating to the impeachment of a witness named Rosen. This witness testified at the preliminary examination to the fact that in several conversations with the appellant the latter had attempted to induce him to undertake "something safe" at a "tea party," where "there were some women" who "wore a lot of diamonds, no holler to it, all covered by insurance and everything fixed." Between the time of the preliminary examination and the trial Rosen had been murdered. Pursuant to the provisions of section 686 of the Penal Code, the district attorney read in evidence the testimony of this witness given at the preliminary hearing. The appellant then attempted to show by at least two witnesses that both before the preliminary examination, and while outside the courtroom and afterwards, Rosen had said on many occasions that his testimony would be, was, and had been, wholly and utterly false and a "frame-up" between himself and the person to whom we shall hereafter refer as the "Iron Duke," an accomplice. The trial court rejected the testimony in its entirety, i. e., that which purported to have occurred prior, as well as subsequent, to the examination.

In *People v. Garnett*, 9 Cal. App. 194, 98 P. 247, a witness was absent from the state, and her deposition given at the preliminary hearing was introduced by the district attorney. In passing upon a similar contention there, it is said: "The court sustained the objection of the district attorney to questions put to the witness George N. Martin for the purpose of showing that Mrs. Coit had made statements to him inconsistent with the evidence read from her deposition. There was no error in this. No foundation had been laid for the impeachment of Mrs. Coit as required by section 2052, Code Civ. Proc. The fact that her testimony was read from her deposition taken at the preliminary examination does not alter the rule. *People v. Compton*, 132 Cal. 484, 64 P. 849; *People v. Witty*, 138 Cal. 576, 72 P. 177; *People v. Pembroke*, 6 Cal. App. Rep. 588, 92 P. 668."

The quoted portion of the opinion would seem to leave no doubt of the correctness of the ruling in so far at least as concerns state-

ments made prior to the giving of the deposition, for the obvious reason that in such cases the opportunity was afforded counsel to lay the necessary foundation for the impeachment. In *People v. Compton*, supra, the statements inconsistent with the testimony which were sought to be introduced were made subsequent to the preliminary examination, and the court dismissed the appellant's contention with the observation: "We know of no rule of law justifying the impeachment of the witness under these circumstances." This brief statement is unsatisfactory to the inquiring mind not enslaved by the force of precedent. However, we do find a logical and just reason for the exclusionary rule in the words of Chief Justice Brinkerhoff in the case of *Runyan v. Price*, 15 Ohio St. 1, 14, 86 Am. Dec. 459, as follows: "If we look at the principal question decided in this case simply as one of judicial policy, without reference to the authority of adjudged cases, it seems to me that a reason, in addition to any that I have yet heard stated, may be found in favor of our conclusion in the following considerations:

"Dead men tell no tales;" and if the rule be once established that the testimony of a deceased witness may be impeached by giving in evidence declarations alleged to have been made by him out of court differing from those contained in his testimony, and when he has had no opportunity for explanation—when all opportunity for explanation by him has passed away—when few will have the motive, and none the power to vindicate his integrity and truthfulness such as he would have if living, it seems to me that temptations to perjury and subornation would be not a little increased by the comparative impunity with which those crimes might be committed. Such declarations, at best, are the lowest kind of evidence; and the administration of justice will suffer little in any case by their exclusion; while, if admitted, and they are falsely alleged against a dead witness, it would be hardly possible ever to disprove them." The conclusion is irresistible that the trial court was not in error.

[4] The next attack of appellant upon the judgments is based upon the refusal of the court to strike the testimony of the accomplice, the "Iron Duke." This witness had testified on his direct examination to the effect that he and an assistant had actually taken the jewels from the women attending the party at the solicitation and instigation of the appellant. At the time he testified he was serving a life sentence in Folsom. On cross-examination he was asked to name and describe the person who aided him in the robbery. He refused to do either. He also refused to say what his own real name was. Counsel then made the motion to strike his entire testimony, calling the attention of the trial court to the authority of *People v. Mc-*

Gowan, 80 Cal. App. 293, 251 P. 643, wherein it was determined that the trial court has the authority to strike out the testimony of a witness who declines to answer proper questions on cross-examination on the principle that before testimony is permitted to go to the jury the adversary shall have the opportunity of subjecting it to "such tests as the experience of ages has shown are necessary to render reliance on it safe. * * *" We may rely upon the announced principle as correctly stating a rule of evidence. But, for reasons now to be stated, we think the court did not commit reversible error. Regardless of whether there was a conspiracy, the evidence sufficiently establishes that the associate of the "Iron Duke" in the actual robbery was a man called Eugene Ferris. The testimony of the appellant discloses that he had met Ferris and could identify his picture by a scar on the face; and that he accompanied the officers to Oxnard for the purpose of finding and identifying the missing participant in the affair. It can hardly be said, therefore, that the failure of the witness to answer the questions was so material or vital as to seriously impair the defendant's right or impel the court to strike the testimony. The similar refusal on the part of the witness to give his own real name cannot be said to have prejudiced the appellant. The witness gave his name when sworn, and on cross-examination testified to at least five aliases. As already observed, he was an inmate of Folsom. It is difficult to imagine how his credibility might have been more seriously attacked, or of what advantage it would have been to appellant to have had the question answered.

[5] Appellant also complains because the court permitted the witness W. R. Belknap to state the numbers which had appeared upon the barrel of a revolver and had been scratched off, which pistol the "Iron Duke" testified had been given to him by the appellant, and which, according to the evidence, had been purchased by the appellant four days previous to the robbery. This witness testified that he had had five years' experience, as special agent for the Pacific Coast Auto Theft Bureau and as inspector with the Motor Vehicle Department, in raising numbers obliterated on metal surfaces; that without the aid of his process he could make out on the gun the outlines of the second and the fourth numbers, and that they were each 5, and that he could make out portions of other figures; that, by applying a secret process, the compressed portions of the metal forming the numbers could be made visible; that sometimes the process took hours to react, and sometimes only a short time; that he had used his process on this revolver, and been able to decipher its number; and that he thought he could again make it visible to the jury. The witness was then asked to apply the process and display the gun to the

jury, which he did. Counsel asserts that with the aid of a high-powered microscope the jurors could not discern the numerals, and that therefore the witness should not have been allowed to state the numbers which he says he was able to raise. We are of the opinion that appellant's argument is addressed to the weight of the evidence rather than to its admissibility. The witness qualified as an expert; the jury had full opportunity through the adroitness of counsel to determine the reliability of the opinion of the witness; and for that reason appellant has no legitimate complaint.

[6] We have yet to consider the sufficiency of the evidence as an entirety; the sufficiency of the corroborating testimony; and the claim of appellant that the court admitted hearsay statements, together with the final claim that the trial judge erroneously refused to give requested instructions. The first two of the problems just stated may be considered together. We have already recited the purport of the testimony of Rosen. The testimony of the "Iron Duke" discloses that, after the appellant had failed to interest Rosen in the nefarious enterprise, he approached the witness on April 7, 1927, saying that he knew of three ladies who were desirous of being relieved of their jewelry in order that they might collect the insurance, who would shortly attend a party; that he, the appellant, wished the "Iron Duke" to stage the holdup, returning to him 25 per cent. of the proceeds from the sale of the loot, it being agreed that one-fifth thereof was to be paid by appellant to his codefendant, Ollie Lowe, who was arranging the party; that appellant gave him a list of the jewelry the women were supposed to have with them; that he and the appellant went by the place several times; that appellant took him to the place on the day the robbery was committed, gave him the gun from which he had chiseled off the numbers; that he and his assistant went in, and one by one took from the ladies present their jewelry; and that subsequently he and the appellant were making efforts to dispose of their ill-gotten gains when he was arrested.

It was the theory of the prosecution that the appellant, the "Iron Duke," and Ollie Lowe entered into a conspiracy for the purpose of defrauding an insurance company in so far as the jewels belonging to Mrs. Lowe was concerned, and that the representation of the appellant to the "Iron Duke" that the other ladies were willing to have their articles of personal adornment taken was a misrepresentation. In view of the statement just made, the testimony of Rosen becomes of extreme importance, not only as corroborating the testimony of the "Iron Duke," an admitted accomplice, but also as possibly furnishing the foundation necessary to admit the acts and declarations of coconspirators. This is particularly true when, in addition to what

has already been said, attention is directed to the fact that Rosen also testified that Mrs. Lowe accompanied the appellant on one of his trips to persuade the witness to undertake the job; that appellant told him that, if the witness did not enter into the conspiracy, he would get some one else, and that the lady wanted 5 per cent. as her split. Considering the testimony wholly, for the time being, from the standpoint of its sufficiency to corroborate the "Iron Duke," we must disagree with appellant's contention. When we consider it in connection with the pistol which appellant purchased, found in the possession of "Iron Duke," and identified as to number by the witness Belknap, and in conjunction with the testimony of Officer "Kynett" that on April 25, 1927, or on the thirteenth day after the crime was committed, he heard the appellant over the dictograph say to his wife that it would be the best move and the best plan to get some certain thing out of town, followed by a conversation regarding the value of certain jewelry, that on the next day he heard the appellant put through a telephone call to a man named Morris, to whom the appellant said, "Get the stuff so we can get out of town with it and get reservations on a certain train," that he also heard the appellant call and make reservations, that on the same day he heard appellant say to his wife that "the Duke had called and that the police had 'pert' near got him, and he was unable to meet him there and stated they would have to leave, to be very careful, and leave very quietly in order to get out of town, and that they were going to Glendale to catch the train there; that they would leave on the train that left Glendale at 6:10 and were going to Canada"—when these things are considered, as well as the undenied fact that the "Iron Duke" and appellant did board the train at Glendale on April 26, that a portion of the jewelry was found on the train, and that the evidence establishes beyond question the taking of the jewelry and money from the women named in the information, there can be no doubt that the testimony was sufficient to warrant the jury in returning the verdicts of guilty, and that the corroborating testimony tended quite strongly to connect the appellant with the commission of the offenses. It must be confessed that the record as we read it, in print, strongly indicates the possibility that appellant may have been the innocent victim of a designing mind of the underworld. Nevertheless, the record furnishes ample basis for the verdicts of the jury. The degree of credence to be attached to the testimony of convicts is for the jury to determine, and the responsibility is theirs.

[7] In the discussion of the sufficiency of the evidence up to this point, we have not specifically considered whether the conspiracy was sufficiently proven to warrant the admission in evidence of the statements of cocon-

spirators. Prefacing our discussion of that subject, we here note that the women who are named as the persons the appellant attempted to rob, and one woman that he did rob, were admittedly unexpected by Mrs. Lowe or the appellant. It happened that on the afternoon of the robbery they called Mrs. Cummings and asked if they might come over and see her new home. Another lady whom appellant is alleged to have robbed was induced by Mrs. Lowe to cancel a previous engagement by the statement that she, Mrs. Lowe, had already made the appointment. There is no evidence that Mrs. Cummings had any knowledge of the plan in the mind of appellant and possibly Mrs. Lowe. The allegation is that Mrs. Cummings was robbed. This covers all the counts upon which appellant was convicted. Undoubtedly under the testimony which we have already recited, if a conspiracy existed, it would have had its culmination in the sale of the loot and realization by the parties of the following percentages: 75 per cent. to the "Iron Duke," 20 per cent. to appellant and 5 per cent. to Mrs. Lowe. But it would not have been ended here, because of the further understanding of the parties, and one of the considerations of the illicit concord was that Mrs. Lowe was to recover on the insurance policies by which her jewelry was admittedly protected. See *People v. Rodley*, 131 Cal. 240, 63 P. 351.

[8] It cannot be doubted, at least so far as the instant cause is concerned, that there was sufficient testimony of the formation of a conspiracy to go to the jury. Under such circumstances, declarations of a conspirator outside the presence of the defendant are admissible; the proper practice being to instruct the jury to disregard the declarations if they do not find a conspiracy. *People v. Dixon*, 94 Cal. 255, 29 P. 504. The conspiracy may be proven as any other fact, and, if a conspirator testifies to what was said and done, the evidence is competent for that purpose (*People v. Zimmerman*, 3 Cal. App. 84, 84 P. 446), or it may be shown by circumstances sufficient to satisfy the jury of its existence (*People v. Schmidt*, 33 Cal. App. 426, 165 P. 555). We have already recited ample testimony to authorize the deduction that there was a conspiracy between the "Iron Duke" and the appellant. We have also noted the presence of Mrs. Lowe on an occasion when appellant attempted to secure the services of Rosen, and that she induced Mrs. Brown to change her engagement because she (Mrs. Lowe) had made an appointment with Mrs. Cummings. We now observe testimony to the effect that it was Mrs. Lowe who took the gin to the party; that, when the "Iron Duke" and his companion rang the doorbell, Mrs. Lowe, although in the kitchen mixing drinks, said she would go to the door; that, when the maid pressed the button to open the door, she could feel Mrs.

Lowe right close to her; that, when the two men said they were officers, and that a booze party was going on, Mrs. Lowe said, "Let them in"; that Mrs. Lowe, when given the opportunity to identify the "Iron Duke" and the appellant at police headquarters, could not do so, and told her friend Mrs. Cummings that she would not identify any one, although, according to her own admission, the appellant had roomed at her apartment "for a few days," and although she signed his application for a bail bond; that she did very shortly after the robbery file her claim for payment of the insurance. From the testimony we think the trial court was justified in admitting the declarations of either the "Iron Duke," the appellant, or Mrs. Lowe under the rule above announced.

We deem it unnecessary to detail the reasons why the failure of the court to give the instructions requested did not constitute error. We have carefully examined them, and have concluded that the court was right in its ruling.

Judgment and order as to count VI reversed, and affirmed as to counts 1, 2, 3, 4, and 5.

I concur: CRAIG, J.

Owing to the absence of WORKS, P. J., he does not participate in this opinion.

100 Cal. App. 103

BUDD v. HOUGH et al. (Civ. 6625.)

District Court of Appeal, First District, Division 1, California. July 24, 1929.

1. Appeal and error $\S$ 876—Only facts in findings can be considered on appeal from order denying motion to vacate judgment and enter different one.

Where no appeal was taken from judgment, none of facts except those facts embraced in findings can be considered on appeal from order denying motion to vacate judgment and enter different one, on ground that conclusions of law were incorrect, erroneous, and not consistent with nor supported by findings of fact.

2. Account stated $\S$ 8—Account stated does not operate as estoppel, but may be impeached for fraud or mistake.

An account stated does not operate as an estoppel, but may be impeached for fraud or mistake.

3. Account stated $\S$ 8—If evidence proves mistake, fraud or undue advantage, vitiating account stated, account is not conclusive on parties.

If fraud or mistake is pleaded in connection with an account stated, and evidence adduced in support of pleading proves that there has been any mistake, fraud, or undue advantage, by which account is in truth vitiated, and balance

incorrectly fixed, account is not conclusive on parties thereto.

4. Alteration of instruments ☞18—Broker's unauthorized alteration of agreements for commission by inserting considerations justified denial of any relief, and impeached integrity of account stated (Civ. Code, § 1700).

Where broker without authority altered written agreements for commission, by inserting in blank spaces certain considerations without consent or authority of principals, alteration was not only legally sufficient to impeach integrity of account stated, but under Civ. Code, § 1700, would have been sufficient to justify denial of any relief whatever, founded on altered agreements.

5. Appeal and error ☞935(1)—On appeal from order denying motion to vacate judgment, any uncertainty in finding must be resolved against appellant.

On appeal from order denying motion to vacate judgment and enter different one, any uncertainty in finding must be resolved against appellant, and be most strongly construed in favor of respondent.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by C. A. Budd against Wm. H. Hough and another. Judgment adverse to plaintiff, and from an order denying his motion to vacate the judgment, and enter a different judgment, plaintiff appeals. Affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

J. E. Rodgers, A. F. Bray, and John McKean, all of Martinez, for respondents.

PER CURIAM. [1] This is an appeal by plaintiff from an order denying his motion to vacate the judgment and enter a different one, upon the ground that the conclusions of law were incorrect, erroneous, and not consistent with nor supported by the findings of fact. No appeal was taken from the judgment, and consequently in that state of the record none of the facts of the case can be considered on this appeal, except those embraced in the findings. *Westervelt v. McCullough*, 68 Cal. App. 198, 228 P. 734.

The action was one by plaintiff, as assignee of C. A. Ricks, to recover \$1,875 claimed to be due as real estate commissions. The complaint contained three causes of action. The first was based on a quantum meruit, the second on an express contract to pay the sum above mentioned, and the third on an account stated. The trial court found that defendants were indebted to Ricks in the sum of \$875, less the sum of \$500, which it found was due from Ricks to defendants, and judgment was entered in plaintiff's favor for the net sum of \$375. With reference to the first and second causes of action, the court found that defendants became indebted to

Ricks for work, labor, and services performed, which was of the reasonable value of \$875, and that defendants agreed to pay him that amount; and with reference to the third cause of action it found that there was no account stated, "whereby it was ascertained and agreed that defendants were indebted to said C. A. Ricks in the sum of \$1,875; but it is true that on each March 31, 1927, and on May 1, 1927, C. A. Ricks sent to defendants, regularly, through the United States mails, a statement setting forth that there was due him for services rendered from the defendants the sum of \$1,875; it is true that the defendants received each of said statements, and that they at no time communicated with said C. A. Ricks to the effect that said statements were inaccurate or not correct."

Plaintiff contends that the specific facts found in the latter part of the foregoing findings nullified the preceding negative finding that there was no account stated, and were sufficient in themselves to establish an account stated, and that consequently he was entitled to judgment for the full amount stated in said account. However, it appears from other facts found by the court that Ricks' claim for commissions was based upon two written agreements, in printed form, entered into by defendants with a firm named Alder & Clark for the exchange of defendants' property, and that in each agreement the space for the insertion of the sums to be paid as commissions was left blank; and with respect thereto it was alleged in the answer and found by the court that, after said agreements had been signed, Ricks, "without any authority and against the wish and consent of defendants, inserted the figures '\$1,000' in said blank" in one agreement, and the figures "\$875" in the blank space in the other agreement.

[2, 3] As uniformly held, an account stated does not operate as an estoppel, but may be impeached for fraud or mistake; and if either of those elements are pleaded, and the evidence adduced in support of the pleading proves that there has been any mistake, fraud, or undue advantage, by which the account is in truth vitiated, and the balance incorrectly fixed, the account is not conclusive upon the parties. *Union Lumber Co. v. J. W. Schouten & Co.*, 25 Cal. App. 80, 142 P. 910; *Vaughan v. County of Tulare*, 56 Cal. App. 261, 205 P. 21; *Gardner v. Watson*, 170 Cal. 570, 150 P. 994; 1 Am. & Eng. Encyc. of Law (2d Ed.) 463. Moreover, section 1700 of the Civil Code provides that the material alteration of a written contract by a party entitled to any benefit under it extinguishes all executory obligations of the contract in his favor against the parties who do not consent to the act.

[4, 5] Even assuming, therefore, as plaintiff contends, that the specific facts found as to defendants' failure to object to the account received by them through the mail would be sufficient, in the absence of any qualifying facts, to establish an account stated, it is evident that, when the findings as a whole are considered in the light of the authorities above cited, the additional facts found as to the unauthorized alteration of the written agreements were not only legally sufficient to impeach the integrity of the account stated, but under the provisions of section 1700 of the Civil Code would have been sufficient, also, to justify the denial of any relief whatever founded on said altered agreements. And it must be assumed that the foregoing was the view taken by the trial court, for, upon an appeal from an order denying a motion of this kind, any uncertainty in the findings must be resolved against the appellant, and they are to be most strongly construed in favor of respondent. *Spotton v. Dyer*, 42 Cal. App. 585, 184 P. 23.

The order is therefore affirmed.

100 Cal. App. 315

JONE3-McLAUGHLIN, Inc., v. KELLY et al.
(Civ. 6230.)

District Court of Appeal, Second District, Division 1, California. Aug. 8, 1929.

1. Contracts ⌘24—Proposal to accept or acceptance of offer on terms varying from those proposed is rejection of offer (Civ. Code, § 1585).

Under Civ. Code, § 1585, providing that acceptance of offer must be absolute and unqualified, and that qualified acceptance is a new proposal, acceptance or proposal to accept an offer on terms varying from those proposed is a rejection of offer, and puts an end to it, and party submitting counter proposition cannot abandon substitute and accept original offer without other party's consent.

2. Sales ⌘22(4)—Conditions in original offer to sell machinery which was rejected by submission of counter proposition accepted by seller formed no part of contract.

Where written offer to sell and install electric motor and compressor at oil well was not accepted according to its terms, but buyer submitted counter proposition on different terms and conditions, which seller accepted, conditions incorporated in original offer formed no part of contract.

3. Contracts ⌘282—Promisor cannot arbitrarily, unreasonably, and capriciously claim dissatisfaction under contract requiring one party to do something satisfactory to other.

Provision of contract requiring one party to do something which is satisfactory to other does not justify promisor in arbitrarily, un-

reasonably, and capriciously claiming that he is not satisfied, in order to evade liability.

4. Contracts ⌘282—In doubtful cases, courts will construe stipulation to furnish something satisfactory to buyer as requiring such thing as ought reasonably to satisfy.

In doubtful cases, and especially where thing furnished and stipulated to be to satisfaction of buyer is so attached to real property that its value would be lost to seller either wholly or in great part, unless paid for, courts are inclined to construe stipulation as one to furnish such a thing as ought reasonably to satisfy buyer.

5. Sales ⌘54—Meaning of ambiguous term used but not defined in contract may be ascertained from surrounding circumstances.

Where contract to sell and install electric motor and compressor at oil well was ambiguous as to meaning of terms used, but not defined in contract, court can go outside of contract and consider circumstances surrounding transaction at time it was made, in order to ascertain meaning of special terms.

6. Sales ⌘72(1)—Contract for purchase of oil well machinery, when construed with surrounding circumstances, held to show agreement that satisfactory result on which payment of price depended was increase in production of 50 barrels per day.

Contract to sell and install electric motor and compressor at oil well providing for payment of first installment of purchase price, if production of well has been sufficiently increased, and the balance to be paid 60 days after installation, if machinery in buyer's opinion proved entirely satisfactory, and obligating seller to remove machinery if it did not produce satisfactory results, when construed in connection with surrounding circumstances, held to show intention that buyer would accept equipment as satisfactory, if compressor produced satisfactory results, and that by satisfactory result parties meant an adequate increase in production of well, and that an increase in production to extent of an average of 50 barrels per day during period allowed for testing machinery would be accepted as a sufficient increase.

7. Evidence ⌘458—Admitting testimony, in action on contract for price of oil well machinery, showing oral agreement that buyers would be satisfied with specified increase in production, and relating to installment of compressor, held not error.

In action on contract to recover price of electric motor and compressor installed at oil well, allowing testimony regarding oral agreement that buyer would be satisfied with compressor, if production of well would be increased from 350 to 400 barrels per day, and testimony as to amount of production and sum expended by seller in installing compressor, held not error, where meaning of terms used was ambiguous, and parol evidence was necessary to show meaning.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Jones-McLaughlin, Inc., against Thomas Kelly and others, copartners doing business under the fictitious name and style of Donley-Barteaux Syndicate, sued respectively as John First and others, copartners doing business under the fictitious name and style of Donley-Barteaux Syndicate. Judgment for plaintiff, and defendants appeal. Affirmed.

Claud B. Andrews and John C. Gillham, both of Los Angeles, for appellants.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

HOLLZER, Justice pro tem. Defendants appeal from a judgment awarded to plaintiff for the contract price of certain machinery, sold and installed by the latter at a certain oil well.

It is conceded that the parties entered into a contract whereby the respondent was to sell and install a certain electric motor and compressor on the appellants' well; that the parties intended that there should be a 30-day test on this compressor following the installation; that on May 31, 1926, respondent completed the installation of said machinery, the same being attached to a concrete foundation imbedded in the ground adjoining said well; that the period for making said test was extended until July 26, 1926; that on the last-mentioned date appellants notified the respondent to remove the machinery; and that the same was used by appellants continuously from May 31 to August 6, 1926, on which date they disconnected the compressor from the well. The amount of the judgment, likewise, is not in dispute.

Appellants contend that the agreement made between the parties granted to them the option to reject the machinery if the same should not prove satisfactory to them, and that, having rejected the same in good faith, they cannot be held liable for the purchase price.

Although five separate grounds are assigned upon which it is claimed the judgment should be reversed, all of the points presented arise out of one and the same issue, namely: Did the contract in question entitle appellants to reject the machinery merely if they were dissatisfied with it, or were they obligated to pay for the same if the machinery proved to be such as would be satisfactory to a reasonable person?

It becomes necessary, therefore, to determine what was the contract which these parties made.

Under date of May 1, 1926, respondent submitted to appellants a written offer to install said machinery, said offer containing, among other provisions, the following: "Thirty days' time will be allowed in which you can satisfy yourself whether or not you wish to keep the machinery. At the end of the thirty days you

will have the option of buying the machinery at the above price, or rejecting it, under which option we are to remove it without any expense to you. * * * We are making the foregoing offer to install machinery upon trial and at our own expense *with the understanding that we are to be granted at least ten days if we desire to make such tests as may be necessary to demonstrate the workability of the system at the well.* Furthermore, *in the event that the well proves to be incapable of yielding oil in satisfactory amounts under this process, we want the right to make a test on your Casa Blanca Well No. 1 before removing the machinery, for the purpose of determining whether that well is capable of satisfactorily producing under the process.* * * * *In the event that we make a substantial and satisfactory showing at the Donley-Barteaux Well we shall expect to make an arrangement with you under similar terms to the above for the purpose of installing machinery and producing oil from the Casa Blanca Well No. 1 and such other wells which you have in the immediate vicinity."*

Under date of May 3, 1926, the appellants sent to respondent a communication which, omitting nonessential portions, read as follows:

"In reply to your letter of May 1st regarding the installation of your electric motor and compressor on the Donley-Barteaux well * * * please enter our order to install the above equipment on the following conditions:

"Thirty (30) days after the installation, we agree to pay your company Three Thousand Two Hundred Twenty-two Dollars (\$3,222.00) for your electric motor, compressor and appliances, *providing the production of the well has been sufficiently increased.*

"*If we decide to keep the compressor, and it is, in our opinion, entirely satisfactory, we further agree, at the end of sixty (60) days, to pay you an additional Twenty-five Hundred Dollars (\$2500.00) for your patents on this machinery covered by patent No. 1,102,-152.*

"*Should this compressor not produce satisfactory results, you are to remove the same and we are to be put to no expense whatsoever."*

At the bottom of the last-mentioned communication the respondent wrote the following:

"Accepted: Jones-McLaughlin, Inc., by R. P. McLaughlin, May 3, 1926."

Thereafter, under date of June 24, 1926, appellant wrote to respondent requesting an extension of the period within which they might test the machinery. In the opening sentence of that communication they wrote: "According to the terms of our *agreement* with you, bearing date of *May 3, 1926*, etc. (Italics, in the foregoing quotations are ours.)

It is the contention of appellants that the letter of May 1, 1926, constituted a part of

the contract entered into by the parties; that, by virtue of the provisions of that letter, they merely took an option to purchase the machinery, with permission to test the same; and that, having rejected it, they could not be held liable for the purchase price thereof.

Admittedly the letter of May 1, 1926, constituted respondent's original offer to sell and install the machinery in question. However, unless such offer was accepted, the conditions specified in that letter did not become part of any contract.

[1, 2] In *Niles v. Hancock*, 140 Cal. 157, 73 P. 840, 841, the court declared: "It is well settled that a proposal to accept, or acceptance of, an offer, on terms varying from those proposed, is a rejection of the offer, and puts an end to it. See *Wristen v. Bowles*, 82 Cal. 87, 22 P. 1136; *Meux v. Hogue*, 91 Cal. 448, 27 P. 744; 3 Am. & Eng. Ency. of Law, 853, and cases there cited. A qualified acceptance is a new proposal. Civ. Code, § 1585. A party who submits a counter proposition instead of accepting an offer cannot abandon the substitute and accept the original offer without the other party's consent"—citing cases.

In their proposal of May 1st, the respondent specified the conditions under which its offer was made, and among these were the following:

First. Respondent was to be granted at least ten days, if desired, to make such tests as might be necessary to demonstrate the workability of its system at the well.

Second. If that well proved incapable of yielding oil in satisfactory amounts under respondent's process, the latter was to have the right to make a test on appellants' Casa Blanca Well No. 1, before removing its machinery, in order to determine whether the latter well was capable of satisfactorily producing under the equipment in question.

Third. If a substantial and satisfactory showing should be made at the first well, respondent was to be given a contract under similar terms to install its machinery on said Casa Blanca well, and also all other wells belonging to appellants in the immediate vicinity.

On the other hand, while appellants' reply of May 3d declared their willingness to order the installation of the equipment in question in conformity to most of the conditions enumerated in respondent's offer, it is clear that all three of the above-mentioned conditions were omitted from their so-called acceptance.

Appellants' reply, therefore, was not an unqualified acceptance of respondent's proposal, and hence itself became a new offer.

Furthermore, the parties themselves construed the letter of May 3d, coupled with respondent's acceptance thereof, as being the contract which fixed their respective rights and obligations. This is established, not only by the circumstance that the respondent

wrote its acceptance at the bottom of that letter, but by the further fact that in their request for an extension of time within which to test the equipment appellants designated the contract as being "our agreement with you, bearing date of May 3, 1926." In addition, the answer of the defendants similarly described the contract, and in pleading the substance thereof omitted all reference to the above-mentioned three conditions incorporated in the offer of May 1st. It follows, therefore, that the provisions contained in the offer of May 1st formed no part of the contract made by the parties herein.

[3, 4] It is next urged that, even under the terms of the agreement of May 3, 1926, appellants had the absolute right to accept or reject the machinery. The principle upon which this argument is advanced, appellants assert, was defined by the Supreme Court in the case of *Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700, 182 P. 428, 6 A. L. R. 1493. The court there said (pages 702, 703 of 180 Cal. [182 P. 429]): "The law governing the rights of the parties under a contract which requires one party to do something which is satisfactory to the other party is thus stated in 13 Corpus Juris, at page 675: 'Contracts in which one party agrees to perform to the satisfaction of the other are ordinarily divided into two classes: (1) Where fancy, taste, sensibility, or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility. In contracts involving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not.' Section 768."

The *Tiffany Case*, however, was one involving a contract for personal services, the agreement there providing that the employee would not hold his employer liable, if for any reason the latter should be unable to turn out enameled and glazed brick satisfactory to it.

On the other hand, as pointed out by the court in that decision, Elliot states the rule to be with respect to the second class of contracts that such an agreement "does not justify the promisor in arbitrarily, unreasonably and capriciously claiming that he is not satisfied, in order to evade liability, and the courts in doubtful cases, especially when the thing furnished is so attached to the real property of the buyer that its value would be lost to the seller, either wholly or in great part, unless paid for, are inclined to construe such a stipulation as one to furnish such a thing as ought reasonably to satisfy the buyer."

A case analogous to the present suit was that of *Thomas Haverty Co. v. Jones*, 185

Cal. 285, 197 P. 105. In that action, the contractor recovered judgment upon an agreement to install the plumbing, steamheating, and ventilation plant in a four-story building, to the satisfaction of the owner, although the latter claimed that the plant was not satisfactory. In affirming the judgment, the Supreme Court, at page 296 of 18 Cal. (197 P. 110) declared: "The finding of the court that the contract was performed in such a manner as should be satisfactory to a reasonable person is sufficient to entitle the plaintiff to recover in the action, so far as that point is concerned. As was stated by the District Court of Appeal: 'A stipulation in the contract to perform to the satisfaction of one of the parties only calls for such performance as should be satisfactory to a reasonable person.' [Citing cases.] This rule does not apply where the performance involves matters dependent on fancy, taste, sensibility or judgment of the other party, but it does apply where the question is merely one of operative fitness or mechanical utility, and especially to contracts for the erection of buildings. *Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 702, 182 P. 428, 6 A. L. R. 1493."

The recent decision of *Petrotta v. Gerson* (Cal. App.) 277 P. 167, 168, is very much in point. That case arose out of an agreement to install a pump on a water well. The contract was prepared upon a printed form, which described the pump and specified its capacity. In addition, the agreement contained a stipulation, written in longhand, and reading: "The company agrees, in event pumping plant does not pump to capacity or is otherwise not acceptable to customer, they will refund initial payment of \$630.80 and take back equipment."

In affirming a judgment awarded to the vendor, the court there said (277 P. 168): "The contract is to be construed as a whole, so as to give effect to every clause and portion, if reasonably possible. * * * Nor does the clause in the written portion of the guarantee, to the effect that the contract may be avoided if the 'pumping plant does not pump to capacity, or is otherwise not acceptable to customer,' authorize the vendee to reject the pump or repudiate the contract upon mere whim or caprice. This clause should be construed in connection with the entire contract, with a view of ascertaining the extent and nature of the guarantee intended by the parties. The subject under consideration, which led to the use of the clause pursuant to which the appellant claims the right to reject the pump for no other reason than that it was 'not acceptable' to him, was the guarantee of the mechanical operation of a machine to pump water from a well. This would not justify the rejecting of the plant merely because the buyer disliked its appearance, or because it was not painted to suit him, or for any other trivial reason. Under

certain circumstances, such language may authorize an arbitrary option to reject a purchased article. But in the absence of language clearly indicating such arbitrary authority, and where the mechanical operation of a machine is involved, there must be reasonable cause for rejecting it. [Citing 6 Ruling Case Law, 954.] * * * The case of *Tiffany v. Pacific S. P. Co.*, 180 Cal. 700, 182 P. 428, 6 A. L. R. 1493, which is relied upon by the appellant, clearly belongs to the class of cases which confers arbitrary power to act."

[5, 6] In the present action, no agreement for personal services is involved. Here appellant promised to pay the first installment of the purchase price 30 days after installation of the machinery, "providing the production of the well has been sufficiently increased." The balance of the purchase price was to be paid 60 days after installation, "if we decide to keep the compressor and it is, in our opinion, entirely satisfactory." Finally, the respondent was obligated to remove it, "should this compressor not produce satisfactory results."

What did the parties mean by the expression, "providing the production of the well has been sufficiently increased?"

What was intended by the remaining stipulations above quoted?

It is clear that the contract itself supplies no definition of these terms. The agreement is therefore incomplete, if not ambiguous in this respect. Hence we must go outside of the contract, and look to the circumstances surrounding the transaction at the time it was made, in order to ascertain the meaning of these terms.

In *Morse v. Tochtermann*, 21 Cal. App. 726, 132 P. 1055, 1057, the court declared: "It is very manifest that the words 'ready for occupancy, which are used in the lease as descriptive of the condition in which it was intended and understood that the premises should be placed before the lessees were required to accept or take possession thereof, are general, vague, and indefinite as to their exact meaning and scope, and that, to secure a full explanation of the precise meaning they were intended to bear, it was requisite to examine testimony extrinsic to the instrument itself. * * * The rule is well settled that, where 'the writing does not show upon its face that it was intended to express the whole agreement between the parties, parol evidence is admissible to show other conditions, or explain latent ambiguities.' *Williams v. Ashhurst, etc., Oil Co.*, 144 Cal. 619, 624, 78 P. 28, and other cases."

In the action at bar, the evidence showed, and the trial court found, that at the time of the making of said contract the parties orally agreed that defendants' satisfaction was to depend and be based solely upon the production of oil and gasoline at the well during the test period, and that defendants

would be satisfied if the oil and gasoline produced at said well during said test period would be increased by an average of 50 barrels per day.

Likewise, it is not disuted that, as a direct result of the operation and use of the machinery installed by respondent, the oil and gasoline produced at said well was increased by an average of 50 barrels per day throughout said test period.

Finally the lower court found upon adequate evidence that the increase thus produced was such as would have been satisfactory to a reasonable person, and that in rejecting said machinery the defendants were arbitrary, capricious, and unreasonable.

It is clear that the contract in the present suit was one involving the operative fitness or mechanical utility of certain equipment attached to a concrete foundation imbedded in the ground adjoining an oil well belonging to the purchaser. Likewise it cannot be seriously questioned that the equipment here furnished was so attached to the real property that, unless paid for, its value would be lost in great part to the seller.

Construing the agreement as a whole, so as to harmonize its various provisions and thus give effect to every portion thereof, and considering further the nature of the contract, we are of the opinion that the appellants agreed that the equipment would be accepted as satisfactory, if the compressor produced satisfactory results, and that by satisfactory results they meant an adequate increase in the production of the well. Thus construed, we hold, in view of the evidence introduced in the court below, that under the contract here made the appellants agreed to pay for the equipment, providing the production of the well should be sufficiently increased, and that an increase in the production to the extent of an average of 50 barrels per day, during the period allowed for testing the machinery, would be accepted as a sufficient increase.

Since the lower court found, and the evidence abundantly proved, that the machinery installed by respondent met all of the foregoing requirements, it follows that the appellants are liable for the purchase price.

[7] The three remaining points presented by appellants relate to rulings of the lower court admitting, over their objections, testimony to the effect that they orally agreed they would be satisfied with the compressor, if the production of the well would be increased from 350 to 400 barrels per day, also testimony as to the amount of the production of the well, and also testimony respecting the sum expended by respondent to install the compressor. In view of the conclusion heretofore announced respecting the construction of the contract made between the parties, we

hold that no error was committed in admitting said evidence.

For the foregoing reasons, the judgment is affirmed.

I concur: CONREY, P. J.
HOUSER, J., absent.

100 Cal. App. 270

MOGAN v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6200.)★

District Court of Appeal, First District, Division 2, California. Aug. 6, 1929.

Rehearing Denied Sept. 5, 1929. Hearing Denied by Supreme Court Oct. 3, 1929.

Municipal corporations *§*187—Finding on sufficient evidence of police commissioners that widow of policeman was not entitled to pension was conclusive, absent abuse of discretion (St. 1917, p. 1708; Code Civ. Proc. *§* 1085).

Under St. 1917, p. 1708, and Code Civ. Proc. *§* 1085, finding on conflicting, but sufficient, evidence of board of police commissioners, on petition of widow of policeman for pension from police pension fund, that policeman did not meet death while engaged in performance of his duties, was conclusive, in absence of showing of abuse of discretion on part of commission.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Mandamus by Mary E. Mogan against the Board of Police Commissioners of the City and County of San Francisco and others. From a judgment for plaintiff, defendant appeals. Reversed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellants.

Leon Samuels, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued in mandamus to require the defendants to award her a pension from the police relief and pension fund, maintained under the provisions of the municipal charter of the city and county of San Francisco. Plaintiff had judgment in the superior court, and the defendants have appealed on typewritten transcripts.

Plaintiff is the widow of Austin J. Mogan, deceased, a former member of the San Francisco police department. On September 23, 1924, Officer Mogan was ordered by his superior officer to report to the Central Emergency Hospital in San Francisco to interview a patient who was reported to have made an attempt to commit suicide. It is claimed on the part of plaintiff that this patient suddenly became violent, and that, in

attempting to restrain him, Officer Mogan was injured, and that such injury caused his death, which occurred soon thereafter. On the part of the defendants it is claimed that no struggle took place at the hospital, and that no injury to the officer resulted, but that he died of natural causes. A full hearing was had before the commission under the terms of the charter, and evidence was received tending to prove that the officer was injured in the struggle, as claimed by the plaintiff, and evidence was also received which was directly contradictory. Beside the direct testimony of the physician and of the nurse in charge that no struggle took place, it was shown that no mention of a struggle was made by Officer Mogan in his report to his superior officer immediately following his return from the hospital; that no mention of a struggle appeared in the report of the nurse in attendance upon the patient; that the physician attending the officer certified that the cause of his death was lobar pneumonia, and that the contributory cause was cerebral infarct; that two physicians appearing before the commission on behalf of this plaintiff testified that Officer Mogan died from a clot on the brain as a result of the attack of pneumonia; and that one of these physicians testified that the officer also appeared to be suffering from angina pectoris.

Upon this evidence the commission reached the determination that the officer's death did not result from injuries received while in the performance of his duties as a police officer, and denied the application for a pension. The petitioner then went to the superior court, asking that court to set aside the finding and determination of the commission on this question of fact, and to determine in its own judgment that the officer's death was the result of injuries received in the performance of his duties. On this appeal the sole question is whether the provisions of the San Francisco charter authorize the commission to hear and finally determine these disputed questions of fact, or whether the court may substitute its judgment for that of the commission without a showing of an abuse of discretion on the part of the commission.

The right of the widow of a member of the police department to a pension, when the officer has died from the result of injuries received in the performance of his duty, arises out of section 4 of chapter 10 of article 8 of the charter. Subdivision 4 of this section, as amended (Stats. 1917, p. 1708), reads as follows: "Any member or members of the family of the deceased claiming to be entitled to a pension under the provisions of this section, shall file a verified petition therefor with said commission, which petition shall thereafter be heard by said board, upon such reasonable notice to the petitioner or petitioners of the time and place of such hearing, as said board may by rule or order prescribe. Said

petitioner or petitioners shall be entitled, upon such hearing, to appear personally and by counsel. Upon such hearing any interested person shall have the right to introduce testimony relative to the matters set forth in said petition. The judgment of said commissioners respecting said application shall be final, unless in determining said application said commissioners commit a clear abuse of discretion."

This amendment was adopted immediately following the decision of the Supreme Court in *French v. Cook*, 173 Cal. 126, 160 P. 411, 412. That decision, which was filed July 25, 1916, was an action in mandamus on the part of a widow to require the same board to grant her a pension under the same section of the San Francisco charter before subdivision 4 was added. In affirming the judgment ordering a writ to issue the Supreme Court emphasized the fact that there was then no provision in the charter as to any hearing or finding by the board, saying: "We are unable to see in the charter provisions bearing on the matter anything which can fairly be held to make the board in relation to such an application as this a tribunal possessing judicial powers whose decision on questions of fact is at all binding;" that "there is absolutely nothing in the charter purporting to confide to the board the power to finally determine any question of fact in connection with such a pension;" and "as we read the charter, it gives no judicial function whatever to the board in such a matter as this, confers upon it no authority to hear and determine a controversy in a judicial sense. It is not a board or tribunal by law vested with authority to decide a question, and herein lies the distinction between this case and the cases cited." (Emphasis was by the court.)

The cases cited were *People v. Los Angeles*, 133 Cal. 338, 65 P. 749; *People v. Ontario*, 148 Cal. 625, 84 P. 205, and others, to the general principle stated in *Freeman on Judgments*, § 531: "As a general rule, whenever any person or persons have authority to hear and determine any question, their determination is, in effect, a judgment having all the incidents and properties attached to a similar judgment pronounced in any regularly created court of limited jurisdiction acting within the bounds of its authority. Hence, whenever any board, tribunal or person is by law vested with authority to decide a question, such decision, when made, is *res judicata*, and as conclusive of issues involved in the decision as though the adjudication had been made by a court of general jurisdiction."

Respondent insists that the judgment must be affirmed on the authority of *Sheehan v. Board of Police Comm'rs*, 197 Cal. 70, 239 P. 844, and the history of this litigation demands consideration. *Sheehan*, a police officer, had been retired on a pension under the pro-

visions of the San Francisco charter upon the ground that he had suffered an injury in the performance of police duties resulting in an impairment of his hearing. Soon thereafter he was found to be practicing law in the courts of the city and county, and the commission, believing that his defective hearing was feigned, cited him to appear before it to show cause why he should not be restored to some active duty in the department, under the section of the charter which provides that when the disability ceases the pension shall cease. He refused to appear, claiming that the commission was without jurisdiction to hear the matter. The police commission then, acting under the section which provides that those retired on a pension are nevertheless subject to call for police duty, and hence subject to discipline, cited him to appear upon a charge of insubordination. He again refused to appear, attacking the jurisdiction of the commission to try him on that charge. The police commission then dismissed him from the department, and the pension fund commission refused to pay the pension which had been allotted him. He commenced proceedings in mandamus to require the payment of this pension, and the District Court of Appeal of the First Division held that the fund commission was without jurisdiction to determine when the disability ceases and affirmed the order requiring the payment of the pension. *Sheehan v. Board of Police Comm'rs*, 47 Cal. App. 29, 190 P. 51.

A petition for a transfer in that case was denied by a vote of four to three of the justices of the Supreme Court. The remittitur went down and, on July 6, 1920, the commissioners were served with the peremptory writ of mandate. Relying on the statement in the opinion that their former action had been arbitrary, the commissioners again cited the officer for examination as to whether his disability had ceased. He again denied the jurisdiction of the commission to take any proceedings in the matter, and obtained from the superior court writs of mandate and prohibition from which appeals were taken to the same division of the District Court of Appeal. On February 24, 1925, that court, upon the authority of its earlier decision, held that, as the commission had no power to hear and judicially determine the fact of physical disability, it could not even cite the officer to appear for a preliminary investigation of the matter, and hence could not charge him with insubordination upon his refusal to appear. 46 Cal. App. Dec. 563. A transfer was granted to the Supreme Court, and that court, in its judgment of September 19, 1925, adopted the opinion of the District Court of Appeal. 197 Cal. 70, 239 P. 844.

In the meantime, however, the electors of San Francisco adopted an amendment by adding section 14 to chapter 10 of article 8 of the charter, which reads as follows: "The

judgment of said board of police commissioners in passing upon or determining the question when the disability upon which a pension has been granted has ceased shall be final, unless in passing upon or determining said question said board commit a clear abuse of discretion." Stats. 1923, p. 1267. This amendment was adopted November 7, 1922, and was approved by the Legislature on January 19, 1923, but was not considered or referred to in the cases mentioned because it was not in effect at the time the rights of the parties arose, the acts of the board there under review having been taken on November 15, 1920. There is, therefore, no opinion of any court of this state interpreting either charter amendment, and, as both were manifestly passed for the express purpose of avoiding the rule of the cases cited, these cases cannot be taken as authoritative interpretations of the charter as amended. We must look, therefore, to analogous cases involving the general question whether an administrative board clothed with the power to hear and finally determine a question of fact can be controlled in that determination by the courts, in the absence of a showing of fraud, abuse of discretion, or similar grounds.

We had occasion to consider this question in *Fraser v. Cummings*, 48 Cal. App. 504, 192 P. 100, 101, a case involving the duty of the city clerk in the examination and certification of petitions filed with him. The Oakland charter, under which the case arose, provided that when petitions for a recall election were filed with the clerk he must "finally determine" whether or not they conform to certain requirements. In holding that his determination was conclusive upon the courts we said:

"In a similar case our supreme court has said that the power conferred upon the registrar of voters by the San Francisco charter to finally determine whether the petition is signed by the requisite number of voters means that he 'must complete his investigations as to the conformity of the petition to legal requirements, and as to the number of lawful signatures, and thereupon * * * finally determine both propositions, and that his decision is final.' *Baines v. Zemansky*, 176 Cal. 369, 378, 168 P. 565, 569. And again in the same case (176 Cal. 379, 168 P. 570) the court say: 'But that the registrar's decision upon such evidence as he may take is to be final upon both propositions, that is, whether the petition conforms to all legal requirements, and whether it contains sufficient genuine signatures, is evident.' To the same effect is *Watts v. Superior Court*, 36 Cal. App. 692, 697, 173 P. 183. * * * *Where the city clerk refuses to act as required by the charter, or where there is a showing of such an abuse of discretion as would indicate that no discretion was exercised*, the courts may by mandamus compel the clerk to perform his duty

under the charter. But here the showing is that the clerk did perform his duty and if, in the exercise of that duty, he reached a different conclusion from what this court might reach on the question of the necessity of showing the cross-streets, this court has no jurisdiction to substitute its judgment for his." (Emphasis added.)

This principle is recognized in *Dufton v. Daniels*, 190 Cal. 577, 581, 213 P. 949, where many cases are cited and the converse of the rule is stated, that where the facts are all admitted, and are susceptible to but one construction, the determination of the board contrary to the admitted facts is merely an erroneous conclusion upon a question of law which may be controlled by mandamus.

Applying these principles to the case here, we find a duty imposed upon the pension board to grant a pension to the surviving widow, if, after a fair and impartial hearing before the board, it finds that the deceased husband met his death while in the performance of duty, and the same duty is imposed upon the board to *deny* the pension if it finds that such facts do not exist. When, therefore, the board has conducted such a hearing, and there is no charge of fraud, breach of faith, or of discretion, the finding of the board, for or against the petitioner, is final and conclusive. Thus, before the courts can entertain a proceeding to compel the board to act in a particular way, it must appear that the board has committed a breach of the duty thus imposed upon it—that it has failed to perform "an act which the law specially enjoins, as a duty resulting from an office." Code Civ. Proc. § 1085. Here the duty specially enjoined upon the board is the duty to hear and determine the facts, and to render its honest judgment based upon those facts. This duty has been performed in all respects in accordance with the demands of the statute.

There is no claim that the hearing before the board was not fully conducted with due regard for the rights of the petitioner, that the essential facts are admitted or that the evidence is susceptible to but one conclusion, that the board acted fraudulently, capriciously, or arbitrarily, or that there was any abuse of discretion in any course of the proceedings. The whole case of petitioner rests on the plea that the testimony of her witnesses should have been believed, and that the testimony of adverse witnesses should have been disbelieved, upon the vital issue of fact. The people of San Francisco have by their charter conferred upon the board the exclusive jurisdiction to determine these questions of fact—possibly because they believed that that board is best able to judge the credibility of the witnesses in matters of this kind—and the courts are without power to set aside the judgment of the board except in the cases noted. To restate the

principle of law involved, when the conceded facts show that the board has performed the duty which the law "specially enjoins," and the evidence is conflicting, but sufficient to support the judgment, mandamus will not lie to compel a different form of judgment, but such relief can be had only upon a showing that there has been a "clear abuse of discretion."

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

100 Cal. App. 409

KETELHUT v. GUNTHER et al. (Civ. 6950.) *

District Court of Appeal, First District, Division 2, California. Aug. 21, 1929.

Rehearing Denied Sept. 18, 1929. Hearing Denied by Supreme Court Oct. 17, 1929.

1. Appeal and error ⇨1001(1)—Verdict supported by evidence could not be disturbed.

Where verdict is supported by evidence, it cannot be disturbed by court of review, although evidence would have justified contrary verdict.

2. Sales ⇨38(1)—Buyers could not show that representations made by seller subsequent to execution of contract induced them to enter therein.

Where seller and buyers entered into a written contract on June 15, 1925, for sale of bakery, in action to recover balance of purchase price, buyers could not show that subsequent representations of seller induced them to enter into contract.

3. Pleading ⇨150—Where parties had treated answer to cross-complaint as sufficient, court properly refused instructions that allegations in cross-complaint should be treated as true.

Where plaintiff stated signature on answer to cross-complaint was not his, court properly refused instructions that allegations of cross-complaint should be considered as true, where parties had treated answer as sufficient.

4. Pleading ⇨345(1)—Where plaintiff denied signature to answer to cross-complaint, denying motion to enter judgment on cross-complaint for defendants was not error.

Court did not err in denying motion to set aside verdict and enter judgment on cross-complaint for defendants, where plaintiff had stated signature on answer thereto was not his, where both parties had treated answer as sufficient, since motion came too late.

5. Sales ⇨347(1)—Seller was entitled to affirmative judgment for money due on contract against buyer for, although seller had re-entered premises, contract had not been terminated.

In action for moneys due on contract for sale of a bakery, where buyers vacated property purchased and seller re-entered premises, contract not having been terminated, seller was entitled to affirmative judgment against buyers.

6. Sales Ⓒ38(7)—Buyers were entitled to rely on representations of seller that bakery business was over \$6,000 monthly.

Where means of knowledge were not equally available to both parties, and seller kept no books, representing that bakery business was over \$6,000 a month, buyers were entitled to rely upon word of seller, and were not required to make independent investigation.

7. Trial Ⓒ252(13)—Instruction that failure to ascertain truth was result of one's own negligence was erroneous as inapplicable to defense of fraud of seller keeping no books and allegedly misrepresenting amount of business of bakery sold.

In action for moneys due on contract for sale of bakery, where defense was fraud of seller in representing amount of monthly business, and seller kept no books, instruction that, where means of knowledge were equally available to both parties, failure of one to ascertain truth was result of his own negligence was erroneous as inapplicable to facts.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Frank Ketelhut against Louis Gunther and others. From a judgment for the plaintiff, defendants Louis Gunther and Brown Jackson appeal. Reversed.

George Allan Smith, of Monterey, for appellants.

John G. Robertson, of Oakland, for respondent.

STURTEVANT, J. Plaintiff commenced an action against the defendants to recover moneys alleged to be due. The defendants appeared and filed an answer, a counterclaim, and a cross-complaint. The plaintiff answered the cross-complaint, and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and, from a judgment entered thereon, the defendants have appealed under section 953a of the Code of Civil Procedure.

[1] In points 1, 2, 3, 6, and 7 the defendants cite portions of the record which they claim would have justified a verdict in their favor. Conceding this claim in its entirety, it must also be conceded that there was evidence which supported the verdict. Under these circumstances a court of review may not disturb the verdict.

[2] On the 15th day of June, 1925, the plaintiff as vendor and the defendants as vendees entered into a formal written contract by the terms of which the plaintiff agreed to sell and the defendants agreed to buy a bakery in the city of Richmond, Contra Costa county. By the terms of that instrument the sales price was fixed at \$12,500. That amount was payable \$1,000 on the execution of the agreement, \$4,000 not later than November 2, 1925, and promissory notes in the sum of \$7,500, to

be executed and delivered November 2, 1925. On the delivery of the second payment in cash and the aforesaid notes, the vendor was to surrender possession. The cash payments and notes were delivered as agreed, and the vendees went into possession on November 2, 1925. Between June 15, 1925, and November 2, 1925, the parties held certain conversations. On the trial of the case the defendants sought to show that in those conversations the vendor made certain representations which induced them to enter into the contract, but the trial court instructed the jury that representations made subsequent to June 15, 1925, could not be used for the purpose claimed. The court did not err in giving those instructions.

[3, 4] In their cross-complaint the defendants alleged that the vendor made several misrepresentations for the purpose of inducing them, and which did induce them, to enter into the contract. The plaintiff interposed an answer in which he denied specifically those allegations. On the trial of the action, both parties entered very fully upon the trial of each and every issue so made. However, the plaintiff was called as a witness in rebuttal, and, after being examined by his own counsel, was cross-examined. During that cross-examination the attorney for the defendants sought to impeach him by the allegations of his answer. On being shown the pleading and his attention called to the signature, he stated that it was not his signature. Thereafter the defendants requested and the trial court refused three proposed instructions, which were of the general import that the jury should consider the facts as stated in the cross-complaint as admitted. Both parties had treated the answer as sufficient and had fully introduced their evidence on the issues made by the cross-complaint and the answer thereto. The proposed instructions were properly refused. *Henderson v. Northam*, 176 Cal. 493, 168 P. 1044. Still making the same contention, at a later date, the defendants made a motion to set aside and vacate the verdict and judgment entered thereon and to enter the default of the plaintiff on the cross-complaint. The motion was denied. In making the order denying the motion, the trial court did not err. The attack came too late.

[5] After the defendants entered into possession November 2, 1925, they did not find business as good as they expected. One or more of them continued to operate the business until some time in January, 1926. At about that time each and all had withdrawn, and plaintiff again went into possession. Our attention has not been called to any fact which operated to terminate the contract. Nevertheless, the defendants now contend that the trial court erred in entering any affirmative judgment against the defendants

because the plaintiff held \$5,000 in cash and promissory notes in the sum of \$7,500. There is no merit in the claim.

[6] The defendants requested, and the trial court refused, an instruction worded as follows: "You are instructed that if the plaintiff made the alleged false representations charged by the defendants and cross-complainants they were entitled to take the word of the plaintiff therefor, and were not required to make an independent investigation of their own to verify the same, or to ascertain the truth or falsity thereof." It was apparently a sound statement of the law, and should have been given.

[7] Acting upon the request of the plaintiff, the trial court gave an instruction which was worded as follows: "I instruct you that in general, parties must rely upon their own judgment and investigate before making contracts. Consequently, where there is no relation of especial trust or confidence, and where the means of knowledge are at hand and are equally available to both parties, and the subject matter is alike open to their inspection, if one of them does not avail himself of those means and opportunities when he might readily ascertain the truth by ordinary care and attention his failure to do so is the result of his own negligence and he will not be heard to say that he was deceived by the other's misrepresentations." The defendants contend that the instruction was an erroneous statement of the law applicable to the facts of this case. The plaintiff replies that the instruction is a correct statement of

the law, and he cites *Oppenheimer v. Clunie*, 142 Cal. 313, 321, 75 P. 899; *Board of Commissioners of Funded Debt of City of San Jose v. Younger*, 29 Cal. 172, 176; 12 Cal. Jur. 756. The language relied on in the *Oppenheimer* Case was addressed to "the condition of the exits and stairways" of a theater. The language used in the *Younger* Case was used with reference to the quantity of land contained in a tract which either party could have had surveyed. The instruction, as given, is a verbatim copy of a portion of section 33 of the article "Fraud and Deceit," 12 Cal. Jur. In the instant case, if the instruction as given had been confined to the physical property which was the subject of the sale, it might not have been objectionable. However, the principal contention of the defendants was based on a written statement made by the plaintiff, in which he stated that the business of the bakery was "over \$6,000 monthly." Furthermore, the contradicted evidence was that the plaintiff kept no books. As to the past accounts of the vendor, it may not be said "the means of knowledge are at hand and are equally available to both parties." The errors in giving and refusing instructions which we have just noticed struck at the very roots of the case which the defendants were attempting to present on their cross-complaint, and were highly prejudicial to them.

The judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 418

PEOPLE v. NUICH. (Cr. 1831.)

District Court of Appeal, Second District,
Division 1, California. Aug. 21, 1929.

1. Witnesses $\Rightarrow$ 393(3)—Refusing to permit reading of testimony from document offered as transcript of testimony in preliminary examination held not error.

In prosecution for unlawful possession of a still, where no proof was offered to show that document was transcript of testimony in preliminary examination of defendant, refusing to permit counsel to read testimony from such document offered for purpose of impeachment was not error.

2. Intoxicating liquors $\Rightarrow$ 223(2)—Evidence showing possession of still did not vary from charge of possession of still worm, still cap, and still condenser.

Charge of possession of still worm, still rap, still condenser and distilling device was sufficient charge of possession of a still shown by evidence, especially in view of stipulation of defendant's counsel.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Tony Nuich was convicted of possession of a still, and he appeals. Affirmed.

John Hyland and B. M. Marble, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, of Los Angeles, for the People.

HAHN, Justice pro tem. By information filed by the district attorney of Los Angeles county the defendant, Tony Nuich, was charged with the "crime of Possession of Still, a Felony, committed as follows: That the said Tony Nuich on or about the 24th day of November, 1928, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously own, operate and cause to be operated, and knowingly have in his possession and control, a certain Still Worm, Still Cap, Still Condenser and Distilling Device, designed, used and intended to be used in the manufacture and production of intoxicating liquor for beverage purposes." The jury returned a verdict of guilty, as charged, and in due course the defendant was sentenced by the court to the penitentiary for the period prescribed by statute.

In his plea for a reversal of the judgment appellant urges that the court erred in rulings made in connection with the offer of cer-

tain testimony, and also urges that the verdict is contrary to the law and the evidence.

[1] It is urged by appellant that in two instances the court erred in sustaining objections of the district attorney to the reading of what purported to be the testimony of a witness given in the preliminary examination. This testimony was offered for the purpose of impeachment and objected to by the district attorney. The court refused to permit the reading of the testimony on the ground that it was not upon a material matter, and, furthermore, that there was no proper foundation laid. There was no error in these rulings. There was no proof offered even to show that the document from which counsel was reading was the transcript of the testimony in the preliminary examination of the defendant; nor was it proven or admitted that the witness had testified as it appeared from the transcript. It was stipulated by the district attorney that the defendant was a witness in the preliminary examination, but the necessary foundation was still lacking for the introduction of the alleged testimony.

[2] In support of the contention that the verdict is contrary to the law and contrary to the evidence, it is urged that the information charged the defendant with having "possession and control of a certain still-worm, still-cap, still-condenser and distilling device, designed, used and intended to be used in the manufacture and production of intoxicating liquors for beverage purposes," while the evidence showed possession of a still. Defendant urges that these specific devices designated do not constitute a still. There is no merit in this contention, particularly in view of the fact that counsel for the defendant during the trial stipulated as follows: "We will stipulate the still is a complete still, fit for the production of alcoholic beverages containing more than one-half of one per cent. fit for beverage purposes." It was further stipulated by counsel for the defendant that the still had mash on the inside of it.

Several other points are raised as to the rulings of the court in connection with testimony offered. We have examined all of the alleged errors, and find that the court's rulings were proper, and not subject to legal criticism.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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207 Cal. 630

WEBSTER MFG. CO. v. BYRNES et al.

BYRNES v. WEBSTER MFG. CO.★

(S. F. 12641.)

Supreme Court of California. July 19, 1929.

Rehearing Denied Aug. 15, 1929.

- 1. Warehousemen ⇨7—Warehouse in 1925, as public utility, might sell, lease, or incurber operative property without Railroad Commission's consent (Public Utilities Act, § 51(a)).**

Where warehouses were not brought until 1927 under operation of Public Utilities Act (Deering's Gen. Laws 1923, Act 6386), § 51(a), providing that certain specific public utilities therein enumerated can neither sell, lease, nor incurber their property without consent of Railroad Commission, on March 21, 1925, warehouse, as public utility, might sell, lease, or incurber its operative property without consent of Railroad Commission.

- 2. Mortgages ⇨1—Deed of trust, though secondary evidence of indebtedness, is only ancillary to debt as security.**

While deed of trust may be secondary evidence of indebtedness, it is not debt itself, but at most is but ancillary to it, as security for its payment.

- 3. Mortgages ⇨1, 51—Deed of trust need not contain covenant to pay, but, if it does, it is evidence of indebtedness.**

It is not necessary that deed of trust or mortgage contain covenant to pay, and, if it does so contain such covenant to pay, it would then be both an evidence of indebtedness and deed of trust; note and mortgage or deed of trust to secure it being one debt and one transaction.

- 4. Public service commissions ⇨6—Act providing that public utility cannot refund note payable within year by notes or "other" evidence of indebtedness without commission's consent means other preceding evidences of indebtedness, as bonds, etc. (Public Utilities Act, § 52(b)).**

In Public Utilities Act (Deering's Gen. Laws 1923, Act 6386) § 52(b), by use of word "other" in portion providing that public utility may issue notes for proper purposes payable within year after issuance without consent of Railroad Commission, but that no note shall, in whole or in part, be refunded by any issue of stocks or stock certificates, or bonds, notes of any term or character, or any "other" evidence of indebt-

edness, without consent of commission, was meant, under doctrine of ejusdem generis, such evidences of indebtedness as had preceded it, as bonds, notes, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Other.]

5. Corporations ⚡449—Public Utilities Act, abridging right of contract, should receive reasonable interpretation.

Provisions of Public Utilities Act (Deering's Gen. Laws 1923, Act 6386), abridging to certain extent right of contract, should receive reasonable interpretation, in light of purposes sought to be accomplished by them.

6. Public service commissions ⚡6—Under act prohibiting certain public utilities from incumbering property without commission's consent, certain utilities enumerated may not under any circumstances so incumber property (Public Utilities Act, § 51(a)).

Under Public Utilities Act (Deering's Gen. Laws 1923, Act 6386) § 51(a), providing that certain public utility corporations shall not sell, lease, assign, mortgage, or otherwise dispose of or incumber property necessary or useful in performance of their duties to public, without first securing consent of Railroad Commission, utilities enumerated may not under any circumstances incumber property without consent of commission.

7. Public service commissions ⚡6—Under statute, long-term indebtedness cannot be created by public utility including deed of trust without Railroad Commission's consent (Public Utilities Act, § 52(b)).

Under Public Utilities Act (Deering's Gen. Laws 1923, Act 6386) § 52(b), providing public utility may issue evidences of indebtedness, payable within 12 months after date, to acquire property for construction, completion, extension, or improvement of facilities, or for improvement or maintenance of service, or to refund obligations, or for reimbursement of moneys actually expended from income or treasury, not secured by or obtained from such issues, except for maintenance of service and replacements, providing it secures from commission authorization for issue, long-term indebtedness may not be created without consent of commission, including deed of trust, if given to secure indebtedness.

8. Public service commissions ⚡6—Short-term notes of public utilities, for proper purposes and not refunding previous short-term notes, may be issued as security without commission's consent (Public Utilities Act, § 51(a)).

Under Public Utilities Act (Deering's Gen. Laws 1923, Act 6386) § 51(a), providing that enumerated public utilities shall not sell, lease, assign, mortgage, or otherwise dispose of or incumber property necessary or useful in performance of duties to public, without first securing commission's authorization, short-term notes, if executed for proper purposes and not as refund of previous short-term notes, may be issued as security without consent of Railroad Commission; section 52(d), providing that all evidences of indebtedness of public utility is-

sued without commission's authorization shall be void, being applicable only to evidences of indebtedness as law requires to have consent of railroad commission.

9. Corporations ⚡449—Warrant to abridge right of contract should be found in statute.

Plain warrant to abridge right of contract should be found in language of statute for so doing.

10. Warehousemen ⚡7—Note representing money borrowed for current expenses of warehouse held valid, under statute authorizing public utility to issue notes for "proper purposes" (Public Utilities Act, § 52(b)).

In absence of plain declaration to contrary, phrase "proper purposes," in Public Utilities Act (Deering's Gen. Laws 1923, Act 6386) § 52(b), providing that public utility may issue notes for proper purposes payable within year after issuance without consent of Railroad Commission, means any outlay necessary or proper to promote legitimate objects of public utility, such as a warehouse concern, and note may properly be issued for current expenses, so that note held by one as representing money borrowed by warehouse for current expenses is valid.

11. Warehousemen ⚡7—Notes secured by former mortgages, and sums paid for taxes, insurance, and equipment, held not short-term notes which might be refunded by other notes issued without commission's consent (Public Utilities Act, § 52(b)).

Former notes secured by former mortgages and deeds of trust on real property of warehouse, that had been placed thereon by predecessors in title and assumed by purchasers as part of purchase price of warehouse concern, and sums paid for taxes and insurance authorized under deeds of trust, and amount paid for completion of title to machinery and equipment purchased under conditional sales contract, to place full title in utility, though "previous indebtedness," held not short-term notes, which might be refunded by other notes issued by warehouse concern, under Public Utilities Act (Deering's Gen. Laws 1923, Act 6386) § 52(b), without consent of Railroad Commission.

12. Warehousemen ⚡7—Where material portion of note claimed issued in violation of statute is valid and severable, illegal portion would not avail defendants in action to determine adverse claims to utility (Public Utility Act, § 52(b)).

As regards validity of note issued by warehouse concern in claimed violation of Public Utility Act (Deering's Gen. Laws 1923, Act 6386) § 52(b), so long as any material portion of note payable within year given to refund indebtedness of warehouse concern is valid and severable, any illegal portion thereof would not avail defendants in action to determine adverse claims to property formerly used as a warehouse, as note would be pro tanto valid, and deed of trust to secure same would likewise be valid, and regular sale thereunder would pass title to property.

13. Corporations ⚡673—That foreign corporation purchased warehouse at trustee's sale was no proof of intention to operate public utility (Public Utilities Act, § 26).

Fact that foreign corporation purchased indumbered public utility warehouse at trustee's sale was no proof of its intention to operate public utility, as prohibited by Public Utilities Act (Deering's Gen. Laws 1923, Act 6386) § 26, since it might transfer property to person qualified to engage in business, or might use property for some other legitimate business.

14. Corporations ⚡656—Objection that foreign corporation could not conduct warehouse purchased can be made only by state (Public Utilities Act, § 26).

Inasmuch as Public Utilities Act (Deering's Gen. Laws 1923, Act 6386) § 26, prohibits foreign corporation, not previously engaged in public utility business within state, to carry on public utility business in California, and declares purchase by corporation void, contention that corporation buying warehouse could not carry on business lies alone with people of state, and is not question that defendants in action to determine adverse claims to property formerly used as a warehouse could avail themselves of.

In Bank.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by the Webster Manufacturing Company against Charles W. Byrnes and others, in which the named defendant cross-complained against plaintiff. Judgment for plaintiff, and defendants appeal. Affirmed.

Superseding opinion in 271 P. 771.

H. H. McPike, of San Francisco (on behalf of Charles W. Byrnes), James F. Peck, Clarence Hawkins, W. B. Bunker, and Peck, Bunker & Peck, all of Oakland, for appellants.

Clark, Nichols & Eltse, of Berkeley (Harri-son S. Robinson, Harry L. Price, and R. W. Macdonald, all of Oakland, amici curiæ), for respondent.

PRESTON, J. Action to determine adverse claims to certain real property, formerly used as a warehouse, situated in Alameda county. Defendants answered by denial of the asserted claim of ownership by plaintiff. Defendant Charles W. Byrnes in addition cross-complained against plaintiff, alleging ownership of said property in himself. To this issue plaintiff interposed a denial. Plaintiff had judgment as prayed for. Defendants have appealed. The facts are undisputed.

On and prior to March 21, 1925, Western Milling Company, later named Oakland Terminal & Elevator Corporation, was admittedly a public utility, to wit, a warehouse, under Public Utilities Act of California (Deering's Gen. Laws 1923, p. 2683, Act 6386) § 2 (aa). Said concern being involved financially, three sets of its creditors sat down

with it on said above-mentioned day and composed their several demands against it, settling between themselves the matter of priority of their respective claims and agreeing upon a system of providing security for them. As a result three promissory notes, each payable in less than 12 months, were executed by the corporation, the first to plaintiff for the sum of \$210,000, the second in a similar amount, and the third and last one for \$200,000, in favor of defendants Williams, Hawkins, and Wholey. To secure the payment of these several notes, three deeds of trust were executed by said public utility, covering the real property in dispute, and perhaps as well some personal property then in use as a part of the operating equipment of said concern. It was stipulated that the several notes and deeds of trust when completed should be deposited in escrow, and the deeds of trust recorded in the order above mentioned, and they were in fact so filed for record by the escrow party.

On or about February 24, 1926, the beneficiaries under said third deed of trust assigned their note, carrying said security therefor, to defendant Charles W. Byrnes, who on said date abandoned the security for said debt and filed an action at law against said public utility, causing a writ of attachment to be issued and levied upon the real property, the subject of this suit. On April 20, 1926, said Byrnes was awarded judgment, defendant having defaulted, and thereafter on May 25, 1926, the sheriff sold under execution the said real property, subject to redemption, and the said Charles W. Byrnes became the purchaser thereof. On May 11, 1926, however, after due notice given, the trustee named in the first deed of trust sold the real property, the subject of this action, pursuant to the terms of said security, and thereafter plaintiff in this action became the purchaser thereof. Under this situation the plaintiff here and said Byrnes became rival claimants to said property, plaintiff claiming under the sale under said trust deed and defendant Byrnes under said execution sale. Soon thereafter, and prior to October 6, 1926, the present action was instituted.

The proceeding under which plaintiff claims and the proceeding under which defendant claims are both regular on their face; hence, if the proceeding under the deed of trust is valid, it is prior in time and first in right. Defendants assert that the deed of trust is void, because made without the consent of the railroad commission. Secondly, they claim that the note is void in part, because a portion of the consideration was for operating expense, which is forbidden, it is said, and the remainder of the note is for a refund of previous indebtedness, and, being made without the consent of the commission, is likewise void. To these claims of invalid-

ity is added the further contention that plaintiff, being a foreign corporation and therefore without ability to operate a public utility, was without power to lawfully purchase at said trustee's sale. These several contentions will now be considered.

The pertinent provisions of said Public Utilities Act, as they read on March 21, 1925, are as follows:

Section 51(a): "No railroad corporation, street railroad corporation, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation or water corporation, shall henceforth sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant or system, necessary or useful in the performance of its duties to the public * * * without having first secured from the commission an order authorizing it so to do. * * *"

Section 52(a): "The power of public utilities to issue stocks and stock certificates, and bonds, notes and other evidences of indebtedness and to create liens on their property situated within this state is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as the commission may prescribe."

Section 52(b): "A public utility may issue stocks and stock certificates, and bonds, notes and other evidences of indebtedness payable at periods of more than twelve months after the date thereof, for the following purposes and no others, namely, for the acquisition of property, or for the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service, or for the discharge or lawful refunding of its obligations, or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the public utility not secured by or obtained from the issue of stocks or stock certificates, or bonds, notes or other evidences of indebtedness of such public utility, for any of the aforesaid purposes except maintenance of service and replacements, in cases where the applicant shall have kept its accounts and vouchers for such expenditures in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditure was made: * * * Provided, that such public utility, in addition to the other requirements of law, shall first have secured from the commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue or the proceeds thereof are to be applied. * * * A public utility may issue notes, for proper purposes and not in viola-

tion of any provision of this act or any other act, payable at periods of not more than twelve months after the date of issuance of the same, without the consent of the commission, but no such note shall, in whole or in part, be refunded by any issue of stocks or stock certificates, or bonds, notes of any term or character or any other evidence of indebtedness, without the consent of the commission."

Section 52(d): "All stock and every stock certificate, and every bond, note or other evidence of indebtedness, of a public utility, issued without an order of the commission authorizing the same then in effect, shall be void. * * *"

[1] Under section 51(a) certain specific public utilities therein enumerated can neither sell, lease, nor incumber their property without the consent of the Railroad Commission. While warehouses have always been classified as public utilities, they were not until the legislation of 1927 brought under the operation of this section; hence we have reached the conclusion that on March 21, 1925, certain public utilities, of which the Western Milling Company was one, unless by other provisions of said act prohibited, might sell, lease, or incumber their operative property without the consent of the Railroad Commission.

Under section 52(a) we find a declaration of the fundamental policy behind this character of legislation, and from this announcement we gather that the power of the Legislature over the issuance of indebtedness and over the creation of liens is plenary, if asserted, and we even find authority for the promulgation of regulations upon this subject by the commission itself.

Under section 52(b) we find no limitation upon sales or leases of a public utility, but we do find a limitation upon the authority of any public utility to issue long-term bonds, notes, and other evidences of indebtedness without the consent of the commission, and we further find that such indebtedness may be incurred only for certain specified purposes. In the same section, however, we find a provision allowing temporary financing by the execution of short-term notes, to wit, notes payable in not more than 12 months, the language in this behalf being: "A public utility may issue notes, for proper purposes and not in violation of any provision of this act or any other act, payable at periods of not more than twelve months after the date of issuance of the same, without the consent of the commission, but no such note shall, in whole or in part, be refunded by any * * * notes of any term or character or any other evidence of indebtedness, without the consent of the commission."

Coupling this last provision with the above-quoted provision of section 52(d), which is to

the effect that every note or other evidence of indebtedness, issued without order of the commission, is void, we have the question squarely presented; Is a deed of trust given without the consent of the Railroad Commission, to secure a valid short term note of a public utility, of a class other than those mentioned in section 51(a), void because forbidden by section 52(d), or any other provision of said Public Utilities Act?

[2, 3] We find nothing at any place in said act to compel, or even make logical, any such conclusion. While a deed of trust may truly be secondary evidence of indebtedness, it is not the debt itself, but at most is but ancillary to it, to wit, security for its payment. It could not be said that, if a note was secured by a deed of trust or mortgage, there had thereby been created two debts. The expression "other evidence of indebtedness," found in section 52(b), means such evidence of indebtedness as is "payable" at periods in the future. Is a deed of trust, divorced from the debt secured by it, payable at any period? Certainly not. It is not necessary that a deed of trust or mortgage contain a covenant to pay, and, if it does so contain such covenant, it would then be both an evidence of indebtedness and a deed of trust. A note and the mortgage or deed of trust to secure it is one debt and one transaction.

Considerable light is shed upon this question by the provisions of section 52(a), where we find the issuing or creation of indebtedness separately segregated from the expression "and to create liens on their property," and thus we have a legislative recognition that the former does not include the latter. No reason exists for giving the same expression any broader or different meaning, when it is met in section 52(d). Indeed, the language of that section, if given its literal import, would clash with the above-considered portion of section 52(b) relating to short term notes, for said literal language is "* * * every * * * note * * * shall be void. * * *"

Much authority has been cited by counsel on both sides intended to throw light upon the question of whether a deed of trust or mortgage is included within the term "evidences of indebtedness." We doubt not that circumstances might exist where it would be proper to hold that a mortgage or a deed of trust was included in the said phrase, but in the act we are considering such is plainly not the case. We are pointed to the fact that, in several of the states of the Union having acts similar to our own, a distinction between the two expressions is maintained. In *Barry v. Snowden* (C. C.) 106 F. 571, a proper distinction, in harmony with our conclusion, is pointed out. The same is true of *Wood v. Williams*, 142 Ill. 269, 31 N. E. 681, 34 Am. St. Rep. 79, and *Schifferstein v. Allison*, 123 Ill. 662, 15 N. E. 275, 276.

[4] In fact, we reach the same conclusion by an application of the rule of *ejusdem generis*, from which it must be concluded that by the use of the word "other" was meant such "evidences of indebtedness" as had preceded it, to wit, bonds, notes, etc. *People v. Chretien*, 137 Cal. 450, 70 P. 305; *In re Johnson*, 167 Cal. 142, 145, 138 P. 740.

[5] The right of contract is by the statute abridged to a certain extent, and no reason exists for making an application of the statute not plainly warranted by the language employed in it. In fact, these provisions should receive a reasonable interpretation, in the light of the purposes sought to be accomplished by them. *Southern Sierras Power Co. v. Railroad Commission* (Cal. Sup.) 271 P. 747.

[6-8] Our conclusion, therefore, is that under section 51(a) certain public utilities may not under any circumstances incur their property without proper consent of the commission; that under section 52(b) long-term indebtedness may not be created without consent of the commission, and this, of course, would mean that a deed of trust, if given to secure such indebtedness, would also require such consent, for in that case the security would be an incident to the issuance of the obligation; but as to short-term notes of a public utility, not mentioned in section 51(a), if executed for proper purposes, and not as a refund of previous short-term notes, neither the issuance thereof nor the giving of security as an incident thereto requires the consent of the Railroad Commission. This seems to be the plain legislative intent, and creates no friction between the various sections under consideration. The most that it does is to require that section 52(d) be held applicable only to such stock, stock certificate, bond, note, or other evidence of indebtedness as the law requires to have the consent of the Railroad Commission.

This holding is also consonant with reason, for without the consent of the commission liens and incumbrances might be imposed upon the property of a public utility by attachment, execution, and perhaps other methods, and if this could be done without the consent of either the commission or the public utility, why could not the utility voluntarily pledge or incur its property as security for such debt? The ability to pledge or incur might be the only method by which a concern of this type could secure the credit necessary to survive. The very fact that defendant Byrnes, without the consent of the commission, could abandon his deed of trust and secure attachment and execution liens, argues strongly for the power in the debtor to voluntarily create such a lien in a case where the consent of the commission is not necessary to the creation of the indebtedness.

[9, 10] But our inquiry takes us to a con-

sideration of the note in this case. The first contention is that the words "for proper purposes," found in section 52(b), when applied to short-term notes, must be construed to have the same meaning as is embraced in the specific purposes thereinabove pointed out respecting long-term notes, and no others, or, in other words, that this phrase excludes the issuance of short-term notes to defray operating or current expenses, and that a portion of the note in question was issued for this purpose. If such was the legislative intent, it could have been easily stated, and the matter not left in doubt. But here again we are asked to abridge the right of contract, and plain warrant should be found in the language of the statute for so doing. The object of long-term obligations is usually very different from the object of short-term obligations. The usual purpose of such obligations is to build up a permanent capital investment. The issuance of short-term notes is for emergency or temporary financing. The right, even to the extent of obtaining funds for current expenses, may be of vital importance to the corporation. We therefore conclude that, in the absence of a plain declaration to the contrary, "proper purposes" means any outlay necessary or proper to promote the legitimate objects of a public utility of the type concerned, and that such a note may properly be issued for current expenses; hence so much of the note held by plaintiff as represents money borrowed for current expenses is valid.

Next, it is claimed that the note is void because the other items therein contained are a mere refund of existing obligations, and hence the consent of the commission to its issuance was required. It is to be noted that the short-term obligation authorized by section 52(b) is a note. No other evidences of indebtedness are enumerated. It is also to be noted that, with respect to the matter of refunding, the refunding is of a note previously issued as a short-term note, and is not the mere recasting of every kind of a previous obligation. In the case before us the note in question was largely given for the following purposes: At the time it was executed the public utility was in a maze of financial entanglements. Plaintiff had judgments against it, aggregating some \$130,000, upon which execution sales had resulted at which plaintiff had become the purchaser, and the time for redemption was fast expiring. In addition, the public utility was liable to plaintiff upon obligations of various types in the amount of this note, \$210,000. To these were added the debts secured by the two junior deeds of trust. The utility was making one final effort to extricate itself. The deed of trust to plaintiff here in question was the result of a compromise and concessions on the part of plaintiff. It gave the utility res-

pitate for a period of nine months. The consideration for this note, in addition to the items therein for operating expenses, was:

[11, 12] Former notes secured by former mortgages and deeds of trust upon said real property, that had been placed thereon by the predecessors in title and assumed by the public utility as a part of the purchase price of the property, and this before it ever became a part of the operative property of the utility. These obligations had fallen into the hands of plaintiff. In this connection, large sums were paid for taxes and insurance, and these were authorized under the mortgages and deeds of trust, and these sums in the same way became a part of this note. To this should be added a large amount for the completion of title to machinery and equipment purchased under conditional sale contracts, and upon the execution of the note and security full title was placed in the utility. While these several items are previous indebtedness, we cannot see that they are short-term notes of the utility, which were by the note in question refunded. The object of this provision of said act was evidently to forbid the circumvention by an endless chain process of the requirement as to consent for long-term notes, but we cannot see that the prohibition is leveled at the transaction here disclosed. Moreover, so long as any material portion of said note is valid and severable, any illegal portion thereof would not avail defendants in this action, as the note would be pro tanto valid, and the deed of trust to secure same would likewise be valid, and, of course, a regular sale thereunder would pass the title to the property. *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725; *Jackson v. Shawl*, 29 Cal. 267; *Innes v. Goldwater*, 30 Cal. App. 101, 157 P. 18; *Granger v. Original Empire Mill & Mining Co.*, 59 Cal. 678.

[13, 14] Lastly, we are to consider the contention that under section 26 of said Public Utilities Act a foreign corporation, not previously engaged in a public utility business, may not carry on any such business in California, and therefore could not purchase at the trustee's sale under said deed of trust. In the first place, as to the public utility here involved, a certificate of convenience and necessity was not at the time in question required to enter such business, nor was the consent of said commission required to discontinue said business. It is difficult, therefore, to come to the conclusion that a creditor may not purchase foreclosed property in order to secure payment of the indebtedness to him. The fact that this corporation purchased the incumbered property at the sale is no proof of its intention to operate the public utility. It might transfer the property to a person qualified to engage in that business, or

it might use the property for some other legitimate business. Besides, inasmuch as the statute does declare a purchase by such a corporation void, an objection of this kind lies alone with the people of the state of California, and is not a question that defendants can avail themselves of. *Spring Valley W. W. v. San Francisco*, 22 Cal. 434, 439; *Blochman Commercial Bank v. F. G. Investment Co.*, 177 Cal. 762, 171 P. 943; *McCann v. Children's Home Soc.*, 176 Cal. 359, 168 P. 355.

It follows from the above that the action of the court below was proper, and its judgment is hereby affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.

up the fact that a sale had been had thereunder at which defendant Webster Mfg. Company became the purchaser and received a deed to said property from the trustee. The prayer of the cross-complaint was that the title of said defendant under said sale be declared valid, and that a receiver be appointed to manage and control the property pending the termination of the litigation. Defendants had judgment as prayed for under their cross-complaint.

The deed of trust here involved is the same deed of trust referred to in case S. F. No. 12641, *Webster Mfg. Co. v. Byrnes et al.*, 280 P. 101, this day decided, to which reference is made, and upon authority of that case the judgment in the instant case is hereby affirmed.

207 Cal. 794

OAKLAND TERMINAL & ELEVATOR CORPORATION, a Corporation, Plaintiff and Appellant, v. **MERCANTILE TRUST CO. OF CALIFORNIA**, a Corporation, Webster Mfg. Company, a Corporation, John Doe Company, a Corporation, Richard Roe Company, a Corporation, First Doe, Second Doe, Third Doe, Fourth Doe, and Fifth Doe, Defendants and Respondents. (S. F. 12236.)

Supreme Court of California. July 19, 1929.

In Bank.

Appeal by plaintiff from a judgment of the Superior Court of Alameda County, J. D. Murphey, Judge, in an action to declare deed of trust null and void and to enjoin sale thereunder. Affirmed.

Superseding opinion in case Civ. 6265, 271 P. 776.

H. H. McPike and R. L. McWilliams, both of San Francisco (I. M. Peckham, of San Francisco, of counsel), for appellant.

Clark, Nichols & Eltse, of Berkeley, for respondents.

Carl I. Wheat, of San Francisco, Arthur T. George, of Los Angeles, and Reginald L. Vaughan and Roderick B. Cassidy, both of San Francisco, for Railroad Commission, as amici curiæ.

PER CURIAM. In this cause plaintiff, a public utility, formerly called Western Milling Company, pleading its own infirmity and want of power, sued the defendants to enjoin proceedings under a deed of trust covering both real and personal property, executed by it, naming defendant Mercantile Trust Company as trustee and defendant Webster Mfg. Company as beneficiary, and to have same removed as a cloud upon the title to its property.

Defendants answered, denying invalidity in said deed of trust, and by cross-complaint set

207 Cal. 641

OAKLAND TERMINAL & ELEVATOR CORPORATION, a Corporation, Plaintiff and Appellant, v. **MERCANTILE TRUST COMPANY OF CALIFORNIA**, a Corporation, Webster Manufacturing Company, a Corporation, et al., Defendants and Respondents. (S. F. No. 12238.)

Supreme Court of California. July 19, 1929.

In Bank.

Appeal by plaintiff from an order of the Superior Court of Alameda County, J. D. Murphey, Judge, appointing receiver and granting certain injunctive relief. Affirmed.

Superseding opinion in case Civ. 6361, 271 P. 776.

H. H. McPike and R. L. McWilliams, both of San Francisco (I. M. Peckham, of San Francisco, of counsel), for appellant.

Clark, Nichols & Eltse, of Berkeley, for respondents.

Carl I. Wheat, of San Francisco, Arthur T. George, of Los Angeles, and Reginald L. Vaughan and Roderick B. Cassidy, both of San Francisco, for Railroad Commission, as amici curiæ.

PER CURIAM. Plaintiff, a public utility, formerly called Western Milling Company, pleading its own infirmity and want of power, sued the defendants to enjoin proceedings under a deed of trust covering both real and personal property, executed by it, naming defendant Mercantile Trust Company as trustee and defendant Webster Manufacturing Company as beneficiary, and to have same removed as a cloud upon the title to its property. Defendants answered, denying invalidity in said deed of trust, and by cross-complaint set up the fact that a sale had been had thereunder, at which defendant Webster Manufacturing Company became the purchaser and received a deed to said property from the trustee. The prayer of the cross-complaint was that the title of said defendant

under said sale be declared valid, and that a receiver be appointed to manage and control the property pending the termination of the litigation. Defendants had judgment as prayed for under their cross-complaint, which judgment this court, upon authority of case No. 12641, Webster Mfg. Co. v. Byrnes, this day decided, 280 P. 101, has this day affirmed. See case S. F. No. 12236, Oakland Terminal & Elevator Corporation v. Mercantile Trust Co. et al., 280 P. 107.

After said above-mentioned cause was at issue upon the amended and supplemental complaint and amended and supplemental answer and cross-complaint, cross-complainants moved the court for the appointment of a receiver, alleging title in themselves, the insolvency of plaintiff, the commission of waste by it in connection with the property, and neglect thereof. Upon these and other facts the court appointed a receiver to take charge of said property. The plaintiff appealed from this order.

Inasmuch as said deed of trust has been declared valid (Webster Mfg. Co. v. Byrnes, supra), and has been held sufficient to pass title to the purchaser, the receivership was impressed upon property not owned by plaintiff, but owned by the cross-complainant, Webster Mfg. Company. All questions, therefore, are now moot, and this order appointing said receiver is likewise hereby affirmed.

208 Cal. 74

MILLER et al. v. CITY OF PALO ALTO.*
(S. F. 12612.)

Supreme Court of California. Aug. 30, 1929.

Rehearing Denied Sept. 26, 1929.

1. Municipal corporations ⇨739(2)—City held not liable for destruction of buildings outside city by fire negligently allowed to spread from burning garbage deposited on vacant property.

Where city, as part of governmental functions, removed garbage from incinerator and deposited it on vacant property outside city while certain materials were hot and burning, as result of which fire spread to adjoining property and completely destroyed buildings, city was not liable for negligence in failing to keep fire under control, since governmental function of disposing of garbage was not completed until ashes were disposed of, and city owed no duty to keep premises within quarter of a mile free or clear of debris or deposits.

2. Eminent domain ⇨15—Destruction of property by fire spreading from garbage deposited by city did not constitute taking of private property for "public use."

Where city, in exercise of governmental functions, removed and deposited outside city burning garbage collected within city, from which fire spread and destroyed buildings, destruction of buildings was not a taking of private property for public use, since "public use" is a use which concerns whole community, as distinguished from particular individuals; pub-

lic usefulness, utility, or advantage, or what is productive of general benefit; a use by or for government, the general public, or some portion of it.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Public Use.]

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Stephen Miller and others against the City of Palo Alto. Judgment for defendant, and plaintiffs appeal. Affirmed.

Miller & Thornton, of San Francisco, for appellants.

Norman E. Malcolm and Leon Thomas David, both of Palo Alto, for respondent.

LANGDON, J. This appeal is by the plaintiffs from a judgment against them, rendered after a demurrer to their complaint had been sustained, upon the ground that said complaint failed to state a cause of action, and plaintiffs had declined to amend.

The complaint alleges that the plaintiffs Stephen and Ida M. Miller are husband and wife, and at the times mentioned therein were the owners of certain described real property in the county of Santa Clara, California, upon which certain buildings were situated; that said buildings were insured against fire by the other plaintiffs; that on or about the 9th day of October, 1926, the defendant, city of Palo Alto, a municipal corporation, "in the carrying out and performing of its duties and powers as such municipal corporation, as aforesaid, caused to be taken from an incinerator constructed by it for the purpose of burning garbage collected within the bounds of said city, and to be removed to and deposited on vacant property about one-quarter of a mile southeasterly from the premises and property aforesaid of the said plaintiffs Stephen Miller and Ida M. Miller, certain materials that were hot and burning, and carelessly and negligently failed to take, or cause to be taken, any care or caution of any kind or character to keep the fire that was burning in said materials confined thereto, or to prevent the fire that was burning in said materials from spreading to adjoining or other property; that, by reason of such carelessness and negligence on the part of said defendant city of Palo Alto, the fire, which was burning as aforesaid in said materials at the time they were deposited as aforesaid on said vacant property, spread to, along and through dry grass, weeds, stubble and other inflammable materials on the ground between the place where said materials were so deposited and the premises and property aforesaid of the said plaintiffs Stephen Miller and Ida M. Miller, and burned and completely destroyed said property and all thereof."

[1] It is conceded by plaintiffs and appellants that a municipal corporation is not liable for damages caused by its negligence, or that of its employees in the exercise of governmental functions, unless it is expressly made liable by statute, and it is also conceded that in the collection and disposal of garbage a municipal corporation exercises governmental functions. Appellants insist, however, that the complaint is not based upon negligence of the corporation or its employees in the performance of governmental functions, but upon the negligence of defendant after its governmental functions had ceased. The controversy resolves itself into a determination of what is included in a disposition of garbage. The trial court held that, when incineration is the method of disposal used by a municipality, the process is not completed until the ashes are disposed of, and we see no escape from the logic of this conclusion.

Appellants rely upon the case of *Savannah v. Jones*, 149 Ga. 139, 99 S. E. 294. In that case, an employee of the city, in collecting garbage, left the lid of one of the receptacles from which the garbage was taken open and in a position where a pedestrian, walking along the sidewalk, collided with it and sustained injuries. The court held that at the time of the injury the city had ceased the exercise of its governmental functions, and was under the duty of keeping its streets and sidewalks free from obstruction, and liability was based upon this ground. In the instant case, the plaintiffs are without the corporate limits of Palo Alto, and the city owes no duty to them to keep the premises within a quarter of a mile from plaintiffs' premises free or clear from debris or deposits. The cases are differentiable upon this ground.

The case of *Louisville v. Hehemann*, 161 Ky. 523, 171 S. W. 165, L. R. A. 1915C, 747, also relied upon by appellants, involved a continuing nuisance, where the city deposited garbage in a street for a long period of time, which garbage became a putrefying mass, and injured the health and destroyed the lives of persons living in the vicinity. This case is also differentiable from the instant case, where no nuisance is alleged, although it is urged by appellants that the deposit of the burning rubbish constituted a nuisance, and upon this ground the city is liable. However, as held by the trial court, the complaint does not allege a nuisance within our statutory definition of such, nor does it allege facts from which a nuisance may be inferred. It alleges a single act of negligence on the part of the city.

[2] There is no merit in appellants' contention that the injury of which they complain constitutes a taking of private property for public use. A public use is "a use which concerns the whole community, as distinguished from a particular individual or a

particular number of individuals; public usefulness, utility, or advantage, or what is productive of general benefit; a use by or for the government, the general public, or some portion of it." 32 Cyc. 1255, and cases there cited.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

208 Cal. 29

LANE et al. v. SAN DIEGO ELECTRIC RY. CO. (L. A. 9533.)

Supreme Court of California. Aug. 24, 1929.

1. Municipal corporations ☞671 (9)—Finding, that maintenance of street car tracks on sidewalk in front of plaintiff's property did not interfere with access to property, held not sustained by evidence.

In action to enjoin maintenance of street car tracks, finding, that plaintiffs were not prevented from having free ingress or egress over their property by reason of construction of tracks, held not sustained by evidence showing car tracks seriously interfered with access to plaintiffs' lot, and showing damage by running of street cars over sidewalk in front of plaintiffs' business house.

2. Highways ☞85—Abutting owner on highway has private rights arising from ownership of property, regardless whether he owns fee of highway.

Abutting owner on highway has public right enjoyed in common with other citizens, and private rights arising from ownership of property contiguous to highway not given to public generally, regardless whether fee of highway is in him or not.

3. Eminent domain ☞85—Abutting landowner on public highway has easement, which cannot be damaged or taken away without due compensation.

Abutting landowner on public highway has special right of easement and user in public road for access purposes, which is property right which cannot be damaged or taken away from him without due compensation.

4. Municipal corporations ☞669, 670—Abutting landowner on street can disturb street and sidewalks, if necessary and done in reasonable manner.

Abutting landowner on public highway in municipality has limited right to disturb highway and sidewalks by reason of business or household exigencies, but such use must be necessary and reasonable, and obstruction cannot exist for long periods each day.

5. Municipal corporations ☞669—Obstruction of abutting owner's access to public street constitutes "private and public nuisance" (Civ. Code, §§ 3479-3481).

Under Civ. Code, §§ 3479-3481, obstruction of abutting owner's access to public street constitutes "private" as well as "public nuisance."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Private Nuisance; Public Nuisance.]

6. Municipal corporations $\S$ 671 (1, 5)—Abutting owner may sue in damages, or for injunction, for impairment of private easement in street in front of property (Code Civ. Proc. $\S$ 731).

Under Code Civ. Proc. $\S$ 731, injury to use of street, which impairs abutting owner's private easement in street in front of, and adjacent to, his property, amounts to injury giving one right to maintain action for damages, or for injunction.

7. Eminent domain $\S$ 106—Street railroad held not justified in taking plaintiff's property without compensation, by constructing tracks over sidewalk, seriously affecting access to property.

Street railroad held not justified in taking plaintiff's property without compensation, by construction of loop tracks in front of plaintiff's property, resulting in running of street cars over sidewalk in front of property, seriously affecting access to property and causing damage thereto.

8. Municipal corporations $\S$ 671 (7)—That continued use of street car tracks, obstructing access to abutting property, would ripen into prescriptive right, entitled owner to injunction against maintaining tracks, regardless of present damage.

That continued use of street car tracks in front of abutting landowner's property, obstructing access to property, would eventually ripen into prescriptive right, held sufficient to entitle abutting owner to enjoin maintenance of tracks, regardless of present damage.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by John Beach Lane and another against the San Diego Electric Railway Company. Judgment for defendant, and plaintiffs appeal. Reversed.

For opinion of District Court of Appeal, see 273 P. 833.

Luce & Swing, of San Diego, for appellants.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, V. F. Bennett, of San Diego, and Read G. Dilworth, of Coronado (C. Coolidge Kreis, of San Francisco, of counsel), for respondent.

PER CURIAM. When this cause was before the District Court of Appeal, an opinion was rendered by said court reversing the judgment herein and directing the trial court to enter judgment in favor of the plaintiffs and appellants. This opinion was prepared by Presiding Justice Finch, and concurred in by Justice Plummer and Justice pro tem. Shields. We are in accord with the following portion of said opinion, which we hereby adopt as the decision of this court in said cause:

The plaintiffs have appealed from the judgment herein denying their application for

a permanent injunction, restraining the defendant from maintaining its car tracks and operating its cars across the sidewalk and the street immediately adjacent thereto in front of their building.

The defendant owns lots 1, 2, 3, 4, 5, and 6, block 38, La Jolla Park, in the city of San Diego. The plaintiffs own the adjoining lots 7 and 8. All the lots face west on Fay street, with uniform frontage of 25 feet, except lot 1, which has a frontage of 24 feet. The defendant operates a single-track electric street railway along Fay street, but maintains a double track in front of block 38, the westerly track being "intended as a holding track * * * upon which cars could be spotted, or placed," the double track being at the northerly terminus of the line. Prior to any controversy between the parties, the defendant erected a substantial passenger depot on its said lots. In June, 1924, it commenced the construction of a loop consisting of an extension of the easterly track in a right-hand curve around the depot and back to the easterly track at the intersection thereof with the south line of lot 8 extended. The plaintiffs made seasonable objection to the construction of the loop in front of their property during the progress of the work, and they commenced this action prior to the completion thereof, but the defendant proceeded to complete the loop, and has thereafter used it for the purposes intended. Following the loop in the reverse order of that stated, it leaves the easterly track at the southerly line (extended) of lot 8, and, curving to the right, the right-hand rail intersects the curb in front of lot 7 at a point 5½ feet south of the north line (extended) of lot 7, and continues in such a course across the sidewalk that the side of a street car moving over the loop passes within 3½ feet of the corner of that lot, the overhang of the street car around the curve being about 3 feet to the right of the right-hand rail. The defendant constructed a culvert over the gutter at the curb in front of lots 6 and 7, the southerly end thereof extending to about the middle of the curb line in front of lot 7. The sidewalk is 14 feet in width, and the distance from the east rail of the main track to the curb is about 17 feet.

On the plaintiffs' lots, occupying the whole of the front thereof on Fay street, is a one-story brick and tile building used as a garage, the entrance thereof for vehicles being immediately south of the dividing line between lots 7 and 8. There is a door in the northwest corner of the building, opening on Fay street. The building was so planned that the front part thereof, on lot 7, "could be rented as a separate small store." It was constructed of sufficient strength "to carry two additional stories in the front part."

The evidence shows without contradiction, and a map introduced in evidence, which respondent concedes "correctly shows the situa-

tion," demonstrates that an average automobile or truck cannot be parked in front of lot 7 while a street car is passing over the loop in front of that lot. Defendant's engineer of maintenance and construction testified that, even if the southerly end of the loop were connected with the west track directly west of the present connection, it would not be possible to park an automobile of greater length than 10 feet in front of lot 7 during the passage of a car over the loop. The defendant introduced evidence to the effect that, at the time of the trial, cars passed over the loop at half-hour intervals, but there appears to be nothing to prevent the use of a greater number of cars in the future. In so far as it lies within its power, the city of San Diego has authorized the maintenance of the loop in its present location. The court found: "It has not been established by the evidence that either plaintiffs, or any lessees, or patrons of plaintiffs, are prevented from having free ingress, egress or regress to, on or from the property or buildings upon the property of plaintiffs by reason of the construction of said electric street railway turn-out track or the operation of electric street cars thereover."

[1] It is clear from what has been stated that this finding is contrary to the uncontradicted evidence, which demonstrates that access to lot 7 is substantially and seriously interfered with by the operation of cars over the loop, and it appears, not only from the uncontradicted testimony of the witnesses, but also from the application of common knowledge to the physical facts shown by the map referred to, that the maintenance of the loop in its present location, and the operation of cars thereover, will substantially depreciate the market value of plaintiffs' property. It requires no proof beyond the bare statement of the situation to show that the regular running of street cars over the sidewalk in front of a business house will cause damage.

[2, 3] "An abutting owner has two kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; and this regardless of whether the fee of the highway is in him or not. * * * An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken away from him without due compensation." 29 C. J. 547; *Fairchild v. Oakland & Bay Shore Ry. Co.*, 176 Cal. 629, 169 P. 388; *Cushing-Wetmore Co. v. Gray*, 152 Cal. 123, 92 P. 70, 125 Am. St. Rep. 47; *Smith v. Southern Pacific R. Co.*, 146 Cal. 164, 79 P. 868, 106 Am. St. Rep. 17; *Eachus v. Los Angeles, etc., Ry. Co.*, 103 Cal. 614, 37 P. 750, 42 Am. St. Rep. 149; *McLean v. Llewellyn Iron Works*, 2 Cal. App. 346, 83 P. 1082, 1085.

[4] "An abutter has a limited right to ob-

struct the roadway and sidewalks in a municipality by reason of his business or household exigencies, as, for example, by teams and vehicles permitted to stand in front of his property for a reasonable time. * * * And an abutting owner may use the street as for the purpose of loading and unloading goods or merchandise, or transporting his goods or other portable articles to and from his property, but such uses must be necessary and reasonable and the abutting owner cannot obstruct the street for long periods each day." 44 C. J. 956.

"The owner of a lot abutting upon a public street has by reason of such ownership a special easement in such street for the purpose of ingress and egress which is property as fully as the lot itself." *Cushing-Wetmore Co. v. Gray*, supra.

[5, 6] "Anything which is * * * an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, * * * is a nuisance." Civ. Code, § 3479. "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons." Civ. Code, § 3480. "Every nuisance not included in the definition of the last section is private." Civ. Code, § 3481. The obstruction of an abutting owner's access to a public street constitutes a private as well as a public nuisance. *Cushing-Wetmore Co. v. Gray*, supra. "An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor." Code Civ. Proc. § 731. "Any injury to the use of the street which impairs plaintiff's private easements in the street in front of and adjacent to his lot amounts to an injury giving plaintiff, as an abutting owner, the right to maintain an action for damages or for an injunction." *Strong v. Sullivan*, 180 Cal. 331, 333, 181 P. 59, 60 (4 A. L. R. 343); *Sala v. City of Pasadena*, 162 Cal. 714, 717, 124 P. 539; *Wilcox v. Engebretsen*, 160 Cal. 288, 299, 116 P. 750; *Danielson v. Sykes*, 157 Cal. 686, 691, 109 P. 87, 28 L. R. A. (N. S.) 1024; *Williams v. Los Angeles Ry. Co.*, 150 Cal. 592, 594, 89 P. 330. Respondent relies on a few decisions from other jurisdictions. It is deemed sufficient to say that such decisions are in conflict with the California cases cited herein, and that the latter appear to be in harmony with the great weight of authority. In *Fairchild v. Oakland & Bay Shore Ry. Co.*, supra, it is said that an abutting property owner's right of action for any special or peculiar damage caused by obstruction in a street, not suffered by other property owners, "is precisely one of those rights of action for the damaging of property which, if it did not exist before, came into existence by virtue of our constitutional

amendment granting a recovery for the damage as well as for the taking of property for public use."

[7, 8] In *Frost v. City of Los Angeles*, 181 Cal. 22, 31, 183 P. 342, 346 (6 A. L. R. 468), it is said, quoting 2 Beach, *Injunctions*, § 1067: "When an injunction to restrain a nuisance will produce great public or private mischief, a court of equity is not bound to grant it merely for the purpose of protecting a technical unsubstantial right." In this case the plaintiffs' right is neither technical nor unsubstantial, but a valuable property right. Neither will the issuance of an injunction "produce great public or private mischief." It does not appear that it would be at all difficult or would involve great expense to so locate an equally serviceable loop as to avoid damage to the plaintiffs' property. But, whatever its necessities were, it was not justified in taking the plaintiffs' property without compensation. *Smith v. Southern Pacific R. Co.*, supra. No public mischief would be produced, even by the abandonment of the southerly connection of the loop, because such change would merely necessitate the switching of the trolley for the return trip, or once every half hour. The fact that the continued use of the southerly end of the loop will eventually ripen into a prescriptive right is a sufficient ground, regardless of any question of present damage, to entitle the plaintiffs to an injunction. *Danielson v. Sykes*, supra.

Judgment reversed.

208 Cal. 27

RITTER v. RITTER. (L. A. 11203.)

Supreme Court of California. Aug. 23, 1929.

1. Appeal and error $\S$ 395, 430(1)—Failure to serve notice of appeal on adverse party and to file cost bond does not require dismissal of appeal.

Appeal will not be dismissed on motion for failure to serve notice of appeal on adverse party and to file a cost bond on the appeal.

2. Appeal and error $\S$ 348(1)—Motion to dismiss appeal on ground transcript was not timely filed was denied, where respondent gave no notice of entry of judgment and orders appealed from (Code Civ. Proc. § 953d; Supreme Court Rule 1).

Where appeal was taken from judgment and second appeal was taken from subsequent orders, and both appeals were consolidated by order of Supreme Court within the 40 days allowed for filing of transcript and both transcripts were permitted to be filed together, and respondent failed to give written notice of entry of judgment and orders appealed from to appellant, as required by Code Civ. Proc. § 953d, motion to dismiss appeal on ground that transcript was not filed within time prescribed by Supreme Court Rule 1 was denied.

In Bank.

Appeal from Superior Court, Los Angeles County; L. T. Price and Elias V. Rosencranz, Judges.

Action by Mabel A. Ritter against Clyde E. Ritter. From an adverse judgment, defendant appeals. On plaintiff's motion to dismiss appeal. Denied.

Le Roy Reames and James R. Jaffray, both of Los Angeles, and John T. Houser, for appellant.

William E. Fox and Brooks Gifford, both of Pasadena, for respondent.

PRESTON, J. In this cause the motion to dismiss is denied as to each appeal. Little time need be consumed in furnishing reasons for this action.

The cause is one for divorce, wherein plaintiff had an interlocutory judgment as well as various orders in her favor for suit money, alimony, and for support of the minor children. The interlocutory decree was granted June 30, 1928. Later a motion for a new trial was denied. On September 19, 1928, notice of appeal therefrom was filed, and on November 16, 1928, a bill of exceptions to support said appeal was settled and filed. On this date, also, a second notice of appeal was filed, directed to certain of the above-mentioned orders or judgments for the payment of money. On December 26, 1928, and within the 40-day period allowed by this court for the filing of a transcript, appellant applied for, and on December 31, 1928, obtained, permission of this court to present both of said appeals in one transcript, and the filing of the transcript upon the first appeal was postponed until the incoming of the record on the second appeal. An additional pertinent fact is that at no time herein involved did respondent give to appellant written notice of the granting of said orders as required by section 953d of the Code of Civil Procedure.

[1] In this situation, respondent comes on December 27, 1928, with a notice of motion to dismiss both appeals upon the following grounds: (1) Failure to serve on the adverse party the notices of appeal; (2) failure to file a cost bond on said appeals; and (3) failure to file a transcript within the time prescribed by rule 1 of this court.

As to the first two grounds, we need but say that the omitted acts referred to were dispensed with almost a generation ago. The writer learned these facts to his sorrow as early as 1908. See *Estate of McPhee*, 154 Cal. 385, 97 P. 878.

[2] As to the third point, the transcript on the first appeal was by order of the court attached to the second appeal and as to the second appeal, as above noted, respondent has not complied with the above-mentioned provision of the Code of Civil Procedure requir-

ing written notice of the granting of said order. See *Griffin v. Kent* (Cal. Sup.) 274 P. 56, and *Attkisson v. Reynolds* (Cal. App.) 270 P. 686. Hence, for aught that appears here, proceedings may now be instituted to settle a record on appeal. Further discussion is unnecessary.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

208 Cal. 35

In re WINNE. (S. F. 13262.)

Supreme Court of California. Aug. 26, 1929.

Attorney and client  **37**—Contention that investigation of attorney's unprofessional acts was not authorized under law not in force when acts were committed held without merit (Code Civ. Proc. § 287; State Bar Act).

Investigation into the conduct of an attorney not being criminal but in nature of special proceeding to determine whether or not he has exercised privilege of franchise to practice law in conformity with statutes and ethics of legal profession and Code Civ. Proc. § 287, defining causes for which attorney may be disbarred or suspended, being in effect at time alleged unprofessional acts were committed, contention that investigation of alleged unprofessional acts could not be made under State Bar Act (St. 1927, p. 38), because act was not in force when alleged unprofessional acts were committed, was without merit.

In Bank.

Application for a review of an order of the Board of Governors of the State Bar of California recommending disbarment of Douglas Thompson Winne. Respondent suspended for one year.

The State Bar, through its Local Administrative Committee for the County of Fresno, for petitioner.

D. T. Winne and Gallaher & Jertberg, all of Fresno, for respondent.

PER CURIAM. The State Bar, through its local administrative committee for the county of Fresno, gave notice to Douglas Thompson Winne in the form of an order to show cause, that it would on May 23, 1928, at a certain time and place in the city of Fresno, investigate certain conduct as shown in three separate specifications on the part of said Winne as an attorney at law and a member of the State Bar, alleged to be in violation of his oath and duty as an attorney and counselor at law, involving moral turpitude, dishonesty, and corruption. The investigation took place as noticed with said Winne present thereat. After consideration of the evidence before it, the committee determined that it was insuffi-

cient to warrant any disciplinary recommendation on its part as to the first two specifications, and they may be dismissed from further consideration. The third specification was as follows: "That in a certain matter in which you [said Winne] acted as attorney for Marabelle Bandy, as administratrix of the estate of her deceased husband, No. 9493, Department No. 1, in the Superior Court of the state of California in and for the county of Fresno; and in which matter it is alleged that you altered, without legal right or authority, the inventory and appraisement in said estate by increasing the amount thereof by the sum of \$1,800.00; and in which matter it is alleged you collected attorney fees on such additional amount of \$1,800.00, which sum, it is alleged, as a matter of law you well knew was no part of said estate, and on which amount you had no legal right to collect any statutory attorney fees in said estate; and that you attempted to deceive the court in this regard."

As to this specification the committee found as follows:

"That said accused was, and for many years last past has been, an attorney and counselor at law, admitted to practice such profession in the state of California, and has practiced the same, and is now practicing the same in the city of Fresno, county of Fresno, state of California, and that said accused now is an active member of The State Bar of California;

"That said accused was the attorney for one Marabelle Bandy, as administratrix of the estate of her deceased husband, Robert Hasckel Bandy, which said estate was probated in the superior court of the state of California in and for the county of Fresno, No. 9493, Department No. 1, in the year 1927;

"That said accused, on behalf of said administratrix, filed a petition for letters of administration in the matter of said estate;

"That letters were thereafter duly issued to the said Marabelle Bandy;

"That an inventory and appraisement was issued in said matters and the same was prepared by the accused;

"That Charles A. Hill, one of the inheritance tax appraisers of the state of California in and for the county of Fresno, was by the said superior court appointed sole appraiser of said estate;

"That said accused listed and set out in typewriting in said inventory certain properties belonging to said estate and delivered said inventory to said Charles A. Hill, as such appraiser, for appraisement of said property so listed therein;

"That said appraiser appraised the said items of property so listed and set out in said inventory and returned said inventory, with his appraisement thereon of said property, to the accused for the accused to file

said inventory and appraisement with the county clerk of the county of Fresno, state of California, and said appraiser at the same time delivered to said accused a certificate that no inheritance tax was payable on said estate;

"That at the time said appraiser delivered said inventory and appraisement to said accused the same was completely typewritten;

"That thereafter said accused, in his own handwriting, in ink, added the following item to said inventory and appraisement:

" 'Life insurance.....\$1800.00,' and said accused altered in his own handwriting, in ink, in one place on said inventory and appraisement the total value of said estate as found by said Charles A. Hill, appraiser, to correspond with said item above quoted inserted in said inventory and appraisement by the said accused;

"That the recapitulation of the value of said estate as found by said appraiser, and appearing on the last page of said inventory and appraisement however, was not changed, but remained the same as fixed by the said appraiser;

"That pursuant to the understanding with the said appraiser, the oath of the administratrix was made after said appraisement had been made by said appraiser, and after the said inventory and appraisement had been returned to the accused by said appraiser, and the said oath is written in the handwriting of the accused in ink, except the printed portions thereof; (The committee attaches no misconduct to this irregularity with regard to the filling in, and taking of the oath by said administratrix, in said inventory and appraisement, as above stated);

"That the accused, after the said inventory and appraisement was returned to him by the said appraiser filed the same with the county clerk of the county of Fresno, state of California;

"That said committee is unable to determine whether the said alterations appearing in ink in the handwriting of said accused in inventory and appraisement, to which the committee attaches importance, were made before or after the filing of the same with said county clerk;

"That thereafter the said accused mailed to the said administratrix of said estate and the said administratrix received the same, a petition for final account and distribution of said estate, together with a letter addressed to said administratrix, itemizing the various properties of said estate, and included therein life insurance money in the sum of \$1800.00, and in said letter computed the attorney fees as owing to said accused based upon the statutory probate fees, and included, for the purpose of fixing the amount of said attorney fees in said computation the said sum of \$1800.00, and requested that said administratrix send her check to the accused for the

amount so found due as statutory attorney fees in the matter of said estate, including therein the amount of statutory attorney fees that would be allowed on said sum of \$1800.00;

"That said life insurance money above mentioned represented the proceeds of a life insurance policy held by the decedent in the State Life Insurance Company of Indiana in the amount of \$1000.00, with double indemnity in case of accidental death; that the sole beneficiary of said life insurance policy was Marabelle Bandy, wife of said decedent; that said decedent met with an accidental death, and said insurance company paid by check directly to the said Marabelle Bandy, said sole beneficiary under said policy, the double indemnity value of said insurance policy, less the sum of about \$200.00, which had been borrowed on said policy by decedent in his lifetime; that the said accused did nothing whatsoever concerning the collection or payment of said life insurance money by said company to said Marabelle Bandy;

"That the collection of said money and the payment thereof to said Marabelle Bandy was handled entirely by J. Wesley Tilton, local agent of said insurance company in Fresno, California;

"That the accused knew prior to the filing of said petition for letters of administration, and at all times thereafter during the course of the administration of said estate, and at the time said written demand for attorney fees, including the statutory attorney fees on the said sum of \$1800.00 was made to the said Marabelle Bandy, that said insurance policy was payable to the said Marabelle Bandy individually, and that the estate of said Robert Haskel Bandy, deceased, was in no manner interested or concerned with the same;

"That although accused prepared and mailed to the said Marabelle Bandy said petition for final account and distribution, including said \$1800.00 life insurance money above referred to as part of the assets of said estate, for her signature and verification, the same never was executed by said administratrix, and thereafter the accused filed a petition in said matter in said superior court for the entire estate to be set aside to the administratrix as the widow of said decedent under the provisions of section 1469 of the Code of Civil Procedure of the state of California, without filing an amended inventory and appraisement or changing in any manner the original inventory and appraisement, including said item of life insurance—\$1800.00—theretofore filed in said estate;

"That thereafter said accused appeared in court at the time of the hearing of said petition and obtained an order of court setting aside to said administratrix under said section 1469 of the Code of Civil Procedure of the state of California, as the widow of said

decendent, all of the property of said estate, without calling the attention of said court to said inventory and appraisal on file in the matter of said estate, which inventory and appraisal (including said item of life insurance—\$1800.00) totaled \$4082.00."

Said committee, as a conclusion from the above findings, determined that the accused was guilty of unprofessional conduct involving moral turpitude and recommended:

"That said accused, Douglas Thompson Winne, be disciplined by being suspended from the practice of law in the state of California and from practicing his profession in any of the courts of the state of California and from holding himself out to the public as an attorney and counselor licensed to practice law in the state of California, for the period of one year."

On September 14, 1928, the Board of Governors of the State Bar passed the following resolution:

"The respondent Douglas Thompson Winne having personally appeared before the Board of Governors and presented his oral argument in opposition to the committee's recommendation, be it

"Resolved, that the findings of the Local Administrative Committee for the county of Fresno be adopted as the findings of the Board of Governors and that the respondent Douglas Thompson Winne be and he is hereby suspended from the practice of the law in the state of California for the period of one year."

The record having been fully filed in this court by the Board of Governors on September 28, 1928, said Winne filed an unverified application for a review of the proceedings. Besides being unverified, it is also redundant in its reference to matters foreign to the particular matter under investigation by the local committee as shown by its findings, and contains no citation of evidence to support applicant's principal contention of a want of evidence to support the findings and determination of the local administrative committee. The applicant has filed no brief, but has offered for filing an "Argument" which may be characterized rather as a plea in extenuation or for leniency. The application suggests certain legal questions, the principal one being as to the constitutionality of the State Bar Act (St. 1927, p. 38), recently passed upon adversely to applicant's contention in State Bar, etc., v. Superior Court, etc. (Cal. Sup. L. A. No. 11141) 278 P. 432, decided May 31, 1929.

It is further contended, as the State Bar Act was not in effect at the time the alleged unprofessional acts were committed, that an investigation of them under the authority of the act is *ex post facto*. The investigation not being criminal, but in the nature of a special proceeding to determine whether or

not the applicant has exercised the privilege or franchise to practice law in conformity with the statutes and ethics of the legal profession, and section 287 of the Code of Civil Procedure, defining the causes for which an attorney may be disbarred or suspended, being in effect at the time of the alleged unprofessional acts, the contention is without merit. See *Cohen v. Wright*, 22 Cal. 293; *In re Vaughan*, 189 Cal. 496, 209 P. 353, 24 A. L. R. 858; *Reetz v. Michigan*, 188 U. S. 505, 23 S. Ct. 390, 47 L. Ed. 563; *Foster v. Police Com.*, 102 Cal. 483, 37 P. 763, 41 Am. St. Rep. 194; *Hawker v. State of New York*, 170 U. S. 189, 18 S. Ct. 573, 42 L. Ed. 1002.

Certain acts of the Board of Governors with relation to procedural matters are also complained of, but are without merit. The principal reliance of applicant is, and must be, upon his contention of insufficiency of evidence to warrant or justify the determination of the Board of Governors. Applicant has not complied with the rule which requires that his application "must fairly state all the material evidence relative to the point as to which such want of evidence is claimed to exist." The record has been carefully read and considered, and we think it amply supports the recommendations of the Board of Governors.

It is ordered, therefore, that Douglas Thompson Winne be suspended from all the rights and privileges of an attorney at law for the period of one year from and after the date of the filing of this order.

208 Cal. 57

In re GRAVES. (L. A. 11319.)★

Supreme Court of California. Aug. 27, 1929.

Rehearing Denied Sept. 26, 1929.

Attorney and client ⇄ 53(2)—Evidence in proceeding to disbar attorney held sufficient to justify recommendation for suspension from practice for six months for unprofessional conduct (State Bar Act).

In proceeding under State Bar Act (St. 1927, p. 38) to disbar attorney, evidence showing attorney attempted to collect attorney's fees from estate wherein he was one of duly appointed and qualified acting executors, and that attorney knowingly and willfully presented to court incorrect and false account for purpose of inducing court to approve same and attempting to mislead and deceive court, *held* sufficient to support recommendation that attorney be suspended from practice of law for six months.

In Bank.

Application for a review of an order of the Board of Governors of the State Bar of California recommending suspension of M. O. Graves from the practice of law. Respondent suspended for six months.

M. O. Graves, of Los Angeles, in pro. per.

A. W. Ashburn, of Los Angeles, for respondent.

PER CURIAM. This proceeding was instituted to review the order of the Board of Governors of the State Bar of California recommending to this court the suspension of petitioner for a period of six months from the practice of law in this state. A hearing in due form and upon legal notice of the charges preferred against petitioner was held before a local administrative committee of the State Bar, as provided by the State Bar Act (St. 1927, p. 38). This committee forwarded to the Bar Governors the evidence taken before it upon said hearing together with the recommendation that the petitioner be disbarred from the practice of law and that his name be stricken from the roll of attorneys of this state. At a regular meeting of said Board of Governors held on the 23d day of November, 1928, upon the evidence submitted by said committee, and upon said recommendation, said Board of Governors made its order recommending the suspension of petitioner from the practice of law in this state for the period of six months.

The charges preferred against petitioner were as follows:

"That you caused to be filed an account as co-executor in an estate matter in which account, you, said M. O. Graves, claimed full executor's fees for yourself and your co-executor, and also full fees allowed by law on account of the estate administrator to yourself, as attorney. The estate proceedings was entitled *The Estate of Stetson*, No. 78,805, on the records of the Superior Court of Los Angeles County.

"That you prepared the different accounts, and you knew at all times that an attorney could not charge a double fee as executor and attorney. That, after the account had been disallowed by the Court as attorney's fees, you nevertheless retained the item of \$743.45 which Judge Reeve had disallowed, and you never advised your co-executor—from whom you had received the money—that said item had been disallowed, nor did you advise the residuary legatee of such fact.

"That you deliberately and knowingly collected such fee as an attorney prior to the time when the account was settled and the item disallowed, and that you nevertheless failed to heed the Order of the Court, and wilfully and deliberately retained the money which you knew did not belong to you, and made no effort to return said money to either the co-executor or the residuary legatee who is entitled to it.

"All of the above acts took place in the City of Los Angeles, County of Los Angeles, State of California."

A brief statement of the evidence in support of said charges shows that during the time mentioned herein the petitioner, M. O.

Graves, was an attorney at law duly admitted to practice in all the courts of this state; that he prepared the last will and testament of Rebecca J. Stetson in which he and one Thomas McClement were named as executors thereof; that on the death of said testatrix petitioner acted as the attorney for the executors named in said will and as such filed said will for probate together with a petition for the appointment of himself and said McClement as executors; upon the admission of said will to probate and the granting of said petition, both petitioner and said McClement qualified as executors of said will, and as one of said executors petitioner signed with his coexecutor the notice to creditors and the inventory in said estate; the final account in said estate was signed by both petitioner and McClement as executors of said will, each of whom verified said account. Said account and the petition for distribution purported to be and were the account and petition of both of said executors, and, as we have said before, it was prepared by petitioner acting as the attorney of said executors; in this account the executors charged said estate with the full executors' fees, \$743.45, and also for full attorney's fees, in a like amount; said attorney's fees were designated in said account as having been paid to petitioner for his services as attorney in said estate. When this account and petition came on for hearing before Judge Sidney N. Reeve in the probate court of the county of Los Angeles, petitioner was sworn as a witness for the purpose of giving evidence in support of said account and petition. He testified that his coexecutor, Mr. McClement, was unable to be present at said hearing, and that he (petitioner) was familiar with all the facts set forth in the matter before the court. He then testified to the receipts and expenditures set forth in the account and that the same were correct. Judge Reeve called petitioner's attention to the two charges of \$743.45 each, one for executors' and the other for attorney's fees. Petitioner then stated that Mr. McClement only had qualified as executor of said will, and that he (McClement) had attended to all the executor's duties while he (petitioner) had acted as attorney for said executor; that he had simply signed the account and had never qualified as executor. Judge Reeve then examined the papers in the estate and found that these statements of petitioner were false. He informed petitioner of the result of his investigation of said papers, whereupon petitioner stated that he had forgotten that he had ever qualified as executor of said will. Judge Reeve thereupon disallowed the item of \$743.45, attorney's fees, and ordered distribution of the residue of the estate, including said sum of \$743.45, to the residuary legatee under the will of said testatrix. The testimony of Mr. McClement showed that he paid to Mr. Graves said sum of \$743.45 as his attorney's fees in the settlement of said estate.

It is not clear from the evidence whether this payment was made before or after the settlement of the final account and the entry of the decree of distribution. This sum of \$743.45 paid petitioner as attorney's fees was never repaid by him to his coexecutor, nor has it ever been paid to said residuary legatee. It appears from the evidence practically without conflict that through petitioner's direction, if not by him personally, a copy of the final account was sent to said residuary legatee, and a settlement and final payment made upon the statements and allegations contained therein, and that no decree of distribution was ever sent to said residuary legatee, nor was any settlement made with said residuary legatee upon the basis of any decree of distribution. It further appears from the evidence that Mr. McClement, petitioner's coexecutor, never knew of the disallowance by Judge Reeve of the item of attorney's fees until the time of the hearing before the committee appointed to take the evidence upon this proceeding against the petitioner. Mr. McClement further testified that petitioner had never paid back to him, nor had he paid to the residuary legatee, the amount received by petitioner as attorney's fees, and that, "He (petitioner) kept it so far as I know."

Petitioner offers certain evidence in explanation of the facts as set forth herein and in extenuation of his conduct in accepting and retaining said attorney's fees. He testified that immediately after the hearing before Judge Reeve, at which the attorney's fees were disallowed, he endeavored to see Judge Reeve and explain the matter to him personally, but that Judge Reeve was at the time a very sick man, and died a short time thereafter. Just what was to be the nature of his interview with Judge Reeve does not clearly appear from the evidence. It does appear, however, that Judge Reeve considered the matter to be exceedingly grave and serious, and that, on the day of the hearing, or soon thereafter, he wrote a lengthy communication to the Bar Association of Los Angeles County, in which he characterized petitioner's conduct on the hearing before him as most reprehensible, and calling upon the Bar Association to take action against petitioner. We are unable to perceive how an interview with Judge Reeve would have helped petitioner's situation, even if we assume the petitioner endeavored in good faith to secure such an interview.

The residuary legatee was the Monmouth College of Monmouth, Ill. There appears a reference in the briefs to a letter received by petitioner from the president of said college in which the latter expressed a willingness on the part of said institution, in view of the fact that both petitioner and Mr. McClement did the work necessary in the administration of the estate and that they had been advisers of Mrs. Stetson in matters for which they had not been compensated, to

waive any right the college had to money paid petitioner as attorney's fees in said estate. This letter was dated April 23, 1928, some months after the hearing before the committee of the Los Angeles Bar Association, at which practically all the facts herein were brought to light. It was written to petitioner evidently in answer to a letter written by petitioner to said college. Just what representations were made to the college that brought forth said letter from the president of said college we are not informed. The letter refers to the matter as "a technical error." Undoubtedly the information as to the nature of this "error" must have come from the petitioner himself. In view of the fact that the president of the college considered the matter as merely "a technical error," we can well understand his willingness to waive any right the college had to the money paid petitioner. We have grave doubts whether the college would have been so lenient with petitioner had it known the true facts of the case as recited herein. But even if, with a knowledge of all the facts, the officers of the college were willing to waive any rights the college had in the premises, that fact could not to any great extent militate in petitioner's favor. The failure to turn the money over to the college, the rightful owner thereof, is only one of the offenses of which the evidence shows the petitioner to be guilty. Before dismissing the subject of said letter, we wish to say that the committee of the California Bar recommended the disbarment of petitioner, but the Board of Bar Governors, in consideration of all the evidence, including said letter no doubt, mitigated the penalty to be meted out to petitioner by recommending his suspension only. In our opinion the petitioner has been given all the benefit to which he may be entitled by reason of the willingness of the Monmouth College to waive its rights to the money illegally paid petitioner as attorney's fees.

The evidence upon the whole, in our opinion, amply justifies the recommendation of the Bar Governors that petitioner be suspended from practice as an attorney at law for the period of six months. The evidence plainly shows that petitioner, both by his direct admissions before the committee and his conduct, while acting as a witness before Judge Reeve, was familiar with the law which would not permit him to receive attorney's fees in an estate wherein he was one of the duly appointed, qualified and acting executors. With this knowledge of the law, he included in the final account of said estate a charge both for full executors' fees and full attorney's fees for himself. This account he then caused his coexecutor to swear to and also swore to it himself, declaring under oath that it was true and correct. Upon his attention being called by Judge Reeve to this double charge, he evidently attempted to mislead the court by

representing that he had never qualified as executor. Judge Reeve confronted him with the papers in the case, prepared by himself, many of them signed and sworn to by him, and all of them bearing unmistakable evidence that he had qualified and acted as one of the executors from the inception of settlement of said estate to the final papers filed therein. He then made the lame excuse that he had forgotten the fact that he had qualified as one of the executors, or that that fact had slipped his mind. It is difficult for us to perceive how this excuse could have been offered in good faith when the evidence shows that the very document he was then testifying in support of, the final account, only a few days before had been prepared, signed, and sworn to by the petitioner. The above facts, we think, establish without any serious doubt that petitioner knowingly and willfully presented to the court an incorrect and false account and that for the purpose of inducing the court to approve the same, attempted to mislead and deceive the court by statements and representations which he must have known at the time he made them did not state the truth. In addition to the foregoing, it appears without contradiction that the only settlement which the petitioner, as an executor of the will of said decedent, has ever made with the residuary legatee of said estate, was made upon the false and untrue final account and not upon the final decree in said estate, with the result that petitioner had retained, and up to the time when this matter was heard before the committee of the State Bar still retained, the sum of \$743.45 which, according to said final decree, legally belonged to said residuary legatee. We are satisfied that the evidence in this proceeding against petitioner before the Board of Bar Governors was ample to justify the conclusion reached by said board and fully warranted their recommendation as to the penalty which should be meted out to the petitioner by reason of the offenses committed by him.

We therefore approve said recommendation, and hereby order that the petitioner herein, the said M. O. Graves, be and he is hereby suspended from the practice of law in this state for the period of six months from the date of the filing of this order.

207 Cal. 657

RAFFERTY v. CITY OF MARYSVILLE.
(Sac. 4209.)

Supreme Court of California. July 23, 1929.

1. Negligence $\S$ 1—Negligence is relative to time, place, and circumstances involved.

Negligence is relative to the time, place, and circumstances which bear on particular acts under investigation, and each case must depend on its own state of facts.

2. Appeal and error $\S$ 1002—Testimony respecting street lights at place of injury being in substantial conflict, testimony on behalf of plaintiff, not being inherently improbable, cannot be discredited on defendant's appeal.

Testimony as to light conditions at street intersection, where pedestrian fell and was injured because of alleged defective condition of sidewalk, being in substantial conflict, and there being nothing in the number, kind, and arrangement of lights having tendency to render inherently improbable testimony of witnesses who testified to insufficiency of light, their testimony could not be discredited by Supreme Court, on appeal from judgment for pedestrian.

3. Municipal corporations $\S$ 818(9)—Evidence that others had previously fallen because of alleged defective sidewalk held admissible in action against city for injury.

In action against city for injury to pedestrian, as result of fall caused by alleged defective condition of sidewalk, testimony showing that others had previously sustained similar accident at that place held admissible.

4. Municipal corporations $\S$ 819(6)—Evidence held to show city had notice of insufficiency of light and unusual drop from sidewalk to street level at place where pedestrian fell.

In action against city for injury to pedestrian, as result of fall caused by alleged defective condition of sidewalk, evidence, including city's acceptance of work from paving contractor, held to show that city had notice, actual and constructive, as to condition at place of injury, both as to insufficiency of light and the unusual distance from sidewalk to street level at curb.

5. Evidence $\S$ 14—Court notices that steps seldom, if ever, exceed 7 or 8 inches, and that public has become accustomed to approximately such distance.

Court may take notice of fact that steps or treads, whether in public places, or stairways in private residences, or on public sidewalks or other places built for pedestrian purposes, seldom, if ever, exceed 7 or 8 inches, and that the public has become accustomed to approximately such a distance.

6. Appeal and error $\S$ 169—Except in rare cases, Supreme Court will not consider points made by appellant for first time in that court.

Supreme Court will not, except in rare cases, consider points made by appellant for first time on appeal in that court.

7. Municipal corporations $\S$ 756—Statute making municipalities liable for injuries from defective streets held applicable to chartered city (St. 1923, c. 328, p. 675, § 2).

St. 1923, c. 328, p. 675, § 2, providing that counties, municipalities, and school districts shall be liable for injuries to persons and property resulting from dangerous or defective condition of public streets, highways, and other property, where governing board had knowledge or notice thereof, and failed or neglected for reasonable time after acquiring such knowledge or receiving such notice to remedy such condition, applies to a chartered city, where municipal affairs are concerned.

8. Statutes $\S$ 107(5)—Statute making municipalities liable for injuries from defective streets held not invalid, as containing two subjects (St. 1923, c. 328, p. 675, $\S$ 2; Const. art. 4, $\S$ 24).

St. 1923, c. 328, p. 675, $\S$ 2, providing that counties, municipalities, and school districts shall be liable for injuries to persons and property resulting from dangerous or defective condition of public streets, highways, and other property, where governing board had knowledge or notice thereof, and failed or neglected for reasonable time after acquiring such knowledge or receiving such notice to remedy such condition, held not invalid, as containing two subjects, contrary to Const. art. 4, $\S$ 24.

In Bank.

Appeal from Superior Court, Yuba County;
J. O. Moncur, Judge.

Action by Anna Rafferty against the City of Marysville. Judgment for plaintiff, and defendant appeals. Affirmed.

W. P. Rich and F. E. Carlin, both of Marysville, for appellant.

Wm. J. Locke, City Atty., of Alameda, Jess E. Stephens, City Atty., of Los Angeles, John J. O'Toole, City Atty., of San Francisco, Preston Higgins, City Atty., of Oakland, Hugh B. Bradford, City Atty., and Jos. L. Knowles, Asst. City Atty., both of Sacramento, Earl J. Sinclair, City Atty., of Berkeley, Archer Bowden, City Atty., of San Jose, J. LeRoy Johnson, City Atty., of Stockton, and Loren A. Butts, City Atty., of Fresno, amici curiæ.

Charles A. Wetmore, Jr., of San Francisco, and Ray Manwell, of Marysville, for respondent.

SEAWELL, J. Respondent was awarded by the court, sitting without a jury, a judgment against appellant, city of Marysville, in the sum of \$7,744 and costs of suit on account of personal injuries sustained by her as the result of a fall caused by a dangerous and defective condition of a sidewalk, which appellant caused to be constructed and maintained at the southwest corner of the intersection of Tenth and I streets. Said injuries were inflicted on the 1st day of May, 1926, and consisted of a fracture of the left ankle above the joint and in the joint, and also a fracture of the olecranon process of the left elbow. As a result of said fall, respondent was confined to her bed for a period of two months and suffered great pain. For several months immediately following the infliction of said injuries she was compelled to use two crutches, and has since been unable to walk, except with the aid of a crutch. Her injuries are permanent, and she will continue to suffer pain. The appeal which is taken from said judgment is supported by city attorneys representing nine municipalities of this state, who appear as amici curiæ.

The section of the city in which the cause

of action has its situs was a thinly settled outlying district, embracing the intersection of Tenth and I streets. I street, which extends in a northerly and southerly direction, is intersected by Tenth street, which extends in an easterly and westerly course. This intersection and contiguous territory was unimproved prior to October, 1924, at which time the city of Marysville entered into a contract with the Warren Construction Company for the paving of I street, from the north line of Ninth street to Fourteenth street. The contract provided that, whenever aprons or approaches from sidewalks were damaged in the construction of curbs, the contractor would be required to repair the same in a neat and workmanlike manner corresponding with the original apron or approach. The contract called for the construction of curbs and gutters along all of the streets to be improved, but did not provide for the construction of aprons or approaches extending from the top of curbs to the street at any of the intersections to be paved. Prior to said improvement the surface of the sidewalk and street at said intersection was composed of the natural soil, but an apron formed by pipes and other material covered over with dirt raised the street crossing to a level with the sidewalk. In other words, there was no step-down in crossing from the curb of the sidewalk to the street. The work, which was completed and accepted by the city in July, 1925, was left, as claimed by respondent, in a defective and dangerous condition, in that the level of the sidewalk at the southwesterly corner of said intersection sharply terminated, leaving a distance from the surface of the curb to the street level of 15 inches.

Respondent at the time of injury was a woman past 58 years of age and had resided in the city of Marysville for a number of years. She resided several blocks distant from said intersection, and was not especially familiar with that section. It has been and is the policy and practice of said city in its street improvement plans to construct aprons at street intersections in such manner as to bring the surface of sidewalks on a level with the surface of the streets, thus bridging gutters and eliminating step-downs. This system uniformly obtains in the thickly settled parts of the city, and the comparatively few intersections which are not aproned are found only in the remote and sparsely settled sections, where the improvements are not as complete and pretentious as in the business and important resident districts. No step-off, where the gutter is left open at the intersection, equals one-half the distance of the Tenth and I street intersection, the highest being but 6 inches in height. It must be held upon the case presented that the general plan of street construction, adopted and approved by long usage of said city, is the apron plan,

and where an exception is made, as in the instant case, the step-down is 6 inches, and not 15 inches, without an intervening step as the means of descent from an approach to the sidewalk.

The citizens had become accustomed to said plan of construction. The Legislature has removed from the consideration of the case all common-law and archaic obstacles that formerly stood in the way of a citizen recovering from a municipality damages for personal injuries suffered from dangerous and defective conditions of public streets, by adopting, in 1923, chapter 328, p. 675, Statutes and Amendments 1923, the following act from which we quote: "Section 2. Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property, in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

[1] Negligence is relative to the time, place, and circumstances which bear upon the particular acts under investigation. Each case must depend upon its own state of facts, and so varying are the factors which contribute to produce a result that no hard and fast rule may find practical application in the great majority of cases.

The respondent, who resided 9 or 10 blocks from the intersection, and her niece, left the former's residence at about the hour of 7:30 p. m., May 1, 1926, to visit a carnival which was being held under license privilege of the city of Marysville on the northwest corner of Tenth and I streets. Her course was northerly upon reaching I street. She crossed a number of street intersections in her course, and in every case the sidewalk was level with the street surface until she reached the southwesterly intersection of said Tenth and I streets. At this point the curb or edge of the sidewalk drops abruptly 15 inches to the street level. The carnival proper was located on the lot situate at the northwesterly corner of said intersection. A Ferris wheel and a merry-go-round were in operation on said lot, and these were lighted by electric lights. The corner was occupied by a "hot dog" stand, which used for illuminating purposes either a gasoline or coal oil torch or

flare. On the northeasterly corner a 100-candle power electric light globe was suspended from an arm of a pole at an elevation of 20 feet and 7 inches from the ground. The southeasterly corner was also occupied by a "hot dog" stand, and was similarly lighted as the other stand above described. There was no light on the southwesterly corner, nor upon the lot proper, except so much as may have been diffused from the lights above described. The 100-candle power electric light (6.6 amperage) was situated diagonally across the intersection at a distance of 97 feet from the point where the injury occurred, there being no light in the center of said intersection. The electrician called by appellant testified that such a light should light up an area of between 90 and 100 feet, and that the direct light would be directly under the lamp embracing a circle 20 feet in diameter, and the diffused light proportionately dimmed as the circle grew in circumference. This estimate would place the limit of the direct rays of the lamp quite a distance from the situs of the defective or dangerous spot in the sidewalk.

[2] The light that was diffused from the Ferris wheel, merry-go-round, and "hot dog" stands may, from ordinary experience in such matters, be set down as negligible. The testimony, however, as to the light conditions, is in sharp conflict. A number of witnesses called for the respondent—especially those who, like her, fell from the curb to the gutter in attempting to cross from the southwesterly corner to the northwesterly corner, where the Ferris wheel and merry-go-round were located—testified that the section was absolutely insufficiently lighted, while others testified that the light was sufficient to enable a person to see the step-off, and that the light was generally sufficient for all reasonable purposes. The conflict is substantial. There being nothing in the number, kind, and arrangement of the lights which has a tendency to render inherently improbable the testimony of the witnesses who testified to the insufficiency of light, their testimony cannot be discredited by us.

The respondent, who was familiar with the apron system which prevailed in the city of her residence, and had walked many blocks with her niece across streets on which the street and curb were uniformly on a level, arrived at the place of amusement about 8 o'clock p. m. Her niece, who preceded her in attempting to cross over to the carnival corner, almost fell as she stepped from the sidewalk. She attempted to forewarn respondent of the step-off, but before she was able to do so respondent, in attempting to go forward, presuming on the continuation of the sidewalk level, was thrown precipitously to the gutter, and sustained the injuries herein described.

[3] During the carnival week three or four

other persons, residents of the city, were thrown from their feet in attempting to cross at the point in question. Joseph N. Whyler, collector for the Appeal-Democrat, was walking arm in arm with his wife, and, as he describes the circumstances, "all of a sudden we stepped off" and his wife fell to her knees. He stated, further, that the corner was dark. Mrs. May Prindiville also suffered a similar experience. She also testified that the lights did not illuminate said corner. Clarence Dempsey, clerk of the court that tried the action, testified: "I was walking along, and saw the carnival across on the lot, * * * and as I came to the sidewalk end to go into the street I stepped down there, and it was deeper than I expected and I—well, I fell, is what I did; didn't sustain any injuries." His testimony as to the condition of lights at the corner was that it was "shadowy." The step-off could be seen, but "you couldn't see to tell it was as deep as it was." The authorities justifying the admission of this class of evidence are collated in 10 Cal. Jur. 827. See, also, the recent case of Gorman v. County of Sacramento (Cal. App.) 268 P. 1083.

[4] There can be no doubt as to the city having had notice, actual and constructive, as to the condition of the locus in quo, both as to the insufficiency of light and the unusual distance from the sidewalk to the gutter level. It may be stated here that this is not a case, such as is considered in many of the cases cited by appellant, where the improvements, being proper in the first instance, became dangerous from use or decay. It is a case rather where the work was improperly constructed in the first instance, and was rendered more dangerous by the lack of street illumination. It is the admitted fact that the mayor of the city, who was also chairman of the committee on streets and roads, was personally notified by Mrs. Edith Thorsen, who resided on I street, very near the point in question, at the time the work was completed in 1925, that the street was, in her opinion, left in a dangerous condition to pedestrians. Her protest was not heeded. For the second time, just as soon as she learned that the carnival was to be located at the northwesterly corner of Tenth and I streets, she visited the mayor and the chief of police, and again notified both that she regarded the situation as dangerous to pedestrians. This question, however, is further conclusively put to rest by the fact that the city accepted the work, and, of course, it will be held to have had notice of the existing condition.

[5] No case has been cited where the distance of the tread from sidewalk to street or from tread to tread in any kind of traffic lane was as great as 15 inches. No one would expect that a step-off of such a distance would be placed at the end of a paved sidewalk or public place without a sign or warning, or

without being given the chance of observing it by the use of the sense of sight. That she exercised the care that was exercised by four or five other persons, presumed to be normal, there is no room for doubt. Her testimony as to the manner of her approach is in accord with the conduct of the average person under similar circumstances, and does not in any wise depart from what should be expected of the average, reasonable, prudent person. Had the electric globe been suspended from a point at the center of the street, instead of the furthestmost corner, it may have shed sufficient light to have enabled persons to have better seen the step-off, or at least judged of its depth. We think we may well take notice of the fact that steps or treads, whether in public places, or stairways in private residences, or upon public sidewalks or other places built for pedestrian purposes, seldom, if ever, exceed 7 or 8 inches, and the public has become accustomed to approximately such a distance. A misjudgment by the fraction of an inch is sufficient to disturb the physical equilibrium.

The trial court found that a dangerous and defective condition continuously existed at said intersection, by reason of the construction as herein described, since its completion and acceptance by the city July 28, 1925, and that the said city had timely notice thereof; that all street intersections between the said intersection and respondent's residence were provided with aprons extending from the end of the sidewalk to the level of the pavement of the street for the protection of pedestrians; that the street light was insufficient to light up said crossing, and thereby apprise respondent of the abrupt step-off, nor was there any sign or warning calculated to apprise her of the fact that said abrupt and precipitous step-off existed at said street crossing. The allegations of appellant's answer as to contributory negligence on the part of respondent are fully disposed of by the findings.

The fundamental principles that a municipality reserves the right to change its street improvement system or program when it is reasonably wise to do so, and that it may ordinarily exercise the powers claimed for it by the appellant and amici curiæ under the constitutional, statutory, or inherent powers which are given it, free from the risk of being mulcted in damages for so doing, may, as a general proposition, be admitted. We are not here dealing with those fundamental principles of law, but have considered the case in the light of the facts upon which it is presented.

[6, 7] Amicus curiæ the city of Sacramento has raised two questions in its brief that were not raised by the appellant at the trial or upon its brief on appeal. While it is the rule that this court will not, except in rare cases, consider points made by an appellant

for the first time upon appeal in this court, we will, nevertheless, state said points, which are as follows: (1) The statute of 1923 does not apply to a chartered city where municipal affairs are concerned; (2) that the act of 1923 is unconstitutional. If the first point is good, the application of the statute would be indeed limited, as most, if not all, of the important cities of the state in which such damages are sought to be compensated occur in chartered cities. As a foreword, not intended to bind ourselves, should the point be regularly raised in the future, we are of the view that it would be an anomalous situation, which would bring about a legal embarrassment, should we be compelled to hold that a city may avoid the force of a general statute by placing the conclusion upon the doctrine that a city is independent of general laws upon municipal affairs. The question of the safety of public works seems, so far as we are presently advised to be a matter of state concern, and the obligation of a city to make its highways reasonably safe for general use cannot be chartered away, even though a municipality should attempt to do so. Said act of 1923 is inconsistent with such a conclusion.

[8] The further objection is that the act of 1923 is invalid, for the reason that it contains two subjects, contrary to the provisions of article 4, § 24, state Constitution. We have considered both objections, but have not been convinced that either ground of objection should prevail, even had they been urged at the proper time. The act has been before the District Court of Appeal in *Gorman v. County of Sacramento* (Cal. App.) 268 P. 1083; *Huff v. School District* (Cal. App.) 267 P. 918; *Dawson v. School District* (Cal. App.) 276 P. 424, and in none of those cases was the constitutionality of the act questioned. It is not necessary to pursue the subject further.

Judgment affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.

208 Cal. 77

In re GRIVEL'S ESTATE. ★

GRIVEL v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY et al.

(L. A. 11340.)

Supreme Court of California. Aug. 30, 1929.

Rehearing Denied Sept. 26, 1929.

1. Executors and administrators ⇨509(4)—Disqualification of judge, because previously appearing as counsel for party, held sufficient ground for proceeding to annul order approving administrator's account (Code Civ. Proc. § 170, subd. 3; § 473).

Disqualification of superior judge, under Code Civ. Proc. § 170, subd. 3, disqualifying

judge who had previously appeared as attorney or counsel for either party, held sufficient ground for proceeding under section 473 to vacate and annul order settling and approving administrator's account, on ground of mistake, inadvertence, surprise, or excusable neglect.

2. Executors and administrators ⇨509(9)—Order annulling order approving administrator's account, where motion was lodged within six months and matter was specifically brought to court's attention, held valid.

Where motion to annul order settling and approving administrator's account was lodged with clerk before expiration of six-months period, and matter was specifically brought to attention of judge, who appointed a day for hearing subsequent to expiration of six-months period, and nothing appeared showing motion was not brought directly to attention of court, order of annulment held valid, since, unless it appears from face of proceeding that application for relief was not made within six months, order of annulment cannot be declared void.

3. Executors and administrators ⇨509(6)—Mere filing with clerk, within six months, of intention after expiration of prescribed period to move to annul order approving administrator's account, is not sufficient.

Mere filing with clerk, within six-months period, of notice of intention to make motion to set aside order approving administrator's account on day subsequent to expiration of six-months period, is not sufficient, since, to constitute application, action of court must be invoked in some appropriate manner before expiration of prescribed period.

4. Executors and administrators ⇨509(5)—Application to annul order approving administrator's account, made within prescribed period, though filed on last day, is sufficient.

Where application to set aside order settling and approving administrator's account is made before expiration of prescribed six-months period, even though it be made on last day of period and before notice to adverse party is or could be given, motion is nevertheless sufficient.

In Bank.

Application for certiorari by Leon R. Grivel, administrator of the estate of Rene Grivel, deceased, to review an order of the Superior Court in and for the County of Imperial, and by Vaughn N. Thompson, Judge presiding in Department thereof, annulling order annulling previous order settling and approving administrator's account. Order annulled.

Edgar T. Fee and Franklin J. Cole, both of Los Angeles, for petitioner.

Muhleman, Anderson & Palmer, of Los Angeles, and Jas. W. Glassford, of El Centro, for respondents.

PRESTON, J. In the above-entitled cause the order of the superior court of the state of California in and for the county of Imperial, given and made on the 24th day of January, 1929, purporting to annul the order of said court given and made on the 28th day of

November, 1927, is itself hereby annulled. A consideration of the following will reveal the basis for this holding:

In the above-mentioned estate, Charles T. Wardlaw, administrator with the will annexed, pursuant to an order to show cause made therein, presented to the court his account and report as such officer, and issues were made thereon by the written objections of Thirza Bass, guardian of the minor heirs of said decedent. In said cause, said account, together with the objections thereto, was heard by Hon. M. W. Conkling, judge sitting in department 1 of said court. The account was approved by an order given and made by him on December 31, 1926.

It appears that said Judge Conkling, prior to his elevation to the bench, had been the attorney for one Barnes, a partner of decedent, in suit No. 4677 on the records of said court, wherein decedent was plaintiff and said Barnes was defendant; that, upon the death of said Rene Grivel, the said Charles T. Wardlaw, as administrator of his estate, was substituted as plaintiff in said action, which was at all times herein pending and related to and involved property claimed as assets of said estate; and that the proceedings in said cause were introduced in evidence and considered by the court in the making of the said order of December 31, 1926.

Thereafter, but within six months, the said guardian filed in said court a document entitled "Motion and Petition to Vacate and Set Aside Order and Judgment Settling and Approving Account of Said Administrator dated December 31, 1926," to which document were attached copies of the pleadings and other proceedings in said cause No. 4677. This petition alleged the disqualification of said judge upon the grounds above stated and the consequent invalidity of the order so made by him. Lack of knowledge previous to June 11, 1927, of said disqualification was also set up. The introductory portion of said motion and petition contained the words: " * * * Petitioner and plaintiff herein * * * respectfully moves and petitions the above-entitled court to vacate, set aside, and annul the judgment and order. * * * " Upon the presentation and filing of these documents, the judge of said court within said period made the following order: "Good cause having been shown, it is ordered that time be shortened, and that this motion be set for hearing on Friday, July 15, 1927. A. C. Finney, Judge of the Superior Court." Whereupon the moving party gave notice that on the day fixed the motion would be made upon this showing and upon the records and files of said cause, said notice containing also a restatement of the grounds of said motion.

Presumably the motion was made upon the day fixed by said court, or upon some subsequent day to which the hearing was regularly postponed, and the proceeding resulted in an

order given and made on November 28, 1927, vacating and annulling said order of December 31, 1926.

Matters remained in this state until January 11, 1929, upon which date John R. Wardlaw, administrator of the estate of Charles T. Wardlaw, deceased, moved the court for an order annulling said order of November 28, 1927, and restoring vitality to the order of December 31, 1926, upon the ground that said order of November 28, 1927, was void on the face of the proceedings. This application was thereafter submitted to the court and on January 24, 1929, Hon. V. N. Thompson, the judge presiding, made an order granting said motion. Thus came into being the order here sought to be annulled.

Thereafter, and on February 16, 1929, Leon R. Grivel, the then administrator of the estate of said decedent, Rene Grivel, filed herein his petition for a writ of review, seeking the annulment of said last-mentioned order of January 24, 1929, as having been given and made in excess of the jurisdiction of the court. On March 12, 1929, the writ of review issued and on March 25, 1929, the said superior court made its return thereto and filed same herein, from which we have gleaned the above facts.

The proper conclusion as to the validity of the order under review will be made manifest, when we establish the validity or invalidity of said order of November 28, 1927.

[1] The disqualification of said judge, under section 170, subdivision 3, of the Code of Civil Procedure, was sufficient ground for a proceeding under section 473 of the Code of Civil Procedure, to vacate and annul the order of December 31, 1926, upon the ground of mistake, inadvertence, surprise or excusable neglect.

[2] The only material point in dispute is this: Did the moving party make an application for relief within a reasonable time, and in this case was it made within six months from the entry of the order in question? Unless we can see from the face of the proceedings that this was not done, said order of annulment cannot be declared void. The motion was lodged with the clerk before the expiration of the six-months period. The matter was specifically brought to the attention of the judge, and upon the showing made the judge fixed a day for hearing of the motion, which day was subsequent to the expiration of said period. Everything appearing confirms rather than disproves the making of the application to the court itself for relief. Nothing appears upon which to question in any wise the fact that the motion was brought directly to the attention of the court and its action thereon invoked. This being conceded, the invalidity of said order of annulment is not shown, but, on the contrary, its full validity upon an attack of this character is manifest.

[3, 4] Precedent for this holding exists in abundance. Of course, it is settled that the mere filing with the clerk within the six-months period of a notice of intention to make such a motion on a day subsequent to expiration of the period is not sufficient. To constitute an application, the action of the court must be invoked in some appropriate manner before the expiration of the prescribed period. *Bell v. Krauss*, 169 Cal. 387, 391, 146 P. 874; *In re Morehouse*, 176 Cal. 634, 169 P. 365; *In re Yoder*, 199 Cal. 699, 702, 251 P. 205. But, when this is done even though it be done on the last day of the period, and before notice to the adverse party is or could be given, it is nevertheless sufficient. *Brownell v. Superior Court*, 157 Cal. 703, 709, 710, 109 P. 91.

In this case, as above pointed out, nothing is shown to warrant the conclusion that the party did not appear and move the court for the relief sought. On the contrary, all existing evidence tends to confirm the conclusion that it was done. This observation brings the case squarely within the holding of this court in *In re Yoder*, supra, wherein, at page 702 of 199 Cal. (251 P. 206), it is said: "Though the petition did not come on for hearing until after the expiration of the six-months period, there is nothing in the record herein to indicate that said petition was not brought to the attention of the court below prior to the expiration of said six-months limitation. The 'petition and motion' having been filed within said period and no showing having been made that the matter was not called to the attention of the lower court prior to the expiration of said period, it will be presumed that the application was seasonably made."

The order of November 28, 1927, being valid and being sufficient to annul the order of December 31, 1926, it follows as of course that the order here under review purporting to annul the order of November 28, 1927, and revive the order of December 31, 1926, is void; hence the conclusion above announced.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.

208 Cal. 42

In re PETERSEN. (S. F. 13225.) *

Supreme Court of California. Aug. 27, 1929.

Rehearing Denied Sept. 26, 1929.

1. Attorney and client ⇨31—Resolution of Board of Governors of State Bar recommending disbarment is not final (State Bar Act, § 26).

Action of Board of Governors of State Bar in recommending disbarment is not a final proceeding, but power of disbarment rests finally and solely with Supreme Court under State Bar Act, § 26 (St. 1927, p. 41).

2. Constitutional law ⇨306—Disbarment proceedings do not deny due process, in view of notice and hearing, and final determination thereof in Supreme Court (State Bar Act, § 26).

Proceeding for disbarment of attorney under State Bar Act (St. 1927, p. 38) does not deny due process, since power of disbarment rests finally and solely with Supreme Court under section 26 (page 41), and notice and hearing are provided for.

3. Attorney and client ⇨53(1)—Attorney in disbarment proceedings should receive benefit of every favorable intendment and of proof of good character and reputation.

In disbarment proceedings, accused attorney is entitled to every favorable intendment and inference in his favor, and to benefit of such proof of good character and reputation as he is able to make, in view of attendant degradation and probable effects upon livelihood.

4. Attorney and client ⇨53(2)—Finding as to attorney's guilt of subornation of perjury held not sufficiently supported by evidence in proceedings for disbarment.

In disbarment proceedings, evidence held insufficient to sustain finding that accused attorney had been guilty of subornation of perjury in connection with defense of one charged with statutory rape, by advising false swearing as to age of girl for purpose of securing marriage license.

5. Attorney and client ⇨58—Attorney's alteration and use of proceeds of debtor's check given him by creditor as his client, and procurement of client's affidavit to complaint against debtor denying part payment, warranted suspension for one year (State Bar Act, § 26).

Where creditor turned over to his attorney check for part of amount due marked, "Paid in full," with instructions not to do anything with it to hurt the case, attorney in striking out the words "in full," and depositing the check and using the proceeds thereof for his own purposes, and thereafter causing his client to swear to complaint in which no credit was given for part payment, was guilty of misconduct warranting suspension for one year; burden being cast on attorney to show that decision of Board of Governors recommending disbarment was erroneous or unlawful under State Bar Act, § 26 (St. 1927, p. 41).

In Bank.

Proceedings by the Board of Governors of the State Bar, on the recommendation of the local administrative committee, for the disbarment of Cedric W. Petersen. The Board of Governors recommended disbarment, and the attorney petitions for review. Action of Board of Governors approved in part, and attorney suspended for one year.

Lillick, Olson & Graham, of San Francisco (Joseph J. Geary, of San Francisco, of counsel), for petitioner.

Matt. I. Sullivan, Sullivan & Sullivan, and Theo. J. Roche, all of San Francisco,

Leon A. Clark, of Oakland, Joseph J. Webb, of San Francisco, and Thomas C. Ridgway, of Los Angeles, for respondents.

PER CURIAM. On February 20, 1928, Amelia J. Rodrick, by her guardian ad litem, John Rodrick, filed with the State Bar of California her verified complaint against Cedric W. Petersen, a member of the State Bar, charging him with misconduct involving moral turpitude, constituting a ground for disbarment. Petersen was directly charged with subornation of perjury, and with compounding a felony in bringing about the marriage of the complainant with one Erasmus J. Silveria, who had been held to answer before the superior court upon a charge of statutory rape alleged to have been committed upon Amelia, in which Petersen was Silveria's attorney; one trial having been had in which the jury disagreed. Proceedings were inaugurated by the local administrative committee of Alameda county, to which the complaint was referred for hearing and action, by the issuance of an order to show cause directed to Petersen, and protracted hearings and the taking of much evidence followed. The committee duly filed its findings and conclusions. It found that Petersen was not guilty of compounding a felony, but held that the subornation of perjury charge had been proved, in that Petersen had advised Amelia J. Rodrick and her parents to swear that Amelia was of the age of 16 years, for the purpose of securing a marriage license to marry Silveria, when in truth and in fact he knew she was but 14 years of age.

Hilding G. Brelín also presented to the State Bar a complaint charging Petersen with misconduct as an attorney at law involving moral turpitude in the alleged unauthorized alteration, collection of, and use by Petersen of the proceeds of a check for \$280, signed by Mrs. John F. Borden, made payable to Brelín, and turned over to Petersen by Brelín to do with as he chose, provided it did not interfere with a claim of \$720 against Mrs. Borden, for which an action was about to be instituted. By an amendment, Petersen was further charged with making false affidavits in verifying a complaint and to secure an attachment in the action.

The Rodrick and Brelín matters were, by stipulation, consolidated for hearing, and in the Brelín matter the committee made findings, in practical effect, that Petersen had been guilty of a misappropriation of funds belonging to Brelín.

The recommendation of the local administrative committee to the Board of Governors was that Cedric W. Petersen be disbarred. After a further hearing of oral argument on behalf of Petersen and the filing of certain documentary evidence, the Board of Governors adopted as its findings the findings of the local administrative committee, in both cases,

and by formal resolution recommended Petersen's disbarment. Within the prescribed time, Petersen petitioned this court to review the decision of the board.

The petitioner claims that:

1. The State Bar Act is unconstitutional and void;

2. The petitioner is deprived of a valuable property right without due process of law;

3. The facts, as disclosed by the evidence, do not support the resolution of disbarment.

The first of these contentions may be dismissed, it having been decided in *State Bar of California v. Superior Court* (Cal. Sup.) 278 P. 432, and in *Re Cate* (Cal. Sup.) 279 P. 131, that the State Bar Act is constitutional.

[1, 2] The second contention, that if the present disbarment proceeding be allowed to remain in force the petitioner will be deprived of liberty and a valuable property right without due process of law, is based upon the assumption that the action of the Board of Governors is a final proceeding. That is not so. By section 26 of the State Bar Act (St. 1927, p. 41), the power of disbarment rests finally and solely with this court. In *re Shattuck* (Cal. Sup.) 279 P. 998. Nor does a proceeding under the State Bar Act deprive any one of property or right without due process of law, since notice and hearing are provided for, and a hearing is given in the court of last resort. In *re Bruen*, 102 Wash. 472, 172 P. 1152.

As to the third point made by the petitioner, the alleged insufficiency of the evidence to support the resolution of disbarment, this court will treat the findings of the Board of Governors as special findings of an intermediary agency, in order that our review may extend to the determination of the sufficiency of the facts to support them, and whether or not the findings, in turn, support the recommendation of the board. In *re Shattuck*, supra.

Directing our attention first to finding No. V in the Rodrick Case, it is as follows: "That at each and all of the times hereinabove referred to, wherein said Cedric W. Petersen, said accused, directed and instructed the complainant, and her said father and mother to swear upon the application for said marriage license that said Amelia J. Rodrick was of the age of sixteen years, as hereinbefore set forth, he did so wilfully, and with the desire and intent to procure a marriage license for said Amelia J. Rodrick and Erasmus J. Silveria, and with the wilful design and intent of procuring said Amelia J. Rodrick to commit perjury."

The salient facts leading up to the Rodrick charge are as follows: Erasmus J. Silveria, a youth of about 19, had been charged with statutory rape alleged to have been committed upon Amelia J. Rodrick at the ranch home of her parents near Livermore some time during

December, 1926, and January, 1927. The Rodricks (or Rodriguez) and the Silverias were neighboring farmers, living about three miles apart. The two families were of Portuguese descent, the older members talking and understanding the English language but imperfectly. The Silverias were in much more comfortable circumstances than the Rodricks and had a more pretentious home than the Rodricks, who lived in a small ranch house occupied by several people. Young Silveria had lived with the Rodricks for some time, enticed there, as the Silverias believed, by the Rodricks, and against his parents' desires. The Silverias were old clients of Petersen and he had, at one time, also rendered professional services for the Rodricks. The Silverias asked Petersen to represent their son on the charge of rape. Upon his advice, Livermore attorneys were engaged to appear at the preliminary hearing in the justice court of that town. Young Silveria was held to answer before the superior court. Petersen conducted the superior court trial, and the jury disagreed. Judge Leon Gray of the superior court of Alameda county, who presided at the trial of young Silveria, furnishes something of the atmosphere of the situation. He testified in the present proceeding that "the attitude of the Rodricks all the way through was to do everything in their power to encourage" marriage, and "threw the children together as much as possible"; "that the Silverias thought they were a little better and that it would be a mesalliance, and they did everything in their power to stop it," and finally succeeded in taking the boy home, not by force but really by "coercion" and against his desire. "It was very clear from the attitude of the Rodricks," testified Judge Gray, "that the rape case was designed to force the marriage." After Erasmus was taken home by his parents, the charge of statutory rape was made against him by the Rodricks, and it was apparently broadcast about Livermore that Amelia was pregnant. This, however, it appears, was not a fact. The effect of this gossip in the community will be appreciated. In the superior court, the sole testimony as to the age of Amelia was that of the Rodricks. They testified that she was under 14 years of age at the time of the occurrences. The only testimony as to rape was that of Amelia herself. Petersen's defense was that Amelia was of statutory age, as he claims he believed. He seems to have consistently believed, at all the times here involved, that the Rodricks were lying as to Amelia's age; and claims that the physical appearance and sophistication of Amelia strongly indicated otherwise. Nothing authentic as to the girl's age appeared until the production of a baptismal certificate during this investigation, which must be accepted as prima facie evidence of its recital that she was born in 1913. Until this record was found, Petersen's efforts to establish

Amelia's age by search of records had been fruitless and the question of age seems to have been unsettled all through the proceedings complained of, and there is testimony from which Petersen was entitled to draw inferences that Amelia's parents were adjusting her age for purposes of their own. A material fact, though, is that Petersen seems to have sincerely believed that Amelia was 16 years of age, and that Rodrick, the father, had told him she was 16, raising an inference that the Rodricks had lied about the matter. Within two days after the termination of the first trial, Deputy District Attorney Chamberlain, in charge of the prosecution of Silveria, was approached by the girl's parents to ascertain his attitude toward a marriage of the young people. It was stated to him that the Silverias had come to them, the Rodricks, and were then willing that their boy should marry Amelia. Petersen was not present at this interview and had no knowledge of it until the deputy district attorney testified to it at the hearing in the matter. Mrs. Rodrick denied having had such an interview with Chamberlain.

The prospects of a second trial appear to have been greatly upsetting to the Silverias. It had been developed during the trial that the young people were really in love with each other, irrespective of the bitter feeling of their parents, and Petersen arranged to have the Rodricks call at his office to ascertain if this feeling still existed, and, if it did, then to suggest marriage as the proper solution, which, provided there was no legal obstacle, seems to be an eminently proper thing to do in such a case. Petersen claims that he was then still under the belief that Amelia was, in reality, 16, and not 14, as her parents had testified. Counsel for the State Bar, in answer to Petersen's claim in this regard, cite the facts established by the record that at, or about, the time the matter of a dismissal of the charge against Silveria was pending, Petersen endeavored to find out from the office of the county clerk of Alameda county if "there was any way a marriage license could be procured for a person if there was a doubt if she was under sixteen years of age." The real issue here, however, seems to rest upon what Petersen is alleged to have said to the Rodricks in relation to securing a marriage license, having the young people married and the case dismissed. The subornation of perjury charge rests upon the story of the Rodricks and the two corroborating witnesses concerning the use of the word "sixteen" by Petersen.

The evidence given by Amelia and her parents, and which was sought to be corroborated by two witnesses, Himes and Mrs. Philbrook, was to the effect that, in his private office, again in his outer office or reception room in the presence of Himes, and again on the following Saturday when all the interested

parties had come together to secure a marriage license, Petersen had told the Rodricks "to say that Amelia was sixteen years of age." Petersen denies having used the phrase testified to upon any of the occasions testified to. He is corroborated as to the first meeting by his stenographer, who was placed purposely to overhear the conversation with the Rodricks in his private office, and by Alice Boylan, who occupied desk room in the outer or reception office where the Rodricks and Himes claim the statement was to "be sure to say sixteen." Each testified they heard no such statement. The Rodricks' corroborating witness, Himes, a fur trapper occupying, rent free, a shack on the Rodrick place, was admittedly under obligations to them, and very friendly. He admitted having talked the matter over on several occasions with the Rodricks, and accompanied them to Petersen's office on the first visit, remaining in the outer office. He attempted to make it plain that he was testifying, not from what he had discussed with the Rodricks, but that he had made a note on a piece of paper of what occurred which was in a trunk somewhere and was not produced. His reasons for making the memorandum somewhat tax our credulity, but it is, nevertheless, very significant that, when held down to the facts, he finally testified as follows:

"Q. What did Mr. Petersen say about the girl being sixteen? A. He just simply said she had to be sixteen in order for them to get married.

"Q. Who did he say that to? A. In front of Mr. Rodrick, Mrs. Rodrick and the girl Amelia Rodrick at that time.

"Q. And yourself? A. Yes, sir."

The other corroborating witness of the Rodricks' story was Mrs. Philbrook, who testified as to what she claimed to have overheard on Saturday morning, and as to what she claims to have said. She testified that she was an ordained minister of the Eternal Truth Church, and therefore familiar with the requirements of the marriage law. She had attended the criminal trial throughout, and had heard the testimony as to Amelia's age, yet she was present to be a witness of the marriage for the Rodricks, knowing it to be unlawful. When questioned as why she acted as a witness to an illegal marriage, she replied: "It was none of my business." Mr. and Mrs. Silveria and Erasmus, who were admittedly present and a part of the group, testified they did not hear Petersen make any such statement as the Rodricks claim he made. They were not impeached, and the intendments are as strong in their favor as in favor of the others testifying in the matter. It would lengthen too much this consideration to attempt to go into detail and point out what appear to us to be the many weaknesses, inconsistencies, and apparent contradictions of the Rodricks' testimony, and that of Himes

and Mrs. Philbrook; but a fair reading of it leads to the conclusion that the finding above set out of the local administrative committee, approved by the Board of Governors of the State Bar, is not sufficiently supported by such clear and convincing evidence, free from doubt, as should be required in such a case. Petersen was acting with the knowledge of the trial judge and the deputy district attorney, but without promises of any sort on their part. The license was obtained, and Erasmus and Amelia were married. When the motion was made to dismiss the charge against Erasmus, Judge Gray called in the official reporter and conducted an examination of the parties to establish that a voluntary marriage had been entered into, and then dismissed the case.

When the two families reached the street after the dismissal of the case, the intense feeling between them flared up because of the insistence of the Rodricks that the young people make their home with them, the Silverias insisting that it be made with them. The discussion became so animated as to create a street scene. It was finally arranged that young Silveria should drive his parents home, as neither could drive the automobile, Amelia and her father accompanying them. When they arrived at the Silveria home, Rodrick refused to allow his daughter to remain there with her husband. Erasmus did remain there. Amelia returned to the Rodrick home. Neither thereafter left their respective homes, and have not lived together since. Mrs. Rodrick made further efforts to have the rape charge renewed. The Silverias provided and furnished a room for the young people and asked Amelia to live there, but she refused. Rodrick testified that he was willing "to furnish a house, groceries, grub for thirty days or sixty days or until he ever get a job, get the credit in the store." After a time the Silverias went to Petersen for advice, and he advised them properly that a wife must conform to a reasonable mode of living provided by the husband, and he wrote a letter to that effect to Amelia, which was signed by Erasmus. An answer to it seems to have been prepared by an attorney named Wilson. Several weeks passed, during which Erasmus received a letter from Amelia saying she would do anything he wished, and to come and get her. Another letter was dictated by Petersen, signed by Erasmus, and sent to Amelia, in which Erasmus reiterated his desire that Amelia come and live with him and that he would be glad to show her what arrangements had been made. Copies of these letters are set forth in the copy of the affidavit of Erasmus Silveria attached to Petersen's answer in these proceedings. No response was ever received to the last letter, and Rodrick engaged an attorney to bring an action against young Silveria for maintenance, with motions for alimony, attorney's fees and

costs. This came on for hearing, and Petersen filed an affidavit therein, prepared by himself and sworn to by Silveria, wherein it was stated, Petersen claims by inadvertence, that Amelia was but 14 years of age, quite contrary to Petersen's contention and what the Rodricks had sworn to in securing a marriage license. The making of this statement is cited here as a damning admission on the part of Petersen that he knew all the time that Amelia was 14. When the preliminary motion for alimony, etc., came on, in answer to some questions by the court, it was stated that Amelia was but 14 years of age, which raised a question as to the status of the marriage, and in consequence no order was made of any kind in the matter. The attorney for the Rodricks then charged Petersen with misconduct in having theretofore advised the Rodricks to swear falsely about the age of Amelia. Petersen's explanation of the reference in the affidavit to Amelia's age is rather weak. He claimed that any reference to her age in the affidavit was an inadvertence, and immaterial in the then proceeding; that a valid marriage had been solemnized, and the material matter he was called on to combat was the refusal of Amelia to live with her husband; and that he was in fact relying upon the statement made by Rodrick in his office that Amelia was 16. The action for support came on subsequently to be heard, Petersen, as attorney for Silveria, having filed an answer and cross-complaint for divorce. Neither party prevailed. Thereafter, Amelia swore to the charges against Petersen here being considered.

Upon the record we are confronted with the problem as to which of two constructions to adopt upon a hopeless conflict of testimony concerning what actually did happen and what Petersen actually did say. We must either conclude that Petersen deliberately advised the Rodricks to commit perjury under conditions of publicity and liability to official investigation in connection with the dismissal of a criminal charge, or that the Rodricks have unintentionally or intentionally distorted into a semblance of truth Petersen's endeavors to make them understand the age requirements of the statute, he being himself convinced and believing at the time, that Amelia was 16 years old and that her parents were not telling the exact truth as to her age. As to what occurred, and the exact language used, we cannot be certain. There are conflicts, inconsistencies and contradictions, however, in the testimony as a whole, some due, no doubt, to the antagonistic feelings of the two families, the imperfect understanding and expression of the English language, a strong taint of animus from different angles toward Petersen, and certain testimony that bears all the earmarks of having been rehearsed by the Rodricks and their corroborating witnesses.

[3, 4] In a matter as serious as the disbarment of an attorney at law, with its attendant degradation and probable effects upon a man's livelihood, the accused is, and should be, entitled to every favorable intendment and inference in his favor, and to the benefit of such proof of good character and reputation as he is able to make. The great weight of authority is to this effect. There was no direct attack on the truth and honesty of any witness. The evidence of Petersen and the Silverias is entitled to as full weight as that of the other witnesses, and the conflict between it and that of the accusers must be resolved, we feel, by consideration of all the circumstances of the case, the animus and desires of the complaining parties, and the impetus given to the prosecution by the advice of an attorney whose actions indicate that he felt that some one had grievously erred in bringing about the marriage of Amelia and Erasmus under the facts as related by the Rodricks. On the whole record of this part of the proceeding to disbar the petitioner, we can accept it as tending only to raise little more than a suspicion that Petersen may have been decidedly indiscreet in his method of procuring the dismissal of the criminal charge against his client. The evidence does not have the persuasive force the local committee appears to have accorded it.

[5] Coming now to the charge against Petersen made by Brelín, it appears from the record that Brelín, as architect, had rendered services to Mrs. John F. Borden. A controversy arose between them as to the amount finally due Brelín. Mrs. Borden sent Brelín a check for the sum of \$280, marked "Paid in full." Brelín, claiming that Mrs. Borden owed him \$720, and "being afraid of doing anything with the check," took it to Petersen, and placed it in the latter's keeping with instructions "not to do anything with the check to hurt the case." At the same time, he directed Petersen to file suit against Mrs. Borden "for the entire bill." What Petersen did in the matter is established by the following findings, made by the local administrative committee and adopted by the Board of Governors. In our opinion, they are fully supported by the evidence. They are:

"II. That the said Cedric W. Petersen received from one Hilding G. Brelín a check in the sum of \$280, dated November 5, 1926, and drawn in favor of the said Hilding G. Brelín, and signed by Mrs. John F. Borden, and drawn on the Central National Bank of Oakland, California; that upon the face of said check appeared in writing the following, to wit: 'In full'; that said Cedric W. Petersen, upon the 20th of November, 1926, drew a line through the words 'in full' on the face of said check, and endorsed the same as follows: 'On account only, H. G. Brelín by C. W. Peter-

sen, his Attorney, Cedric W. Petersen, Trustee.'

"III. That upon the 20th day of November, 1926, said Cedric W. Petersen caused the said check to be certified by said Central National Bank; that upon the 22nd day of November, 1926, said Cedric W. Petersen deposited said check in an account in the Commercial Trust and Savings Bank (now the First National Bank in Oakland) which account was designated as 'Cedric W. Petersen, Trustee'; that thereafter, and within a period of one month said Cedric W. Petersen withdrew the greater portion of said money and appropriated it to his own use; that at no time from the 15th day of November, 1926, until the 14th day of February, 1927, did the said H. G. Brelin know that said Cedric W. Petersen had caused said check to be certified, or had deposited said check in said bank, or at all, or had used the same, or any part or portion thereof, for his own personal use, or otherwise, and that at no time did said H. G. Brelin, or any one in his behalf authorize said Cedric W. Petersen to use the said money represented by the said check, or any part or portion thereof, for his own use.

"IV. That on the 22nd day of November, 1926, the said Cedric W. Petersen caused the said H. G. Brelin to verify a complaint filed in the Superior Court of the State of California, in and for the County of Alameda, against Clara F. Borden (who is the same person as said Mrs. John F. Borden) and John F. Borden, her husband, and which said complaint set forth the full amount of the claim of said H. G. Brelin against the said Bordens, and which said full amount of said claim was in the amount of \$720, and which said complaint set forth that no payment had been made thereon, and that the entire sum was due, owing and unpaid; and upon the said date, the said Cedric W. Petersen also caused the said H. G. Brelin to execute an affidavit for the purpose of securing a Writ of Attachment in said action, in which the averments were in substance the same as the said allegations of the said complaint; that on the 23rd day of November, 1926, the said Cedric W. Petersen wilfully caused said complaint and affidavit to be filed with the Clerk of said Court, and a Writ of Attachment to be issued on said affidavit, knowing that said verified complaint and said affidavit to obtain said Writ of Attachment were false and untrue, in that said check had theretofore been certified and banked as aforesaid;

"V. That at the time said Hilding G. Brelin delivered said check to said Petersen, said Petersen was told by said Hilding G. Brelin that he could do with said check as he saw fit, but to deal with it so as not to injure his case against said Bordens;

"VI. That said Petersen at all times concealed from said Brelin the fact that he had caused said check to be certified; also the

fact that he had altered said check; also the fact that he had deposited said check in his account; also the fact that he had used the greater portion of the sum represented by said check, and that none of said facts were disclosed to said Brelin until the trial of said case against the Bordens, when the check was produced during the cross-examination of said Brelin by counsel for defendants;

"VII. Shortly following the trial of said action in the Superior Court, said Brelin made a demand upon said Petersen for an accounting of said sum of \$280, but that said Cedric W. Petersen has at all times failed to render any such account; that shortly thereafter said Brelin recovered a judgment in the Justice's Court of Oakland Township against said Petersen for said sum of \$280."

Other than these facts so found, the court, in the action, *Brelin v. Borden*, decided that Mrs. Borden was indebted to Brelin in the sum of \$280, and no more. After Brelin obtained the judgment against Petersen for the amount of the check, the latter paid \$50 on account. Before the balance was paid these proceedings in disbarment were brought, and Petersen claims the proceeding was brought as a means of compelling him to pay in full. Since this inquiry was inaugurated he has paid the judgment, including interest and costs. He made a plausible, but not convincing, explanation of his method of carrying his personal and clients' bank accounts, and offered in excuse of his action in depositing the check and appropriating the money the contention that Brelin was indebted to him for legal services. The explanation does not satisfy. The whole transaction, which is reflected in the findings on the charge made by Brelin, was not conducted along any high, or even medium, standard, if there can be a medium standard in legal ethics. We are unable to accept petitioner's contention that, when Brelin placed the Borden check in his hands and told him to do whatever he thought best with it so long as it did not affect Brelin's claim against Mrs. Borden, he (Petersen) was thereby authorized to collect the amount of the check and appropriate the money to his own use. He had no right to so use the money. He was further guilty of misconduct as an attorney at law in causing Brelin to swear to the truth of the allegation in the complaint against Mrs. Borden, and to make the affidavit for attachment in the action, in each of which it was alleged there was due Brelin the sum of \$720, when in fact, as Petersen well knew, under any theory of the case, \$280 had been paid on the claim for services rendered by Brelin.

Both the local administrative committee and the Board of Governors of the State Bar accorded Petersen every reasonable opportunity to clear himself of the serious

charges involving his conduct and standing as a member of the legal profession. By the terms of the State Bar Act (section 26), the burden was cast upon him of showing here wherein the decision of the Board of Governors was erroneous or unlawful. He has not satisfactorily lifted that burden. His explanation and defense of his actions have not been satisfactory. But we feel, under all the circumstances as detailed above, that a judgment of suspension from the right to practice for a definite period will be adequate punishment for the offense committed by petitioner, instead of the more drastic penalty of disbarment. Prior to the initiation of these charges against the petitioner, he appears to have enjoyed a good reputation as an attorney, having a large clientele, and being intrusted with the handling of important matters for his clients. He has rested under the cloud of these charges, followed by the recommendation of the Bar Governors, for a year and a half, which in and of itself is a severe ordeal.

It is therefore ordered that the action of the Board of Governors in this matter be approved, in so far as the findings and decision relate to the charges made against petitioner by Hilding G. Brelin, and that Cedric W. Petersen be suspended from the rights and privileges of an attorney at law for the period of one year from and after the date of the filing of this order.

208 Cal. 19

KAUFMAN v. TOMICH et al. (L. A. 9205.)

Supreme Court of California. Aug. 23, 1929.

1. Municipal corporations ⇨400—Municipality, commanding act inherently wrong, and agent, performing work, are both liable to any one injured thereby.

If an act commanded by municipality is inherently wrong, both municipality and agent performing the work are answerable in damages to any one injured thereby, even in absence of negligence in its performance.

2. Municipal corporations ⇨379, 400—Statute held not to give city engineer complete discretion in preparing plans and specifications for public improvements, but, if it did, city's liability for results would be unchanged (Vrooman Act [St. 1885, p. 147, as amended by St. 1891, p. 206] § 34).

Vrooman Act (St. 1885, p. 147, as amended by St. 1891, p. 206) § 34, does not give complete power and discretion to city engineer in preparation of plans and specifications and other engineering work necessary in carrying out public improvements, and, if it did, it would be merely substituting engineer as another agency of municipality for city council or board of public works, and would not change city's liability, if any, for results.

3. Municipal corporations ⇨388—City was liable if construction of sewer in particular location caused damage to abutting property (Const. art. 1, § 14).

If by reason of construction of sewer in particular location in street, abutting property was damaged, no compensation having first been made to owner, as required by Const. art. 1, § 14, city committed a legal wrong for which it was liable, since, in determining necessity of sewer, city by its council was acting in its governmental capacity, but in planning location and construction of sewer it was acting in its corporate or ministerial capacity.

4. Municipal corporations ⇨388—If plan and location of sewer were inherently dangerous, city was liable to abutting property owner.

If, as found by trial court, plan and location of sewer by city council were inherently dangerous, city was liable for damages to abutting property owner resulting therefrom.

5. Evidence ⇨508—Expert testimony that location and manner of constructing sewer were likely to endanger abutting property through removal of lateral support held admissible.

In action for damages to plaintiff's property, including retaining wall, from improperly planning, locating, and constructing sewer, evidence of witnesses experienced in similar excavation work that location and manner of construction of ditch were likely to endanger plaintiff's property held properly admitted; effect of removal of lateral support from soil on a hillside, composed of black adobe on a thick layer of mixed shale and clay, with subbase of clay, not being a matter of such common knowledge that opinion of experts would not be enlightening.

6. Municipal corporations ⇨404(6)—Evidence held to warrant finding that location of sewer was inherently dangerous to abutting property, and wrong, because of removal of lateral support.

In action against sewer contractor and city for damages to plaintiff's property, including retaining wall, from improperly planning, locating, and constructing sewer, evidence held to sustain finding that location and alignment of sewer were intrinsically dangerous and inherently wrong, and were of such nature and in such close proximity to plaintiff's property as to cause injury thereto by removing lateral support.

7. Municipal corporations ⇨400—Sewer contractor, having undertaken work dangerous to abutting property, and not having taken proper precautions, was liable for damages.

Sewer contractor, having undertaken to carry out work which was inherently dangerous to abutting property, and not having taken precautions which might have averted injury to said property, was liable therefor.

8. Appeal and error ⇨1071(3)—That finding that city did not require sides of ditch to be braced was contrary to evidence held immaterial, in view of finding that location of sewer endangered abutting property.

In action against sewer contractor and city for damages to plaintiff's property, including

retaining wall, from improperly planning, locating, and constructing sewer, fact that finding that city did not by its specifications require sides of ditch to be braced was contrary to evidence was immaterial, where court found that location of ditch by city endangered plaintiff's property, since under such finding it was duty of city at all events to prevent injury.

9. Municipal corporations $\S$ 395(1)—Court was justified in determining damages for subsidence from cost of concrete garage which restored property, where expense was less than that of excavating for retaining wall.

Court's finding as to amount of property owner's damages, due to removal of lateral support by sewer construction, was proper, though based on cost of construction of concrete garage for restoring retaining wall, where evidence showed cost of garage was less than cost of excavating for retaining wall and served same purpose.

10. Appeal and error $\S$ 221—Defendants could not complain for first time on appeal that incorrect measure of damages was adopted.

Defendants, who tried case below on theory that measure of damages adopted by court in its finding was correct, could not complain for first time on appeal that measure of damages so adopted was improper.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Ethel Clayton Kaufman against Peter Tomich and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Superseding opinion of the District Court of Appeal in 272 P. 1082.

Jess E. Stephens, Frederick Von Schrader, and Lucius P. Green, all of Los Angeles, for appellant city of Los Angeles.

Hewitt, Crump & Penn, of Los Angeles (Pierce Works, J. F. Moroney, and Guy Richards Crump, all of Los Angeles, of counsel), for appellant Tomich.

K. A. Miller, Herbert N. Ellis, and Miller & Ellis, all of Los Angeles, for respondent.

WASTE, C. J. For reasons hereinafter more fully stated, this cause was taken over by this court after decision by the District Court of Appeal, First Appellate District, Division 2. The action is one for damages for injuries alleged to have been suffered by plaintiff's property by reason of the installation of a sewer. The defendant city, through its engineering department, prepared the plans and specifications for a sewer in Fairfield avenue as proposed in a resolution of intention adopted by the city council, and a contract for the construction of the sewer was let to defendant Tomich. During the course of the work, and while the street ditches were open, the plaintiff's property, abutting on Fairfield avenue, was damaged by a shifting of the soil upon which plaintiff's retaining

wall and the foundation of her house rested. It was plaintiff's theory, as evidenced by the allegations of her complaint, that the injury to her property resulted from the joint negligence of the city, in improperly planning and locating the sewer line, and of the contractor, in undertaking to install the sewer as so improperly planned and aligned. There are also allegations of the contractor's negligent performance of the work. Judgment went for the plaintiff against both defendants, each of whom thereafter appealed.

[1] Mr. Justice Strother, sitting pro tem. in the District Court of Appeal, in a minority opinion declared, and properly so, that if the act commanded by the municipality was inherently wrong, then both the municipality and the agent performing the work would be answerable in damages to any one injured thereby, even in the absence of negligence in its performance. This declaration finds support in *Perkins v. Blauth*, 163 Cal. 782, 789, 127 P. 50, 53, wherein the rule is expressed in the following language: "Upon the other hand, if the act is one commanded by the municipality itself, if inherently wrong, the municipality and the agent who performed will both be liable. * * * If the injury results, however, not from the wrongful plan or character of the work, but from the negligent or improper manner in which it is performed, the one so negligently acting will always be responsible, and the public corporation may or may not be responsible, depending upon the relationship which it may sustain to that agent."

Being satisfied that the trial court, on competent evidence, had found the plan and location of the sewer to be inherently wrong and dangerous, Judge Strother declared, as his opinion, that judgment was properly entered against both defendants. Mr. Presiding Justice Koford, of the District Court of Appeal, in an opinion concurred in by Mr. Justice Nourse, agreed with that part of Judge Strother's opinion affirming the judgment against the defendant Tomich, but disagreed with that portion which affirmed the judgment against the defendant city of Los Angeles. In reversing the judgment against the defendant city, the opinion of Mr. Presiding Justice Koford declared that "the damage to plaintiff's property was caused by the negligence of the contractor in failing to carry out faithfully the specifications and not by the public work as planned, specified and contemplated."

When the cause came here on petitions for hearing after decision by the District Court of Appeal, we were impressed with the fact that the foregoing quotation appeared to be inconsistent and at variance with those findings of the lower court which, if sustained by the evidence, undoubtedly warranted the

entry of judgment against the defendant city as well as against the defendant contractor. The trial court found that the "location and alignment of the said sewer were intrinsically dangerous and inherently wrong, and were of such a nature and of so close proximity to the front of plaintiff's property and plaintiff's wall as were likely in the natural course of construction of the said sewer thereunder, to damage and injure said plaintiff's property by removing the lateral support from plaintiff's property in the excavating of the ditch for said sewer * * * and the court especially finds that the aforesaid negligence of the defendant the city of Los Angeles in designing and making said plans and specifications and the carrying out of said defective plans and specifications by the said defendant Peter Tomich, conjoined together to remove the lateral support of the soil under said wall and under the property of plaintiff, and conjointly contributed to destroy the wall, lawn and shrubbery on said plaintiff's property and the foundation under plaintiff's house, and placed plaintiff's house in imminent danger of toppling into the street, and necessitated immediate action on the part of said plaintiff in replacing the foundation under said house and the replacing of said wall and the restoring of said soil on said property to prevent further damage to plaintiff's property. * * *

In taking the cause over, it was our sole purpose, therefore, to examine the record with a view to determining whether the foregoing findings found support therein. Examination satisfies us that there is ample evidence in the record to sustain those findings. We are in complete accord, therefore, with the conclusions announced in the opinion written by Mr. Justice Strother pro tem., and we adopt it as the opinion and decision of this court herein, as follows:

This is an appeal from a judgment in favor of plaintiff for damages to real property. The city council of the city of Los Angeles adopted a resolution of intention to lay a sewer on Fairfield avenue, a street upon which plaintiff's property abuts, to be constructed in accordance with specifications adopted by the council and plans and profiles on file in the office of the city engineer. A contract for the construction was let to the defendant Tomich.

Plaintiff's property was situated on the south side of Fairfield avenue, and sloped at a considerable angle toward the street, and at the line was about 7 feet above the street. A concrete retaining wall formed the property line. The defendant Tomich, in performance of his contract, dug a ditch in the street 7 or 8 feet from plaintiff's line and about 7½ feet deep in which to lay the sewer. The ditch was dug in sections 6 or 7 feet long, about 6 feet apart, with tunnels at the bottom between the sections. Directly after the excavation of the ditch, the westerly part of

plaintiff's lot and part of a vacant lot west of hers began to slip diagonally toward the street, breaking the retaining wall and taking out part of the foundation of plaintiff's house, which was set about 15 feet back of the street line. It was the contention of plaintiff that the damage to her resulted from the conjoint negligence of the city in improperly planning and locating the sewer line and of the contractor in negligently performing the work. There was testimony on her behalf that the side of the ditch nearest her property cracked and bulged in, and that the contractor did not properly brace the sides of the ditch, so as to prevent movement of the earth. Judgment went for the plaintiff, and the defendants appeal separately upon a joint bill of exceptions.

It is argued on behalf of the appellant city of Los Angeles that the only act of the city was a governmental one, in declaring the necessity for the construction of the sewer; that the plans and specifications for its construction were the work of an independent agent, the city engineer, and the carrying out of the plans and specifications solely the responsibility of the contractor. The case of *Haughawout v. Hubbard*, 131 Cal. 675, 63 P. 1078, and other cases, are cited in support of the proposition that the city is not liable for the acts of its officers in preparing specifications and doing other engineering work. But in all of these cases the court was considering, not the liability of the municipality, but the sufficiency and regularity of the proceedings as authority for proceeding with the proposed work, or the enforcement of the lien of assessments against the property liable for its cost. The cases which hold that a municipality is not liable for the acts of its administrative officers are those where the officer had omitted the performance of his legal duty, or done some act in violation, or in excess, of his legal duty, as in the case of *Sievers v. San Francisco*, 115 Cal. 648, 47 P. 687, 56 Am. St. Rep. 153.

[2, 3] Section 34 of the Vrooman Act (St. 1885, p. 147, as amended by St. 1891, p. 206) does not, as argued by the appellants, give complete power and discretion to the city engineer in the preparation of plans and specifications and other engineering work necessary in carrying out public improvements, and, if it did, it would be merely substituting him as another agency of the municipality for the city council or the board of public works, and would not change its liability, if any, for the results. The city council in its resolution of intention expressly designated the specifications for the work—which specifications it had theretofore adopted by ordinance—and defined the location of the sewer. In determining the necessity of the sewer, the city, by its counsel was acting in its governmental capacity; in planning the location and construction of the sewer, in its corporate or ministerial capacity, in the con-

struction of a public work of the municipality. If, by reason of its construction in the particular location, the plaintiff's property was damaged, no "compensation having first been made," as required by article 1, § 14, of the Constitution, the city committed a legal wrong for which it is liable.

[4] The question whether the liability existed at common law or was created by the constitutional provision is immaterial, as the nature of the liability is the same in either case. In *Perkins v. Blauth*, 163 Cal. at page 789, 127 P. 53, it is said: "Upon the other hand, if the act is one commanded by the municipality itself, *if inherently wrong*, the municipality and the agent who performed will both be liable." Again: "Wherever the injury complained of is the taking or damaging of private property for public use without compensation then under the guarantee of the federal constitution against such invasion of the private rights of property, neither the state itself nor any of its agencies or mandatories may claim exemption from liability." *Id.* The decisions in this state are uniform to the same effect. In this case, the court having found from competent evidence that the plan and location of the sewer was inherently dangerous, it comes within the rule.

[5, 6] It is urged by appellant city of Los Angeles that the evidence was insufficient to support the finding that the "location and alignment of said sewer was intrinsically dangerous and inherently wrong." Over the objection of defendants, witnesses, who were shown to be experienced in excavation similar in kind and location to that in this case, were permitted to testify that the location and manner of construction of the ditch were likely to endanger plaintiff's property. It is argued that this was not a matter upon which expert testimony was admissible, and appellant Tomich contends that, if the finding was true, he was not liable, and both appellants contend that no joint liability was shown. But it does not seem to us that the effect of the removal of lateral support from soil, on a hillside, composed of an overburden of black adobe on a thick layer of mixed shale and clay, with a sublease of clay, is of such common knowledge that the judgment of those experienced in working under such conditions would not be enlightening, or that the amount of care necessary to prevent soil of that character and in that position from caving, is matter of common knowledge. If they were matters of common knowledge it would seem hardly necessary to have the aid of an engineer, skilled in the planning and supervision of such work, in preparing its plans and specifications and locating its line. This evidence, with the evidence of the physical facts and of

what happened, was sufficient to support the finding of the court.

[7] The contractor having undertaken to carry out a work which the court found was inherently dangerous to plaintiff, and having been found by the court not to have taken the precautions which might have averted injury to plaintiff, was also liable.

[8] Certain other findings of the court are objected to by appellants as not supported by the evidence. The finding that the city did not, by its specifications, require that the sides of the ditch should be braced, was contrary to the evidence. There was testimony, however, to the effect that they were not braced, and the court so found. The court having found that the location of the ditch endangered plaintiff's property, it was the duty of the city at all events to prevent the injury and the finding was immaterial.

The complaint alleged, and the court found, that the notice mentioned in section 832 of the Civil Code, defining the rights of coterminal owners to lateral support, and providing that each shall have the right to make proper and usual excavations on his own land, on "giving * * * reasonable notice to the other of his intention to make such excavations," was not given. There was, in the answer, no denial of the allegation, but merely a denial of the further allegation that "no notice was given."

[9] It is claimed by appellants that the amount of damages found by the court was excessive. Plaintiff restored the retaining wall by the construction of a concrete garage. Witnesses on her behalf testified that the cost of this structure was less than would have been the cost of excavating for a solid foundation for an ordinary retaining wall and replacing the earth behind it, and served the same purpose of restoring and maintaining the stability of plaintiff's property. This was sufficient justification for the court's finding.

[10] Appellants contend that the measure of damages adopted by the court in its finding was not correct, and that the finding should have been as to the difference in the value of the property before and after the injury, not the cost of restoring it to its original condition. The question is raised for the first time on this appeal, and the case was tried by both parties on the theory that the latter was the proper measure of damages. Appellants should not now be heard for the first time on appeal to complain that the case was tried on an erroneous theory. *Kincaid v. Dunn*, 26 Cal. App. 686, 148 P. 235.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

100 Cal. App. 434

DUFOUR v. SEYMOUR et al. (Civ. 7004.)

District Court of Appeal, First District, Division 1, California. Aug. 24, 1929.

Master and servant $\S$ 417(7)—**Finding of Industrial Accident Commission on testimony presenting substantial conflict on question whether servant was injured in course of employment is controlling.**

Where testimony in proceeding before Industrial Accident Commission was in substantial conflict upon question whether or not servant was injured in course of his employment, finding of Industrial Commission is controlling.

Certiorari to Industrial Accident Commission.

Certiorari by Earl Dufour to review an order of the Industrial Accident Commission awarding compensation for injuries to Al Seymour. Writ denied.

Fabian D. Brown, of San Francisco, for petitioner.

G. C. Faulkner and Wm. B. Hornblower, both of San Francisco, for respondents.

PER CURIAM. The testimony in the above-entitled matter seems to present a substantial conflict upon the question of whether or not the petitioner was injured in the course of his employment; and in that state of the record the finding of the respondent Commission is controlling.

The application for the writ is, therefore denied upon that ground.

99 Cal. App. 728

PACIFIC-SOUTHWEST TRUST & SAVINGS BANK v. VALLEY FINANCE CORPORATION. (Civ. 6477.)★

District Court of Appeal, First District, Division 2, California. August 2, 1929.

Rehearing Denied Aug. 3, 1929.

Bills and notes $\S$ 351—**Accommodation party can set up, as against holder taking instrument for value after maturity, any defense he might have (Civ. Code, § 3110).**

Notwithstanding Civ. Code, § 3110, defining accommodation party and providing that such person is liable on instrument to holder for value notwithstanding such holder at time of taking instrument knew him to be only accommodation party, accommodation party can set up any defense he might have as against holder taking instrument for value after maturity.

Appeal from Superior Court, of Fresno County; Denver S. Church, Judge.

On petition for rehearing. Petition denied. For former opinion, see 279 P. 222.

H. A. Savage, of Fresno, for appellant.

Christian Hoeppner and Wakefield & Hansen, all of Fresno, for respondent.

PER CURIAM. The plaintiff has filed a petition for a rehearing. It earnestly presses the point that the rights of the plaintiff as an accommodation party are those of a holder for value notwithstanding that it took the note after its maturity.

At an early date the point was decided against the plaintiff. *Coghlin v. May*, 17 Cal. 515. In 1917 we adopted the Uniform Negotiable Instrument Law (Stats. 1917, p. 1531). It was adopted by incorporating it into our Civil Code and it became division 3, part 4, title 15. As so adopted it contained four chapters. Some of the chapters contained as many as eight articles or more. When so adopted it will be noted that the Civil Code contained cognate provisions (sections 953, 1459) and that the Code of Civil Procedure contained cognate provisions. Code Civ. Proc. § 368. We are commanded by the law-making power to read the provisions of our four codes as though all such Codes had been passed at the same moment of time and were parts of the same statute, and if the provisions of any article conflict with or contravene the provisions of another article of the same chapter, the provisions of each article must prevail as to all matters and questions arising out of the subject-matter of such article. Pol. Code, §§ 4480 and 4483. When the note in suit was executed our statutes provided as follows: In the Civil Code, section 3133 defined "a holder in due course." That definition does not include this plaintiff. Section 3139 provided: "In the hands of any holder *other than a holder in due course*, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. * * *" Section 1459 provided: "A non-negotiable written contract for the payment of money * * * may be transferred. * * * Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement." Section 953 provided: "A thing in action is a right to recover money * * * by a judicial proceeding." Section 368, Code of Civil Procedure, provided: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment. * * *" Section 3097, Civil Code, provided: "* * * As between the immediate parties, and as regards a remote party *other than a holder in due course*, * * * the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. * * *" There is

no provision which expressly excepts accommodation paper from the foregoing rules. If it is to be excepted the exception rests in argument. Our statutes do not classify commercial paper and then state the rules pertinent to accommodation instruments. But in the Civil Code, title 15, sections 3082-3206, chapter 1 is addressed to instruments in general, chapter 2 to bills of exchange, chapter 3 to promissory notes and checks, and chapter 4 is the embodiment of general provisions. There is no chapter and there is no article addressed to accommodation paper. There is section 3110 which defines an accommodation party and then provides: "Such person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." The plaintiff cites and relies on that section as supporting its claims. That argument fails to take into consideration a well-known fact in the history of jurisprudence.

From an early date the contention was made that an accommodation party could set up as a defense, want of consideration, as against an indorsee who took the instrument for value before maturity. 8 C. J., § 410; *Violett v. Patton*, 5 Cranch (9 U. S.) 142, 151, (3 L. Ed. 61). The provision relied on, section 3110, is apparently an enactment to settle the rule just mentioned. Nothing on its face shows to the contrary. It is in an article addressed to "Consideration." Conceding, solely for argument, that there is any conflict between that section and other sections of the same title, the provisions of section 3139, which is contained in an article on "Rights of Holder," will control (Pol. Code, § 4483), and as section 3139 is the later in numerical order it will control for that additional reason (Pol. Code, § 4484). But we think there is no conflict, and for the soundest of reasons the position of the defendant may not be disturbed. The construction which we have adopted gives force and effect to each and all of the provisions of the statute and does not lead to an absurdity. As between the Valley Bank and this defendant each and every defense which this defendant sought to interpose would have been sustained. *First National Bank v. Reed*, 198 Cal. 252, 244 P. 368. But as we have just shown by the provisions of our statutes, the rights of this defendant against this plaintiff are the same as against the Valley Bank. These conclusions are supported by what is known as the majority rule. *Brannan's Negotiable Instrument Law* (4th Ed.) p. 286; *Wilhoit v. Seavall*, 121 Kan. 239, 246 P. 1013, 48 A. L. R. 1273, and note. *Ir Rylee v. Wilkerson*, 134 Miss. 663, 669, 99 So. 901, at page 902, the Supreme Court of Mississippi said: "There appears no sound reason for the distinction in the two classes of negotiable paper, and it would seem that

the makers, indorsers, or acceptors of accommodation paper should be permitted the same defenses as are guaranteed to the makers, indorsers, or acceptors of negotiable paper for value."

In *Cottrell v. Watkins*, 89 Va. 801, 817, 17 S. E. 328, 333, 19 L. R. A. 754, 759, 37 Am. St. Rep. 897, on page 906, the Supreme Court of Virginia stated the contention and then expressed itself as follows:

"Why, then, subject the makers, indorsers, or acceptors of such paper to this species of outlawry by denying to them the defenses guaranteed to the makers, indorsers, and acceptors of negotiable paper for value?"

"We know of no sufficient reason upon which to found any such doctrine, nor do we believe the ingenuity of man can suggest one. The reason, and the only reason, given in the books is that it is 'considered that parties to accommodation paper hold themselves out to the public by their signatures, to be bound to every person who shall take the same for value, to the same extent as if paid to him personally.' This is no reason whatever for the distinction, as precisely the same reason is applicable to the parties to paper for value."

Finally, in the case of *Bartels v. Suter*, 130 Okl. 7, 11, 266 P. 753, page 757, the Supreme Court of Oklahoma, after making an exhaustive study of the subject, reaches the conclusion that the provisions of the Negotiable Instruments Act " * * * should be construed as rendering an accommodation party liable to a holder for value only when such holder, or those through whom he acquired the instrument, became a holder for value before maturity of the instrument."

The petition is denied.

KIYOSHI WATANABE v. SUPERIOR
COURT IN AND FOR SACRAMENTO
COUNTY et al. (Civ. 3853.) ★

District Court of Appeal, Third District,
California. June 28, 1929.

Rehearing Denied July 27, 1929. Hearing
Denied by Supreme Court Aug. 26, 1929.

Trial $\hookrightarrow$ 355(2)—Findings and judgment on jury's special findings were properly refused, where special findings were too general, vague, uncertain, incomplete, and indefinite.

Where special findings of jury in favor of defendant were too general, vague, uncertain, incomplete, and indefinite to support judgment, court properly refused to enter findings and judgment on such special findings.

Petition by Kiyoshi Watanabe for a writ of mandamus directing the Superior Court in and for the County of Sacramento and J. R. Hughes, Judge of said court, to enter findings

and judgment in favor of defendant on special findings of jury in action pending in said court in which K. Ito is plaintiff and Kiyoshi Watanabe is defendant. Petition denied.

Busick & Leeper, of Sacramento, for petitioner.

Lee Gebhart, of Sacramento, for respondent.

PER CURIAM. The petition for a writ of mandate, directing the respondent court to enter findings and judgment in favor of the defendant on the special findings of the jury in an action pending in said court in which K. Ito is plaintiff and petitioner herein is defendant, is denied on the ground that such special findings are too general, vague, uncertain, indefinite, and incomplete to support the judgment. *Hall v. Mitchell*, 59 Cal. App. 744, 748, 211 P. 853.

100 Cal. App. 355

PEOPLE v. FERLITO. (Cr. 1803.)

District Court of Appeal, Second District, Division 1, California. Aug. 19, 1929.

1. Robbery $\S$ 24(4)—Robbery is established by proof of theft of any amount of money, no matter how small, other elements of robbery being present.

That defendant entered bank and made threats as to what he would do if any one interfered with him and was heard handling money in the cage, and thereafter there was shortage of money, was sufficient to establish robbery, as theft of any amount would be sufficient to make crime of robbery.

2. Criminal law $\S$ 1159(3)—In appeal from conviction of robbery, appellate court could not pass upon conflicting evidence.

Where defendant was convicted of crime of robbery and there was a conflict between testimony as to defendant's whereabouts at time of robbery, appellate court could not pass upon conflicting evidence.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Joseph Ferlito was convicted of robbery, and he appeals. Affirmed.

Alfred E. Paonessa, of Los Angeles, and Charles A. Ruby, of Huntington Park, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

YORK, J. This case was tried by the court without a jury, after a waiver of a jury trial by the defendant, his counsel, and the district attorney, regularly entered in the record.

The whole appeal appears to be predicated upon the belief that the appellate court can

pass upon conflicting evidence. The objection is made that the trial court "could have given no credit whatever to the witnesses for defendant, otherwise an alibi was fully established." The defendant was identified as the robber. The testimony of only one witness would be sufficient to enable the court to make its finding of guilt.

[1] There was proof of the corpus delicti in that a party, identified as the defendant, entered the bank and with a drawn revolver made threats as to what he would do if any one interfered with him, and was heard handling money in the cage, and thereafter there was evidence that there was a shortage of the funds in the cage. It makes no difference what the amount of the shortage was; the theft of any amount would be sufficient to make the crime robbery.

[2] The doctrine of the credibility of the testimony of witnesses has no application to this case, as there was a direct conflict between the testimony of defendant's witnesses that the defendant was at King City at the time of the robbery, and the testimony of the witness who testified that appellant was present in the bank and committed the robbery in Alhambra, at the same time fixed by defendant's witnesses as the time he was in King City.

There being no other questions raised upon appeal, the judgment of conviction and order denying motion for new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

100 Cal. App. 433

CHRIST v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 7020.)

District Court of Appeal, First District, Division 1, California. Aug. 24, 1929.

Depositions $\S$ 32—Superior court need not order deposition under letters rogatory from court not proved court of record, where testimony was not proved material.

Superior court was under no duty to make order for taking of deposition of witness pursuant to letters rogatory issued out of Court of Republic of Guatemala, where application was not accompanied by affidavit of materiality of witness' testimony, and it did not appear that court issuing letters was court of record.

Petition by Rodolfo Christ for writ of mandate to be directed to the Superior Court for the City and County of San Francisco, and Hon. James G. Conlan, as Presiding Judge. Writ denied.

Geo. Olshausen, of Berkeley, for petitioner.

PER CURIAM. The petition herein for a writ of mandate to compel the superior court, in and for the city and county of San Francisco, to make the necessary order for the taking of the deposition of a witness pursuant to letters rogatory issued out of the Third Court of First Instance of the Republic of Guatemala, is denied upon the grounds that the application made to the superior court was not accompanied by an affidavit showing the materiality of the testimony of the witness whose deposition was sought, nor did it appear from said application that the court out of which the letters rogatory issued was a court of record.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and George H. Johnson, Dist. Atty., and Wardwell D. Evans, Deputy Dist. Atty., both of San Bernardino, for the People.

Albert E. Weller and Fred Duffy, both of San Bernardino, for respondent.

HAHN, Justice pro tem. Defendant George Wilson was charged by an information filed by the district attorney of San Bernardino county, in each of two counts, with the crime of burglary. To count 1 he pleaded guilty, and in due course sentence was passed upon him, committing him to San Quentin. The other count was dismissed on motion of the district attorney.

Before the defendant was removed to the penitentiary in execution of his sentence, the district attorney learned that he had several prior convictions to his credit and thereupon filed a supplemental information under the provisions of section 969a of the Penal Code (as added by St. 1927, p. 1064), charging, in separate counts, four prior convictions of felonies.

The first charged that the defendant was convicted of first degree burglary in Tulare county, Cal., in 1914 under the name of Frank Clark and was committed to the state penitentiary at San Quentin for the period of one year. In the second count the defendant was charged with having been convicted of burglary in the second degree in Yuba county, Cal., in 1919 under the name of William Henry Duncan, and that he was duly sentenced to five years in San Quentin. The third count was dismissed on motion of the district attorney and requires no comment here. The fourth count charged that the defendant was convicted in the Second judicial district court of the state of Nevada in and for the county of Washoe in 1926, under the name of Will Duncan, of the crime of attempted burglary in the second degree, and in due course was sentenced to the Nevada state prison.

The defendant made specific denial as to the truth of each of the alleged convictions set forth in the several counts.

Upon the trial of the case the district attorney offered in evidence a certified copy of the commitment issued out of the superior court in and for the county of Tulare. This commitment recited the fact that one Frank Clark pleaded guilty to the charge of burglary, and it was adjudged and decreed that the defendant Frank Clark be punished by imprisonment in the state prison at San Quentin for one year. There is no recital in the commitment as to the degree of burglary.

In support of the allegations set forth in count 2, charging a prior conviction of felony in Yuba county, Cal., the district attorney introduced a certified copy of the commitment issued from the superior court in and for

100 Cal. App. 397

PEOPLE v. WILSON. (Cr. 1807.)

District Court of Appeal, Second District, Division 1, California. August 20, 1929.

1. Criminal law ☞1202(3)—In prosecution for burglary, admission in evidence of defective commitment to show prior conviction of felony was not error (Pen. Code, §§ 459-461, 1192, and § 969a as added by St. 1927, p. 1064).

Where defendant was charged by information filed under Pen. Code, § 969a, as added by St. 1927, p. 1064, with crime of burglary and with four prior convictions of felonies, court did not err in admitting in evidence certified copy of prior commitment, defective under Pen. Code, §§ 459-461, and section 1192, in not reciting degree of burglary, as defendant had waived defect by serving his term of incarceration.

2. Criminal law ☞1202(3)—Commitment of foreign court held inadmissible as evidence of prior conviction, where not identified by its legal custodian.

In prosecution for burglary, original commitment of defendant issued by foreign court was improperly received in evidence to prove defendant's prior conviction, as document had not been identified by its legal custodian.

3. Criminal law ☞1156(2)—Court's discretion in granting new trial could not be disturbed, where evidence of identity of defendant conflicted.

In prosecution for burglary charging prior convictions, where evidence conflicted, there being sufficient evidence to support defendant's contention that he was not the same person convicted on former charge, court's discretion in granting new trial could not be disturbed on appeal.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

George Wilson was convicted of the crime of burglary and of prior convictions, and from an order granting a new trial the People appeal. Affirmed.

Yuba county reciting the plea of guilty to the charge of burglary on the part of defendant William Henry Duncan, the degree being therein fixed as second degree burglary.

One J. H. Carpenter, a witness produced by the prosecution, testified that he was and had been for a number of years past captain of the guard at San Quentin prison; that he recognized the defendant, George Wilson to be the same person who entered San Quentin in 1914 under the name of Frank Clark, having been committed from Tulare county, and also the same person who, under the name of William Henry Duncan, served a term in San Quentin beginning in 1919, having been committed from Yuba county.

As to the fourth count the district attorney offered what purported to be the original commitment issued from the Second judicial district court of the state of Nevada, in and for the county of Washoe, which recited a plea of guilty by the defendant Will Duncan to the charge of attempted burglary in the second degree. Attached to the commitment was a certified copy of the judgment of the court committing the defendant to the penitentiary. In addition, one Harlan L. Heward, testified that he was an assistant district attorney of the county of Washoe, Nev.; that the document which was put in evidence was obtained by him from the clerk of the Second judicial district court of that state, and that said document was the original commitment issued in that case; that he had filed the original information charging the defendant Will Duncan with the crime of burglary and that the defendant in that case pleaded guilty to attempted burglary in the second degree; and that the said defendant was committed to the state prison in Nevada, as indicated in the document offered as the original commitment. Heward further testified that defendant George Wilson was the same person against whom he had filed the information referred to, and who pleaded guilty in the Second judicial district court in Nevada, and who was committed to the penitentiary, pursuant to said plea of guilty.

The jury returned its verdict, finding each of the three charges of prior conviction to be true.

In due course, defendant filed his motion for a new trial. The record indicates that in presenting this motion, the defendant urged but two points of error: First, that the court erred in its ruling in admitting in evidence the certified copy of the commitment, issued out of the superior court in and for the county of Tulare, for the reason that the commitment does not declare whether the burglary was fixed as first or second degree burglary; and, secondly, that the court erred in its ruling in admitting the alleged original commitment from the state of Nevada, in that the only method provided by the laws of California for making proof of a judicial act of the

court of a sister state is by a certified copy of such commitment, certified as provided in section 1905, Code of Civil Procedure.

The record further discloses that the court, at the time of its ruling on the motion for a new trial, discussed only the merits of appellant's contention regarding the admission in evidence of the original commitment from Nevada. However, the record would seem to indicate that the court granted a new trial as to all three of the counts of prior conviction of felonies, from which ruling the district attorney prosecutes this appeal.

Counsel for respondent in his brief contents himself with a mere statement that the commitment issued by the superior court of Tulare county was void for the reason that the degree of burglary was not found. No authorities are submitted by him in support of this contention.

Section 459 of the Penal Code specifies the acts that constitute the crime of burglary. Following in sections 460 and 461 are provisions for the classification of the acts constituting burglary and specifying the minimum and maximum periods of incarceration applicable to the several classes or degrees of burglary. A consideration of these sections of the Code would seem to indicate that there is but one crime denounced—that of burglary. The purpose of the Legislature in providing these degrees of the crime was undoubtedly to better enable the assessing of a more severe punishment for those cases of burglary, which are deemed particularly aggravating, and a lesser punishment for those cases which do not indicate a wholly abandoned heart on the part of the culprit. Section 1192 of the Penal Code reads as follows: "Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree."

[1] Unquestionably the commitment is defective in that it does not recite the degree of burglary found, and assuming that the judgment is likewise defective, it does not follow that either or both are void. In fact, it has been decided in this state that a defect of this character may be corrected by the court on its own motion or on demand of the defendant, and thereupon the judgment would be enforced. *People v. Jefferson*, 52 Cal. 452; *People v. Paraskevopolis*, 42 Cal. App. 325, 183 P. 585.

That the defendant in the Tulare Case, whether he was George Wilson or some other person, had the right to waive the defect and serve his term of incarceration, as provided in the commitment, cannot be questioned, and in the absence of anything in the record, it will be presumed that the defect was waived.

The court unquestionably had jurisdiction of the defendant and of the crime with which he was charged, and any error or fault in the judgment or commitment did not render the judgment void.

We are satisfied that the court did not com-

mit error in admitting in evidence the certified copy of the commitment from Tulare county. *Marchi v. People*, 75 Colo. 254, 224 P. 1053; *Kelly v. People*, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184.

[2] In support of the second point urged by appellant relating to the admission in evidence of the alleged original commitment from the state of Nevada, it is contended that the document was properly admitted in evidence under subdivision 7, section 1918, of the Code of Civil Procedure, while respondent urges that the only method provided for proving one's conviction of a felony in another state is by a certified copy of the judgment or record thereof, as provided by section 1905 of the Code of Civil Procedure.

Assuming, but not deciding, that the record of a person's conviction of a felony in another state may be proven by the introduction of the original judgment or commitment, such document must necessarily be identified by the officer or person who is the legal custodian of such original document. The witness Heward, who presented the controverted document, stated that he had received it from the county clerk of Washoe county, who told him that it was the original commitment. Clearly the witness' testimony was hearsay and the document in question was not sufficiently identified to entitle it to be admitted in evidence. If a document is offered as the original judgment or commitment from a court of another state, it must come from the hands of one, who by law is intrusted with the keeping of the document in question, for it is only by reason of the knowledge and position of the custodian that the law attributes verity to the document and his testimony identifying it.

[3] Respondent further urges that, irrespective of the determination of the question as to the competency of the documents introduced in evidence, the court's order granting a new trial must be sustained, because there was a sharp conflict in the testimony as to whether or not the defendant George Wilson is the same person who was convicted of burglary in Tulare county under the name of Frank Clark, and who was convicted in Yuba county of the crime of burglary under the name of William Henry Duncan, and who was convicted in Nevada of the crime of attempted burglary under the name of Will

Duncan. The only testimony in the record identifying the defendant Wilson as the same person convicted in Tulare county under the name of Frank Clark and in Yuba county under the name of William Henry Duncan is that of J. H. Carpenter, who testified that he was captain of the guard at San Quentin and identified the defendant as the same person incarcerated in San Quentin prison under the name of Frank Clark and later under the name of Duncan. The only testimony identifying the defendant Wilson with the person convicted in Nevada, under the name of Will Duncan, was that of the deputy district attorney, Heward, who identified the defendant as the same person. The defendant Wilson in his own behalf denied that he was ever convicted of the crime of burglary in Tulare county, or of the crime of burglary in Yuba county, and stated that he had never been incarcerated in San Quentin prison. He likewise denied that he was convicted of the crime of attempted burglary in Washoe county, Nev., and denied that he had ever been incarcerated in the state prison in Nevada. The question of identification being a material one, and one upon which there was a conflict of evidence, it is within the discretionary powers of the court to grant a new trial. *People v. Canfield*, 173 Cal. 309, 159 P. 1046; *People v. Petros*, 25 Cal. App. 236, 143 P. 246; *People v. Washington*, 86 Cal. App. 133, 260 P. 806. As has been repeatedly held in this state, the court's action in granting a new trial will not be disturbed on appeal, where there is a conflict of evidence upon a material issue, unless it can be said that a verdict in favor of the moving party would not have found sufficient legal support in such evidence. *Tweedale v. Barnett*, 172 Cal. 271, 156 P. 483; *Empire Investment Co. v. Mort*, 169 Cal. 732, 147 P. 960. Inasmuch as it cannot be said from the record that there was not sufficient evidence to support the defendant's contention that he was not the same person who was convicted in Tulare county and Yuba county, Cal., and in Washoe county, Nev., this court cannot say that error was committed by the trial court in granting a new trial.

The order granting a new trial is affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

100 Cal. App. 135

RIDEOUT v. EICH, County Treasurer.★
(Civ. 3844.)

District Court of Appeal, Third District, California. July 26, 1929.

As Modified, on Denial of Rehearing, Aug. 7, 1929.

1. Counties ⇨204(5)—Though supervisors may compromise, settle, and adjust claims against county, they cannot by compromise give legal status to void claim.

Even though boards of supervisors possess power to compromise and settle and adjust claims against county, board cannot by compromise give legal status to claim against county which is otherwise void.

2. Counties ⇨152—County's agreement to pay difference between that paid and purchase price for real property could not validate previous contract incurring indebtedness exceeding county's income for year (Const. art. 11, § 18; Pol. Code, § 4101, subd. 6).

Agreement of county board of supervisors to pay difference between that already paid and price agreed upon as purchase price of certain real property, though difference to be paid was within amount in county treasury, could not validate previous agreement to lease and buy premises which was illegal because it incurred indebtedness or liability exceeding in year income and revenue provided for year in violation of Const. art. 11, § 18, and under which payment was void because not upon valid warrants based on orders as required by Pol. Code, § 4101, subd. 6.

3. Counties ⇨152—County's agreement to lease and purchase real property before money was raised held void as incurring indebtedness exceeding income for year (Const. art. 11, § 18).

Agreement by which county agreed to lease and purchase real property held void as incurring indebtedness in excess of county's income in year, in contravention of Const. art. 11, § 18, where no money had been raised by taxation authorizing leasing and purchasing of building and land.

4. Counties ⇨152—Contract originally void under Constitution cannot be ratified.

Ratification of contract originally void by reason of prohibitory provisions of Constitution cannot be had, since ratification presupposes power equivalent to previous authority.

5. Counties ⇨152—County, by agreeing to pay difference between that paid under previous illegal contract and purchase price of real property, could not waive return of money illegally paid (Const. art. 11, § 18; Civ. Code, § 1608; Pol. Code, § 4101, subd. 6).

County board of supervisors could not, by contract to pay difference between that already paid under contract to lease and purchase property before money was raised by taxation, in violation of Const. art. 11, § 18, because incurring indebtedness in excess of county's income for year and purchase price of property, waive return of money illegally paid out by county

treasurer because not based on warrants as required by Pol. Code, § 4101, subd. 6, under Civ. Code, § 1608, providing that, if any part of single consideration for one or more objects or several considerations for single object is unlawful, entire contract is void.

Application by Phebe M. Rideout for a writ of mandate prayed to be directed to Harvey Eich, as County Treasurer of the County of Yuba, State of California, to require respondent to make payment of money under a certain contract. Writ denied.

Brobeck, Phleger & Harrison, of San Francisco, and Warren Steel and Homer Lingenfelter, both of Marysville, for petitioner.

Peirce Coombes, McKinstry, Haber & Firebaugh, and Russell P. Tyler, all of San Francisco, for respondent.

PLUMMER, J. This cause is before us upon the petition of the above-named Phebe M. Rideout seeking a mandatory writ from this court directing the payment to her of the sum of \$24,811.14 in cash, by the respondent herein, as treasurer of the county of Yuba.

The petitioner's cause of action is based upon a certain agreement dated the 14th day of May, 1929, entered into between the petitioner, as the party of the first part, and the board of supervisors of the county of Yuba, as the party of the second part. This agreement is in the words and figures following, to-wit:

"Witnesseth: Whereas, under date of February 8, 1923, the parties hereto executed a certain indenture in the words and figures following to-wit:" (here follows the agreement, Exhibit A herein), "which is the instrument of lease and purchase entered into between the petitioner herein and the board of supervisors of the county of Yuba, whereby the petitioner agrees to erect a certain memorial building on the premises described in the instrument, and to lease the same to the county of Yuba for a period of five years and six months, at a rental of \$2,500 per month; and also, the payment by the party of the second part of certain other items set out in the agreement; and providing, further, that in consideration of the sum of \$1, the party of the first part agrees to sell to the party of the second part the leased premises for the sum of \$167,500; and further providing that the rentals paid for the premises shall be considered as payment on the purchase price of the property referred to and covered by the lease." (Exhibit A also includes a resolution of the board of supervisors of the county of Yuba purporting to authorize the execution of the lease and option to purchase by the president and clerk of the board of supervisors) "and Whereas, first party has done and performed everything by said indenture stipulated to be by her done or performed, and said 'Veterans Memorial Building' was ac-

cepted by second party on the 5th day of February, 1925, on which last mentioned date second party entered into possession thereof, and has since used and occupied the same, and has paid unto first party under the terms of said indenture, the sum of one hundred thirty-two thousand one hundred seventeen and 45/100 dollars (\$132,117.45); and Whereas, on said 5th day of February, 1925, said Board of Supervisors passed and adopted a resolution in the words and figures following: " (Here follows the resolution, Exhibit B herein, which is as follows:)

"It appearing to the satisfaction of this Board that Phebe M. Rideout has caused to be constructed the Veterans Memorial Building mentioned and referred to in that certain agreement made and executed by and between her and the County of Yuba, in the State of California, on the 8th day of February, 1923, in accordance with the terms of said agreement, and has acquired title to the real property in said agreement referred to, and that all thereof are now ready for acceptance and occupancy by said County in accordance with the terms of the agreement aforesaid:

"It is Hereby Resolved, that said contract has been fully complied with on the part of said Phebe M. Rideout and said structure, namely, said Veterans Memorial Building, and the real property in said contract referred to, be, and the same hereby are accepted by this Board on behalf of said County of Yuba;

"Be it Further Resolved, That the said lease referred to in said agreement be and the same hereby is accepted by this Board on behalf of said County, the term thereof to commence on the 5th day of February, 1925, and that the option to purchase in said agreement mentioned and made a part of said lease, be, and the same hereby is, accepted by said Board on behalf of said County;

"And it Further Appearing to This Board that the total cost of said Auditorium and said land referred to in said agreement is the sum of \$155,441.11;

"Therefore, it Is Hereby Resolved, That this Board on behalf of said County hereby orders and directs that there be paid to said Phebe M. Rideout, out of the County Treasury of said County, upon said option to purchase, the sum of \$39,693.76, and F. H. Greeley, auditor of said County of Yuba, is hereby directed to forthwith draw his warrant upon the County Treasury of said County of Yuba in favor of said Phebe M. Rideout for said sum last aforesaid."

"And Whereas, an action has been commenced in the Superior Court of the State of California, in and for the County of Yuba, by one F. W. Johnson, as plaintiff, against the said County of Yuba and various of its officers as defendants, wherein the said plaintiff as a tax-payer seeks to have the said County of Yuba and certain of its officers en-

joined from expending any further moneys under said indenture, and to have said indenture declared void; and

"Whereas, by reason of the matters and things hereinbefore recited various and sundry doubts and a controversy exists between the parties hereto as to their respective rights and liabilities under said indenture and their respective performance of the terms thereof; and

"Whereas, second party, to avail itself of the provision of section 4041f of the Political Code of California, originally entered into said indenture and made the payments to first party as aforesaid, and desires now to avail itself of the provisions of said section 4041f of the Political Code of California, by purchasing from first party the said land mentioned in said indenture, together with the improvements thereon, viz.: said 'Veterans Memorial Building', and first party is willing to sell the same to second party for the sum of one hundred fifty-six thousand nine hundred twenty-eight and 59/100 dollars (\$156,928.59), and such present purchase is advisable in the best interests of said County of Yuba;

"Now, Therefore, it is mutually agreed as follows:

"First: Said indenture executed by and between the parties hereto, and dated February 8, 1923, is hereby cancelled, terminated and rescinded.

"Second: Second party agrees that said sum of one hundred thirty-two thousand one hundred seventeen and 45/100 dollars (\$132,117.45) heretofore paid by second party to first party as aforesaid may be retained by first party on account of the purchase price of the said real property and improvements, and agrees forthwith to pay to first party in cash the balance of said purchase price, to-wit: the sum of twenty-four thousand eight hundred eleven and 14/100 dollars (\$24,811.14)

"Third: First party agrees, upon receipt of said sum of twenty-four thousand eight hundred eleven and 14/100 dollars (\$24,811.14) in cash, to convey to second party by a duly executed and acknowledged grant deed, said real property and improvements, free and clear of all liens and encumbrances except the lien of current taxes not delinquent.

"Fourth: In consideration of the preceding stipulations of this instrument and the said present sale and conveyance of said real property and improvements by first party to second party, as aforesaid, each of the parties hereto does hereby release and forever discharge the other of and from all claims and demands, actions, and causes of action of every kind and nature, so that neither of them shall have any claim on the other, directly or indirectly, arising from said indenture dated February 8, 1923, or from any act or thing undertaken, done or omitted or attempted to be done pursuant thereto.

"This instrument, and all the provisions

thereof, is intended by the parties to be whole and entire and no provision nor any part thereof is intended to be severable but the considerations moving to the respective parties hereunder are received, and this instrument is executed by said parties, in contemplation of one whole and entire and non-severable disposition of the matter and things, aforesaid, the subject matter hereof.

"In Witness Whereof, the parties hereto have executed these presents the day and year first above written." (Signed by the respective parties thereto.)

The record discloses that the respondent refused to pay the warrant issued to petitioner by the auditor of the county of Yuba, under the direction of the board of supervisors, on the ground that the agreements referred to herein are invalid. The petition sets forth the legal existence of the board of supervisors of the county of Yuba, and the personnel constituting the same; that prior to the 30th day of June, 1925, no money had been raised by taxation, as provided by the act of the Legislature, authorizing the leasing, building, and purchasing of a building to be used by the American Legion, and other patriotic organizations, as a home or meeting place; that since said date there has been raised, by the levy of a tax, as provided in said act, and by moneys transferred from the general funds of the county into a fund called the veterans' memorial fund of said county, the sum of \$158,093.85; that at the date of the issuance of the warrant in favor of the petitioner herein there was in said veterans' memorial fund a sum of money in excess of \$25,000. Other matters are set forth in the petition, such as the publication of notice of intention to purchase and of the fact that the agreements herein referred to were all executed in good faith. The petition also shows that other than as to the \$25,000 just referred to in the veterans' memorial fund, that there was not, on the 5th day of February, 1925, nor at any time during the fiscal year from July 1, 1924, to June 30, 1925, the sum of \$155,441.11 mentioned in the resolution of the board of supervisors of that date, in the treasury of said county, applicable to the purchase of said property, and said sum was in excess of the income and revenue of said county of Yuba provided for such year and available for payment to the petitioner under the terms of the agreement of lease and purchase called Exhibit A; that no election was ever held for the purpose of determining whether any indebtedness should be created by the issuance of bonds to raise money for the erection of the building referred to in the agreements, or any memorial building. The petition further sets forth that on or about the 11th day of December, 1928, an action was commenced in the superior court of the state of California, in and for the county of Yuba, to enjoin the officers named therein as respondents,

from expending any further money under the agreement of lease and purchase, on the ground that said agreement was a violation of section 18 of article 11 of the Constitution, and also seeking the judgment of the court that the respondent in this action repay to the county treasury of the county of Yuba all moneys paid out under and by virtue of the agreement of lease and purchase amounting to the sum of \$132,117.45. To the petition the respondent filed a general demurrer, and the cause is now before us upon the legal issues involved.

[1, 2] Basing his argument upon the cases *City and County of San Francisco v. Boyle*, 195 Cal. 426, 233 P. 965, and *Mahoney v. City of San Francisco*, 201 Cal. 248, 257 P. 49, the respondent contends, and the petitioner, acknowledging the application of the reasoning of those cases as applied to the agreement of lease and purchase, practically admits, that the agreement of lease and purchase entered into between the petitioner herein and the board of supervisors of the county of Yuba on the 11th day of December, 1923, and accepted and ratified by the board of supervisors of the county of Yuba on the 5th day of February, 1925, is void, as being in contravention of section 18 of article 11 of the Constitution. The theory of the petitioner's claim herein is that the instrument hereinbefore set forth as Exhibit D and entered into between the petitioner and the board of supervisors of the county of Yuba on the 14th day of May, 1929, is valid as being an instrument of purchase and sale involving only the sum of \$24,418.14 in cash, which sum was in the veterans' memorial fund in the treasury of the county of Yuba at the date of the execution of this instrument. It is further contended that this instrument stands alone; that it is not based upon the original agreement of lease and purchase; and that therefore the void character of the agreements previously entered into between the parties cannot and does not affect the right of the petitioner to the sum of \$24,418.14 represented by the warrant issued to her as the balance of the purchase price of the building referred to in the respective instruments. This argument is based in part upon the following paragraph contained in Exhibit D, to wit: "Whereas, by reason of the matters and things herein recited various and sundry doubts and a controversy exists between the parties hereto as to their respective rights and liabilities under said indenture" (referring to the previous agreement of lease and purchase) "and their respective performance of the terms thereof." This, followed by the citation of a number of authorities to the effect that boards of supervisors are clothed with the power of compromising claims against the county, and that the agreement known as Exhibit D, wherein the county purports to buy, and the petitioner to sell to the county, the memorial building,

is a compromise of a claim against the county. Whether any claim has been filed against the county does not appear from the record in this cause, and we do not find anything therein in support of such contention. However, if the agreement to which we have just referred be denominated a compromise and adjustment of the controversy between the parties, we think, even though the authorities cited by the petitioner apparently support the contention that boards of supervisors possess the power to compromise and settle and adjust claims against the county, it does not follow that a board of supervisors may, by way of compromise, give a legal status to a claim against the county which is otherwise void; that while boards of supervisors may compromise contested claims and agree upon the amount legally due, no validity can be given in this manner to an illegal claim. The agreement of the board of supervisors to pay a certain amount upon an otherwise illegal claim does not render such claim legal. Furthermore, a board of supervisors cannot escape the results of its illegal acts by way of compromise with the other party to the illegal transaction, nor can a board of supervisors, by way of compromise, eliminate the prohibitory provisions of section 18 of article 11 of the Constitution. In other words, if the agreement of lease and purchase entered into between the petitioner and the board of supervisors of the county of Yuba was rendered void by the prohibitory provisions of the Constitution, no act of compromise on the part of the board of supervisors, in relation to the transaction, could give validity thereto or endow the petitioner with any right to the retention of any moneys illegally obtained from the county under and by virtue of the void agreement.

[3] That the original agreement was and is void, by reason of the prohibitory provisions of the Constitution declaring void any contracts calling for the expenditure of money beyond the revenues provided, further appears by the reasoning found in the case of *Arthur v. City of Petaluma*, 175 Cal. 216, 165 P. 698. In that case we find the following with reference to section 18 of article 11 of the Constitution: "That constitutional provision means, not only that an indebtedness incurred contrary to its express provisions is absolutely void, but that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income and revenue of any future year."

Again, the contention of the petitioner that the contract dated May 14, 1929, stands alone, and is not in any wise dependent upon the original agreement, does not appear to us to be well taken. The contract of May 14, 1929, provides for the retention by the petitioner of the sum of \$132,117.45 paid to her upon the

void agreement. In other words, it gives vitality to such illegal payments and overlooks entirely all questions as to whether that sum of money is or ever was legally applicable to the purchase of the property for which the balance of \$24,811.14 was to be paid. That Exhibit D does not stand alone is further shown by the fact that Exhibit B incorporated therein, provided for payment on the option to purchase of the sum of \$39,993.76. This was provided for on the 5th day of February, 1925, the date upon which the lease and agreement to purchase was to begin to operate and upon which date there was no such sum of money due on account of rentals if it could be otherwise contended that the original instrument was only one of leasing. The petitioner admits that on the date of this payment on account of the option to purchase, no provision had been made by the board of supervisors relative to the revenues of the county, as provided by section 18 of article 11 of the Constitution. It is further contended that the contract or agreement of May 14, 1929, does not violate any of the provisions of section 18 of article 11, in that there was and is in the county treasury of the county of Yuba, in the memorial fund, a sum in excess of \$25,000. If nothing further were involved, petitioner's contention might be admitted, but it eliminates the real meat of the controversy, that is, that the board of supervisors may illegally pay out all but a minor portion of the purchase price of the property involved, and then, by making payment of an amount slightly below the money at their disposal, legalize the whole transaction and validate what the Constitution declares to be void. If this can be done, even in good faith, then and in that case the constitutional prohibition contained in the section referred to is meaningless. The purchase price of the property was really and in fact not the balance of 24,000 and odd dollars, but that sum of money including all that had been previously illegally paid. The circumstances of this case distinguish it from the principle involved in the case of *Buck v. City of Eureka*, 109 Cal. 504, 42 P. 243, 30 L. R. A. 409, and *Id.*, 124 Cal. 61, 56 P. 612, and *Higgins v. San Diego Water Co.*, 118 Cal. 524, 45 P. 824, 50 P. 670, and *Higgins v. City of San Diego*, 131 Cal. 294, 63 P. 470. Likewise, the circumstances are distinguishable from those involved in the case of *Pullman's Palace Car Co. v. Central Transportation Co.*, 139 U. S. 62, 11 S. Ct. 489, 35 L. Ed. 69, and the case of *Chapman v. Douglas County*, 107 U. S. 348, 2 S. Ct. 62, 27 L. Ed. 378, and the case of *Sacramento County v. Southern Pacific Co.*, 127 Cal. 217, 59 P. 568, 825. Those actions involved quantum meruit for work and labor performed and for materials furnished or rescission. This is not an action for restitution and accounting, but is simply a petition asking for a writ of mandate to compel payment upon a contract entered in-

to, having as its basis, as we have said, prior void contracts and in effect, if not by intent of the parties, avoiding the consequences of an illegal transaction. Furthermore, the record does not show that title has passed, and it further appears that title did not pass only as coincident with the payment of the warrant involved in this action. As to the liability of the county for the occupancy of the premises, though argued in the briefs, we need only to state that the record presents no such question for decision nor do we need express any opinion as to whether section 4005 of the Political Code is applicable to any claim that might be presented by the petitioner.

Again, the Political Code prescribes the method for disposition of moneys belonging to a county. Subdivision 6 of section 4101 specifies that money shall be drawn out of the treasury only upon warrants based upon orders. That is the only method by which \$132,000 and odd dollars could be applied upon the purchase price of the property involved.

By the stipulation of the parties to this action and by the petition on file, it is made to appear that the \$132,117.45 is involved in litigation now pending in the superior court of Yuba county, and that the treasurer of the county, the respondent herein, is enjoined from paying out any money under the provisions of the original agreement. If the petitioner's contention could be held valid that the \$24,811.14 is supported by a valid agreement in no wise dependent upon the preceding transactions, then and in that case a judgment of the trial court affecting the payment of \$132,117.45, apparently paid without authority of law, would not be affected by the issuance of a writ of mandate herein.

[4, 5] It is needless to cite authorities to the effect that ratification of a contract, originally void by reason of the prohibitory provisions of the Constitution, cannot be had. Ratification presupposes a power equivalent to previous authority. *Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96; 7 Cal. Jur. pp. 515, 516, § 88. Section 1608 of the Civil Code is likewise applicable here so far as it applies to the payments already made upon the contract, and made preceding May 14, 1929. The principle announced in many cases that the mode provided measures the power for action by the board of supervisors applies to this case, and there is no mode provided authorizing a board of supervisors, by a subsequent contract, to waive the return of money illegally paid out by the county treasurer, even though paid following illegal orders entered by the board of supervisors. The noble purpose of the petitioner in this case and the good faith of the board of supervisors are fully appreciated, but we cannot give consideration to those matters where the question is one of constitutional law.

Nothing contained herein is intended as an intimation that, if the moneys referred to were in the treasury of Yuba county, the board of supervisors would not, or does not, possess the power and authority to make purchase of the property involved for the purposes mentioned in section 4041f of the Political Code.

The writ is denied.

We concur: FINCH, P. J.; THOMPSON, J.

100 Cal. App. 152
SOUTHERN LAND CO. v. McKENNA et al.*
(Civ. 6219.)

District Court of Appeal, Second District, Division 1, California. July 29, 1929.

Rehearing Denied Aug. 19, 1929. Hearing Denied by Supreme Court Sept. 26, 1929.

1. Quieting title $\S$ 44(1)—Defendants in action to quiet title, stipulating that third party owned property when conveyed to plaintiff, had burden of showing plaintiff lost title.

In action to quiet title, defendants had burden of establishing by preponderance of evidence that plaintiff had lost title to property, where it was stipulated that third party had been owner of property to certain date and had conveyed property to plaintiff.

2. Lost Instruments $\S$ 8(3)—Evidence of alleged conveyance of property to defendants sued to quiet title held insufficient to show lost deed.

In action to quiet title to property claimed by defendants to have been conveyed to them by plaintiff corporation under lost deed, evidence that officers who were supposed to have executed conveyance were dead at time of trial, and that defendants were dealing with third party who they believed to be true owner of property, together with evidence indicating transaction with corporation had fallen through, and absence of record of any conveyance, held not to show lost deed to property.

3. Corporations $\S$ 617(2)—Deed by trustees of corporation at time when corporation's right to transact business was suspended for failure to pay taxes held not to convey corporation's interest.

Deed executed by alleged trustees of corporation at time when corporation's right to transact business was suspended for failure to pay taxes held not to convey any of corporation's interest in property, since failure to pay taxes did not cause forfeiture of corporate existence nor vest assets in trustees.

4. Appeal and error $\S$ 1010(1)—Finding that conveyance by plaintiff suing to quiet title was not established, warranted by evidence, cannot be disturbed on appeal.

Finding by trial court, in action to quiet title, that alleged conveyance from plaintiff corporation to defendants had not been established, warranted by evidence, cannot be disturbed on appeal.

5. Adverse possession $\S$ 95—Evidence of failure to pay taxes for five years before suit to quiet title did not sustain defense of adverse possession.

In action to quiet title, defense of adverse possession by defendants *held* not sustained under evidence showing that defendants had not paid taxes on property for five consecutive years preceding commencement of action.

6. Corporations $\S$ 630(3)—Evidence that certain persons purchased corporate stock after corporation's suspension and revived corporation to institute suit to quiet title *held* properly excluded (St. 1917, p. 377, § 12, as amended by St. 1921, p. 606).

In action by corporation to quiet title to property, evidence that certain persons had purchased stock in corporation and caused it to be revived for purpose of bringing suit, and that such persons were not stockholders at time of corporation's suspension for failure to pay taxes, and that such persons were real parties in interest and caused corporation to be revived with knowledge that neither corporation nor its stockholders claimed any interest in property, *held* properly excluded under St. 1917, p. 377, § 12, as amended by St. 1921, p. 606, providing that all corporate powers suspended may be revived and restored on application by any stockholder or creditor thereof on payment of all accrued taxes.

7. Corporations $\S$ 630(5)—Evidence that corporation of same name as corporation suing to quiet title was incorporated while plaintiff's powers were suspended, *held* properly excluded (St. 1917, p. 377, § 12, as amended by St. 1921, p. 606).

In action by corporation to quiet title, evidence of records showing that while corporation's powers were suspended for nonpayment of taxes, articles of incorporation had been filed by company having same name as plaintiff corporation, *held* properly excluded under St. 1917, p. 377, § 12, as amended by St. 1921, p. 606, providing that corporate powers may be revived by stockholder or creditor on payment of taxes.

8. Corporations $\S$ 630(3)—Certificate of revival to corporation suspended for nonpayment of taxes *held* properly admitted, in corporation's action to quiet title to land (St. 1917, p. 377, § 12, as amended by St. 1921, p. 606, and § 14 as amended by St. 1921, p. 766).

In action by corporation to quiet title to land, evidence of certificate of revivor issued to plaintiff corporation whose powers were suspended for nonpayment of taxes *held* properly admitted under St. 1917, p. 377, § 12, as amended by St. 1921, p. 606, and section 14 as amended by St. 1921, p. 766.

9. Corporations $\S$ 617(2)—Corporation suspended for nonpayment of taxes *held* not deprived of use of name by another corporation adopting similar name (St. 1917, p. 377).

Corporation whose rights, powers, and privileges have been suspended for nonpayment of taxes subsequent to effective date of St. 1917, p. 377, may not be deprived of use of its corporate name through adoption of similar name by another corporation organized in state during period of such suspension, but such corpo-

ration is entitled to certificate of revivor from state controller, regardless of fact that during period of its suspension another corporation has been organized under similar name.

10. Corporations $\S$ 630(2)—Corporation not dissolved by failure to pay taxes nor having trustees *held* not barred from suing to quiet title by six months' limitation for suit against trustees' action (Code Civ. Proc. § 341, subd. 3).

Action to quiet title by corporation *held* not barred by limitations provided in Code Civ. Proc. § 341, subd. 3, barring, within six months, action to set aside action by trustees of corporation dissolved by operation of law, including revivor of any such corporation, where corporation's failure to pay taxes did not cause it to become dissolved, and corporation did not have any trustees who could act in its behalf.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Southern Land Company against J. Irving McKenna and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellants. Emmet H. Wilson and Randall J. Hood, both of Los Angeles, for respondent.

HOLLZER, Justice pro tem. This is an action to quiet title. Defendants appeal from a decree awarded to plaintiff.

It is difficult to ascertain on what grounds a reversal is sought. Appellants' brief is a mixture of rambling and more or less disconnected narrative and discussion. No particular finding of fact is attacked. No points of law, respecting which it is claimed the trial court erred, are presented under separate or any headings. In short, appellants have failed to comply with rule VIII of this court, which requires that "the brief must present each point separately under an appropriate heading, showing the nature of the question to be presented."

In their original answer filed February 5, 1925, defendants claimed title to the property by adverse possession.

In an amendment to the answer filed more than a year later, and only a few days prior to the trial, the defendants asserted that in July or August, 1918, plaintiff conveyed the property to them, but that said conveyance was never recorded and had been lost.

It was further charged in this later pleading that in September, 1921, and while plaintiff's right to transact business had been suspended for nonpayment of taxes, the defendants obtained another deed to the same property, which later conveyance was signed "W. S. Brush, Geo. B. Raum, all of the surviving members of the last named board of directors of the Southern Land Co. (a defunct corpora-

tion), as the trustees of and all of the stockholders of said defunct corporation."

Defendants also alleged that while the plaintiff's rights were suspended another corporation, in no way connected with the latter, but having the same name as the plaintiff, was organized under the laws of this state, and that plaintiff's subsequent attempted revivor was void and that it had no capacity to sue.

Defendants further pleaded that plaintiff's cause of action was barred by the provisions of section 341, subdivision 3, Code of Civil Procedure.

The record on this appeal was prepared under what is commonly known as the alternative method, and the reporter's transcript is rather voluminous. The appellants' brief, however, contains only a small portion of the evidence presented in the court below.

[1] At the trial it was stipulated that one George E. Hart had been the owner of the property in question up to 1916, and that in the latter year he conveyed the property to the plaintiff. Under this state of the record the burden rested upon the defendants to establish by a preponderance of the evidence that the plaintiff had lost title to the property.

[2] The evidence respecting the alleged lost deed, by which it was claimed plaintiff had transferred to defendants the property in question, was not convincing, to say the least.

At the time of the trial plaintiff's officers, who were supposed to have executed this conveyance, were dead. Defendants were the only persons who testified that such a deed had ever been in existence. However, they admitted that in obtaining the instrument, claimed to have been subsequently lost, they had dealt with one Hart because they considered him the real owner of the property, and also acknowledged that after Hart's death they had secured from his heirs a quitclaim deed to the same property. Their recollection as to who executed the document in question was uncertain. Furthermore, it appeared that at the time they were dealing with Hart the defendants did not know who was the owner of the property. Likewise witnesses called on behalf of the plaintiff testified that after the commencement of the action at bar one of the defendants had admitted that the deal whereby the latter were to obtain a conveyance from the plaintiff had fallen through. One of the plaintiff's directors testified that he had never heard of any such a deed, and also that during the year following its alleged delivery to the defendants he had been employed by the plaintiff to sell the property. These facts, and also the absence of any record of such conveyance—both of the defendants being attorneys naturally understood the importance of having the same recorded—and the further fact that defendants' testimony that they had paid the taxes on this property for the years 1918,

1919, and 1920 had been disproved, all these circumstances were sufficient to create a serious doubt as to whether such a conveyance had ever been made.

[3] The deed bearing date September, 1921, introduced by defendants, was executed, not by the plaintiff, but by certain alleged trustees thereof, and at a time when plaintiff's right to transact business was suspended for failure to pay taxes. Such failure, however, did not cause a forfeiture of plaintiff's corporate existence; nor did its assets become vested in any trustees. This instrument, therefore, did not convey any of plaintiff's interest in the property. *Usher v. Henkel* (Cal. Sup.) 271 P. 494.

The case of *Clark v. San Francisco*, 53 Cal. 311, cited by defendants, is not in point. That decision merely holds that *where a corporation has been dissolved*, the directors are the trustees for the stockholders and have the exclusive power to settle its affairs and, in the exercise of that authority, may convey its property. In the action at bar, however, as already pointed out, the plaintiff's failure to pay taxes did not cause it to become dissolved, and there were no trustees who were authorized to transfer its property or otherwise act in its behalf.

[4] The lower court therefore was fully warranted in holding that the defense based upon an alleged conveyance from plaintiff to the defendants had not been established. In the light of the record as heretofore outlined, its finding in that regard cannot be disturbed on appeal.

Whether defendants have abandoned the claim of adverse possession is not altogether clear. In the court below, during the early portion of the trial, while arguing objections to the introduction in evidence of a certificate of redemption issued by the county auditor to Feely, the following took place:

"Mrs. McKenna: If your Honor please, I object to that as incompetent, irrelevant and immaterial, because in the first instance here this plaintiff was not concerned as to whether the taxes were paid or not; the payment of taxes is not a material matter.

"Mr. Wilson: It certainly is so far as it bears upon the question of adverse possession.

"Mr. McKenna: *We are not relying on adverse possession. I am relying on a deed executed by this corporation.*

"The Court: Are you not relying on adverse possession?

"A. Only to show we had a deed and went into possession of it and exercised the ownership of it, and then too, if your Honor please, I have here receipts and I know I personally paid those taxes and I know the property was assessed.

"The Court: Then it goes into a question of contradictory evidence." Reporter's Trans., pp. 74, 75.

[5] Assuming, however, that the claim of

ownership under alleged adverse possession is still one of the issues to be decided, the evidence establishes quite clearly that the defendants did not pay the taxes for five years continuously next preceding the commencement of the action. Although both of the defendants testified that they personally had paid all of the taxes continuously from 1912 down to the date of the suit, documentary evidence introduced by the plaintiff, and consisting of a portion of the records of the county auditor, showed that the taxes for the years 1918, 1919, and 1920 had been allowed to become delinquent. These records further proved that the property had been sold on account of such delinquent taxes, and that on November 14, 1921, the property had been redeemed by one Frank E. Feely, who, on the last-mentioned date, paid the taxes covering those years, together with the accrued interest and penalties thereon. The complaint having been filed on January 26, 1925, payment of the taxes for a period of five consecutive years, beginning with 1920, constituted one of the prerequisites to proving ownership acquired by adverse possession. Accordingly, since it appeared that the defendants had not paid the taxes for the year 1920, the lower court very properly found that the defense of adverse possession had not been sustained.

[6] At the trial defendants offered to prove that in 1924 one Boswell and one Usher had bought stock in the plaintiff corporation, and thereafter had caused it to be revived for the purpose of bringing the present suit and similar actions; also, that these men were not stockholders at the time of plaintiff's suspension, that they were the real parties in interest in the present case, and that they caused the plaintiff to be revived with knowledge that neither the plaintiff nor its stockholders claimed any interest in the property. The lower court sustained an objection to this offer of proof. Appellants claim that this was error.

It is a sufficient answer to this contention to point out that the law in force at the time plaintiff's corporate rights were suspended, and likewise applicable at the time of its revivor, expressly provided that "all corporate powers, rights and privileges, suspended or forfeited under the provisions of this act, may be revived and restored to full force and effect upon application therefor by any *stockholder* or creditor thereof and upon payment of all accrued taxes," etc. Section 12, c. 215, p. 377, Stats. 1917, and section 12, c. 414, p. 606, Stats. 1921.

[7] The defendants also offered in evidence certain records from the county clerk's office showing that on November 13, 1922, and while plaintiff's corporate rights, powers, and privileges were suspended for nonpayment of taxes, articles of incorporation had been filed by a company having the same name as that

of the plaintiff, which company was in no way connected with the latter. The trial court sustained an objection to the admission of this evidence.

[8] In addition, the defendants objected to the introduction in evidence of the certificate of revivor issued to the plaintiff by the state controller on December 26, 1924. This objection the trial court overruled.

Defendants contend that these rulings were erroneous. Their argument is that, since another corporation had been organized under the same name as that held by plaintiff during the period of the latter's suspension, the certificate of revivor issued by the state controller to the plaintiff was void and of no effect. In support of their argument appellants cite the cases of *Rossi v. Caire*, 186 Cal. 544, 199 P. 1042, and *Ransome-Crummey Co. v. Superior Court*, 188 Cal. 396, 205 P. 446.

Neither of these authorities supports appellants' contention. In the case of *Rossi v. Caire*, supra, the court was construing the statute of 1905 (St. 1905, p. 493) and the amendments thereof, all of which, however, had been repealed prior to the incorporation of the plaintiff. On the other hand, that law was superseded by the act of 1915 (St. 1915, p. 422), as amended by the act of 1917 (chapter 215, p. 371, Stats. 1917) and as further amended by the act of 1921 (chapter 414, p. 606, Stats. 1921).

In *Ransome-Crummey Co. v. Superior Court*, supra, the court held that under the terms of these amendments the penalty for nonpayment of license and franchise taxes by a corporation had been changed, and that the result of such nonpayment was no longer a forfeiture of its charter and consequent dissolution of the corporation, but only a suspension of its rights, powers, and privileges, with the provision of revivor. As observed by the court in the last-mentioned case, at page 397 of 188 Cal. (205 P. 448):

"The distinction between the position of a corporation, after failure to pay its license and franchise taxes, under the former and under the present law was pointed out in *Rossi v. Caire*, 186 Cal. 544, 199 P. 1042, where the status of such a corporation was considered. The court in that case said: 'The corporation (under the former laws) simply ceased to exist, just exactly as in the case of a forfeiture for cause by judicial decree, without any existing provision of law for rehabilitation as a corporation. It was not a case simply of suspended animation as under the present license tax law, but one of absolute death.'

"It follows that petitioner did not cease to exist during the period of suspended animation."

The only restriction against the controller issuing a certificate of revivor to a corporation which has paid all of the delinquent taxes and accrued penalties is to be found in

section 14 of the act of 1917 (chapter 215, p. 378, Stats. 1917), as amended in 1921 (chapter 497, p. 766, Stats. 1921). Section 14 as thus amended provides, in substance, that "any corporation which has heretofore failed to pay any license tax and penalty imposed under the provisions of chapter three hundred eighty-six, Statutes 1905, and amendments thereof, or under chapter one hundred ninety, Statutes of 1915, and for such nonpayment suffered a forfeiture of the charter of such corporation or of the right to do business in this state may be relieved of such forfeiture or may be restored to its right to do business in this state upon making application therefor" and paying certain taxes and penalties. "In case the name of any corporation which has suffered the forfeiture prescribed by either of said acts" above mentioned "has been adopted by any other corporation since the date of said forfeiture," then such reviving corporation shall be entitled to a certificate of revivor pursuant to the terms of said section "only upon the adoption by such corporation seeking revivor of a new name." Such reviving corporation shall have the right to use its former name or take such new name "only upon filing an application therefor with the secretary of state."

On the other hand, section 12 of the same act declares, in substance, that "all corporate powers, rights and privileges, suspended or forfeited under the provisions of *this act* may be revived" upon application therefor by any stockholder or creditor thereof and upon payment of certain taxes and penalties to the state. Upon the payment of such moneys, "*the state controller shall issue a certificate under his seal evidencing such payment and restoration.*"

It will be observed that, although both of these sections deal with the subject-matter of the conditions or procedure under which a corporation which has suffered a forfeiture or suspension by reason of failure to pay taxes may be relieved of such forfeiture or suspension, each covers a different class of cases.

Section 14 defines the procedure with respect to a "corporation which has heretofore failed to pay any license tax and penalty imposed under the provisions of chapter three hundred eighty-six, Statutes 1905, and amendments thereof, or under chapter one hundred ninety, Statutes of 1915." As to any such corporation, it is provided that "in case the name of any corporation which has suffered the forfeiture prescribed by either of said acts" above mentioned "has been adopted by any other corporation since the date of said forfeiture," then such reviving corporation shall be entitled to a certificate of revivor "only upon the adoption by such corporation seeking revivor of a new name."

Section 12, however, lays down the procedure whereby "all corporate powers, rights

and privileges, suspended or forfeited under the provisions of *this act* [Stats. 1917, chap. 215, p. 371] may be revived." As to such a corporation there is no provision that such suspension or forfeiture in any way jeopardizes the corporation's right to the use of its name. The payment of the taxes and penalties specified in that section is the sole prerequisite to a restoration to corporate capacity upon the application of any stockholder or creditor.

Since its suspension occurred in March, 1921, plaintiff does not come within the classification of a "corporation which has heretofore failed to pay any license tax and penalty imposed under the provisions of chapter three hundred eighty-six, Statutes 1905, and amendments thereof, or under chapter one hundred ninety, Statutes of 1915."

For the same reason plaintiff must be regarded as a corporation, the powers, rights, and privileges of which were suspended under the condition defined by section 12 of the act of 1917 (St. 1917, p. 377). With respect to the restoration of such a corporation to its rights, powers, and privileges, that section empowers the state controller to issue the certificate of revivor merely upon payment of certain taxes and penalties.

[9] Accordingly, we conclude that a corporation whose rights, powers, and privileges have been suspended for nonpayment of taxes subsequent to the date on which chapter 215, Statutes of 1917, became effective, may not be deprived of the use of its corporate name through the adoption of a similar name by another corporation organized in this state during the period of such suspension. In other words, a corporation whose rights, powers, and privileges have been thus suspended, upon complying with the provisions of section 12 of said act, is entitled to a certificate of revivor from the state controller, regardless of the fact that during the period of its suspension another corporation has been organized in this state under a similar name.

[10] The remaining contention advanced by appellants may be briefly disposed of. In the amendment to their answer, defendants pleaded that this action was barred by the provisions of section 341, subdivision 3, of the Code of Civil Procedure. The latter subdivision bars, within six months, an action to set aside or invalidate any action taken or performed by a majority of the trustees of any corporation heretofore, or hereafter dissolved by operation of law, including the revivor of any such corporation. As heretofore pointed out, plaintiff's failure to pay taxes did not cause it to become dissolved, nor did it have any trustees who could act in its behalf. There is no merit, therefore, in this point.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

100 Cal. App. 447

LARRABEE v. REPUBLIC BOND & MORTGAGE CO. et al. (Civ. 6723.)

District Court of Appeal, First District, Division 1, California. Aug. 27, 1929.

1. Corporations Ⓒ306—Evidence, in action against corporation and its president for selling stock, held to sustain conclusion corporation alone was liable for commissions.

In action against corporation and its president for commissions on sale of corporation's capital stock, evidence held to sustain conclusion that corporation and not president was real party to contract of employment, and that president acted merely on behalf of corporation, rendering corporation alone liable for commissions.

2. Brokers Ⓒ56(3)—Salesman interesting purchaser in corporate stock was entitled to commission, where president took over prospect and closed transaction after termination of salesman's services.

Where salesman before termination of services interested large investor in corporation, whereupon president took over prospect because of unusual circumstances surrounding investment and closed transaction after termination of salesman's services, salesman was entitled to commission, since if, after broker initiates negotiations, seller takes matter into his own hands and completes sale on his own terms, broker is so completely discharged from responsibility in premises that seller is estopped to contend as against broker's claim for commissions that broker has not produced purchaser ready, able, and willing to make purchase.

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

Action by Weldon C. Larrabee against the Republic Bond & Mortgage Company and another. Judgment for plaintiff and for defendant D. Binkhorst, and defendant company appeals. Affirmed.

Fickeisen & Richardson and J. E. Haley, all of Los Angeles, for appellant.

Loewenthal, Collins & Loewenthal and Loewenthal, Lissner, Roth & Gunter, all of Los Angeles (Julius Mackson, of San Francisco, of counsel), for respondent.

KNIGHT, J. The respondent, Weldon C. Larrabee, brought this action against the Republic Bond & Mortgage Company, a corporation, and D. Binkhorst, its president, to collect \$2,000 claimed to be due as commissions for the sale of the corporation's capital stock. The trial court granted a nonsuit in favor of Binkhorst upon the ground that respondent's contract of employment was with the corporation alone, and at the conclusion of the trial entered judgment against the corporation for the amount of said commissions less the sum of \$450 theretofore advanced to respondent under the terms of his contract, from which judgment the corporation appeals.

The corporation now contends that respondent's contract of employment was with Binkhorst, and that consequently the corporation was not liable for the payment of said commissions. There is no merit whatever in the contention. The evidence shows that said corporation was about to enter upon a stock-selling campaign, and in furtherance thereof had obtained from the corporation commissioner a permit to sell a certain number of shares of its capital stock and to pay a selling commission of not exceeding 20 per cent. of the par value of the stock sold. Thereupon the directors of said corporation, by resolution, directed its vice president and secretary to enter into a written contract with Binkhorst to "supervise the sale" of said stock for a commission "of 20% of the selling price thereof as authorized by said permit" and granting him power "to appoint and employ for said corporation and in its name competent salesmen. * * *" (Italics ours.) On January 24, 1924, a contract to that effect was executed whereby Binkhorst was employed as "fiscal agent * * * to supervise and conduct the sale" of said stock, with power "to appoint and employ sub-agents and to fix the amount of their remuneration upon the condition that the entire cost to the company of selling a unit of said stock shall not exceed twenty per cent (20%) of the selling price thereof." Acting pursuant to the authority thus granted, Binkhorst entered into a written contract with respondent whereby the latter was employed as "sales manager" to carry on the sale of said stock. Such contract was in the form of a letter addressed to respondent, signed by Binkhorst, and written from the corporation's offices on one of its letterheads setting forth the name of the corporation and the names of its officers, including the name "D. Binkhorst President." The letter contained the terms and conditions of the employment, and read in part as follows: "This is to state that after our several interviews we have appointed you a Sales Manager for the sale of our capital stock as authorized under the permit issued by the Corporation Securities Commissioner, a copy of which is attached hereto. The writer hereby appoints you as Sales Manager by virtue and under the contract with the corporation dated January 24, 1924. You are to provide salesmen to sell this security and pay them a commission of 10%. You are to increase this sales force and create an adequate sales organization as the conditions will warrant. You are to receive an overriding commission of 2% on all sales made by the corporation while and during the time you are its Sales Manager for the sale of its capital stock, except such sales which have been partially closed and committed from the directors of this corporation. * * *" Furthermore, it was agreed to furnish respondent with of-

fices, office equipment, stenographer work, telephone bills, and all expenses incident to such overhead, and also to pay him \$75 a week "as an advance" on his commissions. The letter further provided as follows: "You are to co-operate with us in the method of advertising * * * and in all matters of importance in your sales campaign you are to counsel and directly deal with the President and Board of Directors of the Republic Bond & Mortgage Company." And then, after setting forth other matters relating to the employment, but which are not pertinent here, the letter concluded as follows: "As we are compelled technically to work under the contract made by me with the corporation under date of January 24, 1924, I agree within a period of 90 days, if it will serve our purposes best, to have the corporation execute a contract direct with you or have a more definite contract executed with you under this agreement of January 24 with myself and the assistance of our attorneys for the corporation. With the understanding that a more permanent and definite contract shall be executed between ourselves and the corporation at a later date, and by signing your name in acceptance hereto, the foregoing is considered to be a contract between us and expresses clearly your authority to proceed as Sales Manager for the sale of the securities of the Republic Bond and Mortgage Company under the customary reasonable and cooperative methods usually employed in executing the duties of Sales Manager." Attached to the letter was the written acceptance of respondent and Binkhorst.

Thereafter and in accordance with the terms of said contract the corporation furnished respondent with offices which were part of the general offices of the corporation, supplied him with business cards representing him to be its sales manager, and with letters of introduction to several directors of said corporation, written on the corporation's letterheads and signed "Republic Bond and Mortgage Company, D. Binkhorst, President," in which it was stated in part: "This will introduce to you Mr. Weldon Carey Larrabee whom we have engaged as sales manager in the department created for selling our capital stock." The corporation also paid respondent the weekly installments of \$75 each mentioned in the contract by the checks drawn upon its funds; and, furthermore, the evidence shows that the entire proceeds derived from the sale of the capital stock were retained by the corporation and paid into one account. The 20 per cent. allowance for commissions for the sale of the stock was not segregated. A "fiscal agent" account was carried on the books of the corporation to which money was transferred at irregular times from the general funds of the corporation; but the funds so deposited in the "fiscal agent" account were used generally to defray the operating expenses of the corporation and

to meet the expenses of the sale of said stock. Binkhorst drew no salary from the corporation, nor was he paid any commissions on stock sales, but he drew various sums from the "fiscal agent" account from time to time as his circumstances required.

[1] We think it evident without discussion that the foregoing facts are amply sufficient to sustain the trial court's conclusion that the corporation and not Binkhorst was the real party to the contract of employment, and that Binkhorst acted in the matter merely on behalf of the corporation and as its president in carrying out the directions of the board of directors set forth in its resolution, and that consequently the corporation was liable for the payment of respondent's commissions. It may be fairly inferred, as indicated by the trial court in granting the nonsuit, that the reason why the corporation did not contract directly with respondent for the employment of his services was to avoid any technical violation of the corporation commissioner's permit limiting the commission on stock sales to 20 per cent. of the par value of the stock sold.

[2] Appellant further contends that in any event respondent is not entitled to the commissions sued for because, as it claims, he abandoned his employment prior to the consummation of the particular sale out of which the present demand for commissions arises. This contention is equally without merit. The contract of employment contained the following provision: "I (Binkhorst) will co-operate with you in trading your securities and assist in absorbing the losses on account of such exchanges, and as president of the Republic Bond & Mortgage Company I pledge that the officers and directors of this corporation will assist you to a reasonable degree in the endeavors of your sales campaign." The evidence shows that prior to the date of the alleged termination of respondent's services one of the salesmen employed by him pursuant to the terms of his contract procured a prospective purchaser named Foreman who was desirous of investing \$100,000 in said stock under certain conditions, and that after conferring with Foreman respondent, accompanied by the salesman, introduced Foreman to Binkhorst; that upon being informed of the conditions under which Foreman was willing to invest the amount mentioned Binkhorst told respondent that the transaction was an unusual one and could be handled only by himself as president of the corporation. Thereafter Binkhorst closed the transaction with Foreman for the sale of stock of the par value of \$100,000. Under such circumstances, respondent was clearly entitled to a commission on said sale even though, as appellant claims, respondent's services ended prior to the date of the consummation of the Foreman sale, because it is well settled that if after a broker initiates the negotiations the seller takes the matter into his own hands and completes the sale on his own terms, the broker

is so completely discharged from responsibility in the premises that the seller is estopped to contend against the broker's claim for commissions that the broker has not produced a purchaser who is ready, able, and willing to make the purchase. *Contant v. Wallace*, 62 Cal. App. 768, 217 P. 1081; *Bail v. Glantz*, 78 Cal. App. 49, 248 P. 258.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

100 Cal. App. 435

PEOPLE v. MARTIN. (Cr. 1085.)★

District Court of Appeal, Third District, California. Aug. 26, 1929.

Rehearing Denied Sept. 10, 1929. Hearing Denied by Supreme Court Sept. 23, 1929.

1. Husband and wife ⇨313—Evidence held to show that husband willfully refused and neglected to provide wife with necessities of life (Pen. Code, § 270e).

Evidence, in prosecution for abandoning and leaving wife in destitute condition and refusing and neglecting to provide her with necessary food, clothing, shelter and medical attendance, *held* sufficient, under Pen. Code, § 270e, providing that proof of acts charged is *prima facie* evidence of willfulness, to show that defendant willfully refused and neglected to provide wife with necessities of life.

2. Husband and wife ⇨313—Evidence held to show husband abandoning and leaving wife in destitute condition had sufficient ability to provide for wife's support and was able to earn means thereof (Pen. Code, § 270a).

In prosecution for abandoning and leaving wife in destitute condition and refusing and neglecting to provide her with necessary food, clothing, shelter, and medical attendance, evidence *held* sufficient to show that defendant had sufficient ability to provide for wife's support, and was able to earn means of wife's support within meaning of those terms as used in Pen. Code, § 270a.

3. Husband and wife ⇨313—Evidence of husband's earnings between date he was charged with abandoning and leaving wife destitute and date on which information was filed held admissible (Pen. Code, § 270a).

In prosecution for abandoning and leaving wife in destitute condition and refusing and neglecting to provide her with necessary food, clothing, shelter, and medical attendance, under Pen. Code, § 270a, evidence of defendant's earnings at any time between date he was charged with abandonment and date information was filed *held* admissible.

4. Husband and wife ⇨313—Evidence of husband's earnings after information was filed charging abandonment of wife leaving her destitute held admissible as tending to show earning capacity (Pen. Code, § 270a).

Evidence showing defendant's earnings after information was filed charging him with

abandoning and leaving wife in destitute condition, under Pen. Code, § 270a, *held* admissible as tending to show defendant's earning capacity.

5. Husband and wife ⇨305—Husband abandoning wife and leaving her destitute can be punished therefor, though others furnished wife necessities (Pen. Code, § 270a).

Husband, who abandoned wife, leaving her in destitute condition, and refused and neglected to furnish her with necessities of life, *held* punishable therefor, under Pen. Code, § 270a, though wife was furnished necessities of life by others after abandonment.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Thomas P. Martin was convicted of abandoning and leaving his wife in a destitute condition and refusing and neglecting to provide her with necessary food, clothing, shelter, and medical attendance, and he appeals. Affirmed.

H. W. McGowan, of Willows, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information herein filed January 5, 1929, charges the defendant with the crime of abandoning and leaving his wife in a destitute condition, "on or about the 11th day of July, 1928," and refusing and neglecting to provide her with necessary food, clothing, shelter, and medical attendance. The case was tried before the court without a jury, the defendant expressly waiving a jury trial. He was found guilty and sentenced to imprisonment in the county jail. This appeal is from the judgment and the order denying a new trial.

Appellant contends that the evidence is not sufficient to show that he willfully abandoned and left his wife in a destitute condition or refused to provide her with the necessities of life.

Mrs. Martin testified that on many occasions from June 1 to July 11, 1928, the defendant, without cause and in profane and vulgar language, ordered her to leave, threatening that he would kick her out if she did not; that, by reason of such conduct, on July 11, she left and went to the home of a neighbor, where she lived for several weeks; that on September 6, 1928, she broke some small bones in her foot, which prevented her from earning anything for six weeks; that at that time she had no money and had no "help only with what my mother sent me"; that she wrote her husband two letters during that time to the effect that she was "disabled and sick * * * and had no means of getting along," but he did not go to see her or help her out in any manner. The testimony shows that the defendant refused to pay the physician who attended his wife's injuries, but this refusal was after the physician's services had

been performed. It was admitted by the defendant that, during the fall of 1928, he notified a butcher not to let Mrs. Martin have any meat on the defendant's credit. The evidence shows without contradiction that the defendant did nothing whatever towards the support of his wife after she left him.

[1] "Proof of the abandonment and nonsupport of a wife * * * is prima facie evidence that such abandonment and nonsupport * * * is willful." Pen. Code, § 270e; *People v. Wallach*, 62 Cal. App. 385, 398, 217 P. 81. The foregoing evidence is amply sufficient to show that the defendant willfully refused and neglected to provide his wife with the necessities of life.

[2] It is next urged that the evidence fails to show that the defendant had the ability to so provide for his wife. The defendant testified that for certain kinds of work he received a dollar an hour; that he worked "about two days a week and last month nothing at all, just about enough to eat on"; that "there is nothing to do"; that he had not "looked for work in fifteen years"; that he did not "look for any for the simple reason it hasn't been necessary up until a short time ago"; that he did not know of his own knowledge that there is no work to be had, but that he had seen "the men that are not working around town." Mrs. Martin testified that about a month before she left the defendant he said he had between \$1,100 and \$1,200 in his pocket. Other witnesses testified that certain payments had been made to the defendant for work since his wife left him. While the aggregate of such payments is not large, it cannot be held that the trial court was not justified in finding from the whole evidence that the defendant had "sufficient ability to provide for his wife's support" and was "able to earn the means of such wife's support," within the meaning of those terms as used in section 270a of the Penal Code. In *People v. Turner*, 29 Cal. App. 193, 195, 156 P. 381, 382, cited by appellant, it is said: "If the defendant had an opportunity to work and refused it, his conduct in that behalf would probably be regarded in conjunction with the fact of nonsupport as constituting a violation of the section of the Code in question."

[3, 4] It is contended that "the court erred in admitting evidence of the financial condition and earnings of the defendant after July 11, 1928, the date of the alleged commission of the offense." Evidence of the defendant's earnings at any time between July 11, 1928, and January 5, 1929, on which latter day the information was filed, was clearly admissible. *People v. Curry*, 69 Cal. App. 501, 505, 231 P. 358; *People v. Frazier*, 87 Cal. App. 65, 67, 261 P. 1071. There was some evidence admitted showing the defendant's earnings after the information was filed. This evidence was properly admitted as tending to show the defendant's earning capacity. It is highly im-

probable that the trial court considered it for any other purpose.

[5] Appellant seems to contend that, when a husband has abandoned his wife, if she is furnished the necessities of life from any source, the husband is not liable to punishment under the provisions of section 270a. In support of this contention, he cites *People v. Selby*, 26 Cal. App. 796, 148 P. 807; *People v. Smith*, 31 Cal. App. 736, 161 P. 753; *People v. Clarke*, 51 Cal. App. 469, 201 P. 465; and *Matter of Povlitzki*, 80 Cal. App. 410, 251 P. 940. None of these cases sustain appellant's contention. In *People v. Morrison*, 54 Cal. App. 469, 472, 202 P. 348, a case prosecuted under section 270 of the Penal Code, relating to the failure of a father to support his minor child, and arising prior to the amendment of 1921 (St. 1921, p. 1723), providing that "it shall be no defense to such an action that such child has been provided for by other persons," it was held that the defendant could not escape criminal liability by showing that the child was supported by the charity of others. As said in *State v. Bess*, 44 Utah, 39, 137 P. 829, 831, to permit a defendant, "whose family, because of his violation of a penal statute, is being sheltered, fed, and clothed by sympathetic friends or charitable institutions," to interpose "this same charity as a shield to protect himself from the penalties which the law imposes for the violation of the statute under which he is prosecuted * * * would be to make a farce of the law and a mockery of justice."

The judgment and the order are affirmed.

We concur: ROLFE L. THOMPSON, J.;
PLUMMER, J.

99 Cal. App. 617

IN RE WITHINGTON'S ESTATE.

WITHINGTON v. WITHINGTON et al.*

(Civ. 6462.)

District Court of Appeal, Second District,
Division 2, California. July 25, 1929.

Hearing Denied by Supreme Court Aug. 22,
1929. Petition for Modification of Opin-
ion Denied Sept. 4, 1929.

Appeal from Superior Court, San Diego
County; Eugene Daney, Jr., Judge.

On petition for rehearing. Petition denied
with modification of opinion.

For former opinion, see 279 P. 196.

Luce & Swing and Albert J. Lee, all of San
Diego, for appellant.

Ed P. Sample and Harden & Green, all of
San Diego, for respondents.

PER CURIAM. In denying this application
for rehearing, we are impelled to condemn in-
temperate statements therein contained, re-

ferring to parts of the opinion in an impertinent and disrespectful manner not warranted by the record. It is said concerning the following from the opinion: "It appears that both the testator and the appellant had previously had other spouses, but that notwithstanding that fact they had maintained exceedingly intimate relations," that it is "an unjustified and unfair aspersion upon the character of the contestant." This statement is utterly untrue. The contestant's own testimony amply supports the essential assertion contained in the paragraph above attacked, that the testator and appellant had maintained exceedingly intimate relations while having other spouses. She at first denied knowing Withington before she married him. Thereafter she testified that she knew him five years before they were married, at which time she was married to a man named Hanes. She then ran a rooming house, and Hanes was a bookkeeper in a grocery store; that Withington brought his first wife there to rent an apartment, as "the proposed Mrs. Withington"; that thereafter she met Withington by appointment at hotels in Los Angeles, Calexico, and San Diego, and stayed at the same hotels with adjoining rooms. She testified that he had a wife living, and she still had a husband; that one Cucick, acting on behalf of Withington, brought her from Calexico to San Diego to meet Withington; that, upon this occasion, the then Mrs. Gladys Withington, meeting contestant on the street, pushed the latter, who tripped on the curb and fell, and that the difficulty was occasioned by contestant visiting Withington; again, that Mrs. Gladys Withington went to the house where Withington and his bookkeeper were occupying adjoining and connecting rooms at Calexico with contestant, and on this occasion, on warning from Cucick that Mrs. Withington might do some harm, contestant left Withington's apartment, and Mrs. Withington entered contestant's (then Georgia May Hanes) apartment, "breaking up all the furniture and the glass out of the door and the flower pots." Concerning the manner in which contestant and Withington lived in the apartment house at Calexico, we quote the following from her testimony:

"Q. Well, you and Mr. Withington at no time occupied the same room there? A. Why, he had his room in connection—

"Q. In connection? A. (Continuing)—with my apartment, he and his bookkeeper.

"Q. Right off of your apartment? A. Yes, sir.

"Q. His room—and did you ever have to get out of that room hurriedly on notice that Mrs. Withington was there for some purpose? A. Well, if I remember right, I did one time."

[1] We are satisfied that the statement contained in the opinion that contestant and Withington "maintained exceedingly intimate relations" before they were married is amply

justified, and that the assertion in the petition to the contrary is wholly unwarranted.

[2] Again, the petition assails, as wholly unjustified by the evidence and as contrary to the evidence, the statement in the opinion that "their marital relations, as upon previous ventures, were not blessed with constant congenial peace and quiet." From contestant's testimony it appears that, when first married, she and Withington lived at Venice for about a month; that they had "little disputes"; that upon one occasion thereafter Withington accused her of being in love with one Grundy; that "we had an argument, and he struck me and knocked me to the floor and it bruised me up terribly"; that thereafter they discussed the subject of divorce more than once and negotiated concerning a property settlement. No important inaccuracy is pointed out.

We have not attempted to give all of the evidence in support of either of the assertions in the opinion referred to and assailed in the petition in an unwarranted manner, nor to pay attention to a number of other instances of a similar character in the petition, but, since it is replete with exaggerated and improper assertions, we feel that the impropriety of this character of petition cannot be passed entirely unnoticed.

The opinion of this court in the above-entitled matter, filed on June 26, 1929, and reported in volume 59, California Appellate Decisions, at page 679 (see 279 P. 196),¹ is amended as follows: Strike from the third paragraph on page 680 thereof sixteen lines commencing with the words "It appears," to and including the quoted words "or I will," and insert in lieu thereof the following:

It appears that both the testator and the appellant had previously had other spouses, but that, notwithstanding that fact, they had then maintained exceedingly intimate relations. She testified that she herself had been attacked by the decedent's former mate for her associations with him, prior to the time she married him, and censured by Withington for visiting the Tia Juana resort of, and being friendly with, one Grundy. Withington had for many years been engaged in conducting saloons, gambling houses, and assignation resorts in California and in Mexico, prior to and during his marriage with appellant, with some of which she was familiar, and from one of his places of business at Tia Juana she had drawn considerable sums of money. Their marital relations were not blessed with constant congenial peace and quiet; they discussed the subject of divorce, each suggesting that the other obtain a decree, and Withington upon one occasion told the appellant, "Either you get a divorce or I will." Shortly thereafter appellant proposed, "I

¹ The amendment herein specified has been incorporated in the opinion as published in 279 P. 196, on page 197.

would get a divorce and I would go my way and he could go his," if he would "do the right thing" by her in a financial way. She testified that they had "little disputes," and that at one time, after complaining that she did not love him, and that he had heard rumors, he knocked her down.

With this modification, the petition for rehearing is denied.

Owing to the absence of Presiding Justice WORKS, he does not participate in this order.

GACKSTETTER v. MARKET ST. RY. CO. et al. (Civ. 6951.)★

District Court of Appeal, First District, Division 2, California. Aug. 21, 1929.

Rehearing Granted Sept. 19, 1929.

1. Trial ⇨140(1), 143—Credibility of witnesses, and weight, effect, and probative force of conflicting testimony, are for jury.

Where conflict of testimony exists, it is for jury to judge credibility of witnesses, and weight, effect, and probative force to be given their testimony.

2. Appeal and error ⇨930(1)—Reviewing court must construe conflicting evidence to support verdict.

Reviewing court, on appeal, is to construe conflicting evidence, so as to support verdict, if it may be done so reasonably, accepting as true evidence tending to sustain verdict, unless it be inherently incredible, and rejecting as untrue those portions which conflict therewith.

3. Negligence ⇨6—Violation of ordinance is negligence per se.

The violation of an ordinance is negligence per se.

4. Street railroads ⇨114(8, 21)—Evidence sustained findings that street car was negligently operated between intersections when striking child, and that negligence was proximate cause of child's injury.

Evidence held sufficient to sustain findings of jury that defendant's street car was negligently operated between intersections at time it collided with plaintiff child, and that negligence was proximate cause of injury to child.

5. Witnesses ⇨379(2)—Testimony that street car, striking child, was traveling at moderate speed, could not be impeached by question whether witness stated motorman made fine stop and was not at fault (Code Civ. Proc. §§ 2051, 2052).

Where witness, in action for injuries sustained by child when struck by defendant's street car, had previously testified that car was traveling at moderate speed, which he thought was 20 to 25 miles per hour, his testimony could not be impeached, as provided by Code Civ. Proc. §§ 2051, 2052, by question, on cross-

examination, whether witness said that motorman made fine stop and was not at fault.

6. Witnesses ⇨386—Inconsistency appearing inferentially, allowing inference favoring consistency, is insufficient to impeach witness (Code Civ. Proc. §§ 2051, 2052).

In order to impeach witness, under Code Civ. Proc. §§ 2051, 2052, by showing that he has made inconsistent statements, impeaching testimony must appear to be plainly inconsistent with that already given, and is insufficient if inconsistency appears only inferentially, under circumstances that an inference in favor of consistency might also be drawn.

7. Trial ⇨260(1)—Refusing instruction, substantially covered by instructions given, held not error.

Refusing to give requested instruction, substance of which was fully covered by other instructions given by court, held not error.

8. Street railroads ⇨95(2)—That street car was operated within speed permitted by ordinance would not preclude recovery for injuries to child struck by car, if car could not be stopped in time to avoid accident.

Refusal, in action for injuries child sustained when struck by street car, to give instruction that motorman could operate car at speed permitted by ordinance, and that, if at that speed car could not have been stopped in time to have avoided striking plaintiff, verdict must be against plaintiff, notwithstanding speed was in excess of speed authorized by ordinance, held not error, since one may act in strict conformity to terms of ordinance, and yet not exercise care required under circumstances.

9. Appeal and error ⇨1039(13)—Variance between allegations that plaintiff, before being struck by street car, was on south side of street, and proof that she was on north side, did not justify reversal.

Variance between allegations of complaint, in action for injury sustained when struck by defendant's street car, that plaintiff before accident was on south side of street, and proof showing that she was on north side, held not to justify reversal of judgment for plaintiff in action for injuries, since, to justify reversal, variance must be material, and it not appearing there was variance that could have misled defendants to their prejudice; allegations of complaint being in accordance with testimony of defendant motorman.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Betty Gackstetter, a minor, by John Gackstetter, her guardian ad litem, against the Market Street Railway Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. M. Abbott, K. W. Cannon, and Walter H. Linforth, all of San Francisco, for appellants.

Vincent W. Hallinan and James J. Roach, both of San Francisco, for respondent.

LAMBERSON, Justice pro tem. On June 24, 1925, plaintiff, a girl, then about three years of age, was injured by one of the cars of the defendant corporation. The accident occurred about 4 o'clock in the afternoon on Hayes street, between Broderick and Divisadero streets, in the city of San Francisco. A verdict for the sum of \$5,000 was rendered in favor of the plaintiff, and the appeal is by the defendants, Market Street Railway Company and L. McClelland, from the judgment entered upon such verdict.

The car was proceeding easterly on Hayes street under the operation of defendant McClelland, as motorman, and had stopped to let off passengers at Broderick street. It was then started towards the next street, Divisadero street, where a regular stop had to be made, according to the regulations of the defendant corporation. After traveling almost half way along the block, the motorman noticed the plaintiff and a little boy near a sand pile in front of a building under construction. The evidence is conflicting as to the exact position of the little girl immediately before the accident—the testimony of a woman spectator, who was standing near the point of collision, being that the little girl ran from the north side of the street and attempted to run across the street; that she was struck by the left side of the front fender, tossed across the fender to the right side of the car and onto the pile of sand, from which she rolled down under the wheels; and the testimony of the motorman being that she was on the south side of the street just off the curb a foot or so; that his car was running at the rate of about 7 or 8 miles per hour when he saw her, and that he did not exceed that rate between Broderick street and the point of the accident; that, when he first saw them, the boy and girl were standing near the sand pile, at a distance of about $1\frac{1}{2}$ car lengths from the car. The girl started to run fast toward the car and toward the north side of the street, and instantly he sounded the gong, threw on the air, and reversed the car; that, when she started to run, she was about 20 feet away from the car; that she was struck by the right forward steps of the car at the very front corner; and that he found a piece of overall cloth on the step after the accident, the cloth resembling the material of the garment which she was wearing.

The girl was seriously injured, the chief injury being in the legs, one of which was broken, and there being cuts and bruises on other parts of the body. The motorman stopped the car very suddenly and within a short distance after sounding the gong. The girl was found, with her feet on the rail, lying close against the brake shoe immediately in front of the front wheel of the forward truck of the car, the wheel not having passed over any part of her body.

The complaint alleges that on the date of the accident there was in full force and effect Ordinance No. 1674 of the city and county of San Francisco, which provided in part that no person or corporation should operate any street car at a greater speed than 15 miles per hour within a certain area therein described, which area embraced the territory where the accident occurred. The complaint also alleges that the street car which struck the plaintiff was being operated at the time at a speed in excess of 15 miles per hour.

The testimony on behalf of the plaintiff as to the speed of the car was somewhat meager and lacks the exactness that should be present in a case of such serious nature. Valentine McDonnell, a policeman, as a witness on behalf of the plaintiff, testified that he was seated in the rear end of the car reading a newspaper. The following examination occurred:

"Q. Now, do you remember the car proceeding across Broderick street and down Divisadero street prior to the time of the collision? A. Yes; I do.

"Q. Now, during that space—from the time it crossed Broderick street until the little girl was struck, at what rate of speed was the car being operated? A. Oh, it was going at a moderate rate of speed.

"Q. What do you call a moderate rate of speed in miles per hour? A. I would call a moderate rate of speed between 20 and 25 miles per hour.

"Q. Was it going about that speed at the time you mention? A. Well, to the best of my knowledge."

The witness heard some one scream; then the sound of the gong; then all of a sudden the car came to a stop. He jumped off and ran to the front, where he found the plaintiff in the position heretofore stated. He testified that the car was stopped very quickly.

The jury heard the conflicting testimony of this witness and the motorman, and had the witnesses before them where they could note their bearing, their tone of voice, and the other elements of personality which are so essential in the courtroom, and particularly before a jury. In the case of *Charves v. Terminal Railways*, 44 Cal. App. 221, 186 P. 154, the court said:

"What the actual rate of speed of the car was at the time was a question of fact for the jury, and whether or not the rate of speed which the jury found said car to have been actually running at said time was an undue rate of speed for cars to be operated upon said Adeline street, were also questions of fact for the jury. *Burr v. United Railroads*, 163 Cal. 663, 126 P. 873; *Ellis v. Central Cal. Traction Co.*, 37 Cal. App. 390, 174 P. 407."

[1, 2] Where a conflict of testimony exists, it is for the jury to judge the credibility of the witnesses, and the weight, effect, and pro-

bative force to be given their testimony and the duty of the reviewing court on appeal is to construe the evidence so as to support the verdict, if it may be done so reasonably; that is to say, to accept as true such evidence as tending to sustain the verdict, unless it be inherently incredible, and to reject as untrue those portions which conflict therewith. *Truittner v. Knight*, 83 Cal. App. 655, 257 P. 447.

[3] The violation of an ordinance is negligence per se. *Baillargeon v. Myers*, 180 Cal. 504, 182 P. 37, 39; *King v. San Diego Electric Railway Co.*, 176 Cal. 266, 168 P. 131; *Mann v. Scott*, 180 Cal. 550, 182 P. 281. In *Baillargeon v. Myers*, supra, the court said:

"In view of the conflict in the evidence in this behalf, we must assume in favor of the judgment that the jury found that at the time of the collision the ordinance was being violated by the chauffeur, and that the condition of the traffic was not such as to excuse such violation. This being so, the defendant was guilty of negligence per se, and is liable for the injury to the plaintiff, if such negligence was the proximate cause of the injury, and if the plaintiff was free from contributory negligence."

"It has been repeatedly declared by the Supreme Court of this state that the failure to perform a duty imposed by statute or municipal ordinance constitutes negligence. *Siemers v. Eisen*, 54 Cal. 418; *Driscoll v. Market Street, etc., Ry. Co.*, 97 Cal. 553, 32 P. 591, 33 Am. St. Rep. 203; *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 P. 152, 5 L. R. A. (N. S.) 1059. But the omission to perform such duty must contribute directly to the injury; otherwise, however, illegal the act or omission thereof, in the abstract, no action for damages can be maintained thereon. *McKune v. Santa Clara V. M. & L. Co.*, 110 Cal. 480, 42 P. 980." *Fenn v. Clark*, 11 Cal. App. 81, 103 P. 944, 945.

[4] Upon this branch of the case we are of the opinion that the evidence is sufficient to sustain the findings of the jury as to defendants' negligence in the operation of its car, and that such negligence was the proximate cause of plaintiff's injury.

The point is made by defendants that the trial court erred in sustaining objections to questions by defendants on cross-examination of the witness McDonnell, who testified as hereinbefore related as to the speed of the car. The cross-examination was directed to a conversation had with such witness by a representative of the defendant corporation about two weeks after the accident. The question was asked: "Now, then, didn't you at that time tell him that in your opinion the motorman made a fine stop and was not at fault?" Again: "Let me put it this way: Did you, at that time and place, say to Mr. Lewin that the motorman was not at fault?"

And again: "Did you, at that time and place, state to Mr. Lewin that the motorman made a fine stop?"

[5] Objection was made to each question, upon the ground that it was not an impeachment of anything testified to by the witness. The objections were properly sustained. The witness had previously testified that the car was traveling at a moderate speed, that he called 20 to 25 miles per hour a moderate rate, and that to the best of his knowledge the car was traveling at that rate.

Section 2051 of the Code of Civil Procedure provides that a witness may be impeached by contradictory evidence, and section 2052 of the same Code provides that a witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony.

Before a witness may be impeached, it must be shown that the statements sought to be elicited are either contradictory or inconsistent with the statements he has previously made in his testimony. In this instance the statements sought to be brought out are not inconsistent with or contradictory of any other statements. The motorman might have acted in a very commendable manner, and with great promptitude and presence of mind, and have made a very fine stop; but his conduct at that moment would not serve to erase any acts of negligence which preceded, and which might have been found to have been the proximate cause of injury. A statement that the motorman made a fine stop and was not at fault would be simply a conclusion of the witness, and would not serve to enlighten the jury as to facts and conditions which the witness obviously had not observed.

[6] In order to impeach a witness, by showing that he has made inconsistent statements, the impeaching testimony must appear to be plainly inconsistent with that already given; it is insufficient if the inconsistency appears only inferentially under such circumstances that an inference in favor of consistency might also be drawn. 27 Cal. Jur. 153; *People v. Collum*, 122 Cal. 186, 54 P. 589.

Defendants have taken exception to the refusal of the court to give the following instruction to the jury:

"In a case where the alleged negligence consists of an omission of duty suddenly and unexpectedly arising from a person walking or running either in front of the car upon the track without warning, or running into the side of the car, it is incumbent upon plaintiff to show that the circumstances were such that the motorman had an opportunity to become conscious of the facts giving rise to the duty, and a reasonable opportunity to perform it, before it can be said the motorman was guilty of negligence or the railroad company can be held liable on that ground. Of course, it is for

you to say whether or not the little girl did walk or run in front of the car, or did walk or run into the side of the car."

[7] The instruction was properly refused. The substance of the instruction was fully covered by other instructions given by the court. The court gave instruction No. IX, as follows:

"It is for the plaintiff to prove by a preponderance of the evidence that the defendant McClelland was negligent and careless in the operation of the car at the time of the happening of the accident referred to in the complaint. If the plaintiff has failed to prove this negligence by a preponderance of the evidence, then your verdict must be against the plaintiff and in favor of the Market Street Railway Company and its motorman."

Also instruction No. X:

"The duty resting upon the motorman of the car in question was to use ordinary care for the safety of the plaintiff. He was not obliged to use a higher degree of care; if he did use ordinary care, then your verdict must be against the plaintiff and in favor of the motorman and also in favor of the Market Street Railway Company."

Also instruction No. XIII:

"The motorman of the street car in question had a right to expect, in the absence of warning or knowledge to the contrary that the plaintiff, Betty Gackstetter, would not suddenly undertake to run across the street or into the car, if you find she did so."

Also instruction No. XIV:

"In determining the question of negligence in this case you should take into consideration all of the facts and circumstances surrounding the occurrence, including the fact that the street car could not travel upon any other part of the street except its rails; the speed at which it was traveling; that the plaintiff was a child of the age of three years; the place where the accident happened; the conditions existent at the time and place and any other facts proved from which you can determine whether under the circumstances the motorman defendant used the degree of care which an ordinary prudent person would have used in the same circumstances."

Also instruction No. XV:

"If you find that the plaintiff suddenly ran in front of, or in such close proximity to the moving car at a time and under such circumstances that the motorman by the exercise of ordinary care had no reason to believe or expect that she would do so, and at a time, when by the exercise of ordinary care it was impossible to have stopped the car in time to have avoided injuring her, then I instruct you your verdict should be against the plaintiff and in favor of the Market Street Railway Company and its motorman, if you fur-

ther find they were not guilty of negligence as charged in the complaint."

It is not error to refuse an instruction, when the matter requested is substantially covered by other instructions. 19 Cal. Jur. 748; *Murray v. United Railroads*, 49 Cal. App. 462, 193 P. 596; *Cook v. Los Angeles, etc., Ry. Co.*, 134 Cal. 279, 66 P. 306.

Defendants also complained of the refusal by the court to give the following instruction:

"The defendants had the right at the time and place of the happening of the accident in question, to operate its car at the speed of 15 miles an hour. If you find, under the facts and circumstances of this case, as shown by the evidence, by the use of ordinary care, the car, if traveling at this rate of speed could not have been stopped in time to have avoided the infliction on plaintiff of the injuries complained of, then your verdict must be against the plaintiff and in favor of the Market Street Railway Company and its motorman, notwithstanding you also find the speed of the car at the time and place in question was in excess of 15 miles an hour."

[8] The proffered instruction does not correctly state the law. It does not follow, merely because one has complied with the terms of a statute or ordinance, that he is thereby absolved from negligence. One may act in strict conformity to the terms of an enactment, and yet not exercise the amount of care which is required under the circumstances. 19 Cal. Jur. 634; *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125; *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 P. 203, 15 A. L. R. 401. In the case of *Spring v. McCabe*, 53 Cal. App. 330, 200 P. 41, 43, the court said:

"The operator of a vehicle may not escape liability for a collision by simply saying that he was not exceeding the speed limit established by statute or ordinance when it happened. It may appear (the other party being without fault) that though a defendant was not exceeding the limit of speed prescribed by the ordinance, yet that he was operating his vehicle without such control as to speed under the particular circumstances as a careful and prudent man in the exercise of due care and caution would have had."

The jury were fully and properly instructed as to the law upon this particular point in instructions XVI, XVII and XIX.

The defendants also complain of the refusal of the court to give the following instruction:

"If you find the accident in question was caused solely and entirely by the fault of the plaintiff, then your verdict must be against her and in favor of the defendant Market Street Railway Company and its motorman."

The matters set forth in that instruction were covered by instructions VI and XV as given by the court.

[9] The point has been made by the defendants that plaintiff cannot, as a matter of law, recover for negligence in a case involving the action of the plaintiff in running from the north side of Hayes street to the south side; in other words, that there is a variance between the allegations of the complaint and the proof. In order to justify a reversal, the variance must be material. 19 Cal. Jur. 692; Poak v. Pacific Electric Ry. Co., 177 Cal. 190, 170 P. 159.

It does not appear that there was such a variance between the allegations of the complaint and the proof as could have misled the defendants to the prejudice; the allegations of the complaint being in accordance with the testimony of the defendant McClelland.

It is ordered that the judgment be affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

HAMMOND LUMBER CO. v. RICHARDSON BUILDING & ENGINEERING CO., Inc., et al. (Civ. 3782.)★

District Court of Appeal, Third District, California. Aug. 26, 1929.

Rehearing Denied Sept. 25, 1929. Hearing Granted by Supreme Court Oct. 24, 1929.

1. Appeal and error ⇨1011(1)—Where evidence conflicted, finding that plaintiff received and accepted note was conclusive on appeal.

Where finding that materialman received and accepted note, alleged to constitute extension of time of payment, was based on conflicting evidence, such finding was conclusive on appeal.

2. Subrogation ⇨31(1)—Surety is entitled to benefit of securities held by creditor upon satisfying obligation of principal (Civ. Code, §§ 2848, 2849).

Upon satisfying obligation of plaintiff, a surety is, under Civ. Code, §§ 2848, 2849, entitled to benefit of securities held by creditor.

3. Account stated ⇨1—"Account stated" is unperformed promise of one party to pay stated sum to another.

An "account stated" is unperformed promise of one party to pay a stated sum to another and, if complete, it contains a signed and written acknowledgment of present, unqualified indebtedness or liability.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Account Stated.]

4. Account stated ⇨4—Execution and acceptance of note for balance of unsettled account constitutes "stating of account."

Execution and acceptance of note for balance of an unsettled account constitutes stating of an account between parties.

5. Mechanics' liens ⇨315—Execution and acceptance of note as account stated did not release sureties on contractor's bond.

Execution and acceptance of note as account stated did not release sureties on contractor's bond given for materials furnished to contractor.

6. Sales ⇨82(2)—Where contract was silent as to time of payment, presumption arose that it was due immediately or on demand when contract was completed.

Where contract to furnish material was silent as to time of payment, presumption arose that it was due and payable immediately or on demand when plaintiff's contract was completed.

7. Mechanics' liens ⇨315—Materialman's acceptance of note held not extension of time so as to release sureties on contractor's bond (Code Civ. Proc. § 1183).

Where contract to furnish material was silent as to time of payment, taking of ninety-day note was not an extension of time so as to release sureties on contractor's bond given for payment of material under Code Civ. Proc. § 1183, but merely established maturity of obligation which theretofore had been indefinite.

8. Principal and surety ⇨112—Sureties are not entitled to reduction of liability on account of payments made to creditor on another contract.

Sureties on one contract are not entitled to a reduction of their liability on account of partial payments made to their creditors on another debt.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by the Hammond Lumber Company against the Richardson Building & Engineering Company, Incorporated, and others. From a judgment denying plaintiff relief against their sureties, plaintiff appeals. Reversed in part with directions.

Superseding opinion in 278 P. 261.

R. L. Horton, of Los Angeles, for appellant. Stephens & Stephens and G. C. De Garmo, all of Los Angeles, for respondents.

FINCH, P. J. This action was brought against Richardson Building & Engineering Company, a building contractor, and Ella W. Richardson, E. Will Richardson, and W. C. B. Richardson, the sureties on the contractor's bond, given pursuant to the provisions of section 1183 of the Code of Civil Procedure, for materials furnished by the plaintiff to the contractor and used in the construction of a building for Edward A. Geissler. The plaintiff was given judgment against the contractor, but was denied any relief against the sureties. The plaintiff has appealed from the judgment.

As required by section 1183, the bond provides that "the same is hereby expressly made to inure to the benefit of any and all persons who perform labor upon or furnish

materials to be used in the work described in the said contract, or in any modification thereof; and any and all such persons shall have and are given a right of action to recover upon this bond against the said principal and sureties, or either of them, in any suit brought to foreclose mechanic's liens, which may be filed by such persons, or any of them upon the property mentioned in said contract, or in a separate suit brought upon this bond, and may recover in such action or actions the value of such labor done or materials furnished, or both, not exceeding, however, in the aggregate of such recoveries, the amount of this bond as above specified."

The only defense relied on by the sureties is that they were discharged from liability by alleged acts of the plaintiff, found by the court, substantially in the language of the answer, to be as follows:

"That on the 26th day of December, 1923, said defendant Richardson Building and Engineering Co. Inc., as contractor, was indebted to said plaintiff for and on account of building materials furnished by said plaintiff to said Richardson Building and Engineering Co. Inc. for use in various buildings theretofore constructed by said contractor, including the materials furnished by said plaintiff for use in the building described in plaintiff's complaint; that to evidence said entire indebtedness said Richardson Building and Engineering Co. Inc., did on the 26th day of December, 1923, execute to said plaintiff and said plaintiff did accept and receive from said Richardson Building and Engineering Co. Inc., a promissory note for the sum of \$23,192.82 payable on or before 90 days after date thereof, with interest at the rate of seven per cent per annum; and said note by its terms provided that the execution and acceptance of said note constituted evidence of said debt as a stated account.

"That said note was secured by an assignment to said plaintiff of certain securities belonging to said contractor; and since said time said note and securities have been and are now retained by and are in the possession of said plaintiff.

"That prior to the 26th day of December, 1923, the indebtedness referred to in plaintiff's complaint and sued on in this action was an ordinary book account and the same was and had been payable on or before the 28th day of September, 1923; that subsequent to the execution of said note there was a novation of indebtedness sued on herein and said book account was closed, discharged and liquidated and the same was, subsequent to the 26th day of December, 1923, merged into and became and was an account stated, which account stated included debts other than the one herein sued on.

"That at the time of the execution of said note, it was agreed between said plaintiff and said contractor that five per cent should be

added to said book account of \$4,756.03, making a total of \$5,003.40, as alleged in plaintiff's complaint, and said sum of \$5,003.40 became and was made a part of said promissory note hereinbefore referred to and described.

"That the extension of time given by said plaintiff to said contractor for the payment of said original debt, under and by virtue of the execution of said note, and the substitution of said new account for said original book account, as aforesaid, were given and made by the parties thereto, without the knowledge or consent of the defendant sureties, or either of them; that said defendant sureties did not at any time assume, promise or agree to pay said account stated or said note or any part thereof."

The promissory note referred to in the findings contains the following: "This note is not given or accepted as payment of said amount due said payee, but as evidence of said debt as a stated account only." It is not found that the note was given or accepted as payment, and the note itself states that it was not so given or accepted. "In the absence of an agreement to this effect, the acceptance is not a payment of the debt." *National Lumber Co. v. Whalley*, 162 Cal. 224, 226, 121 P. 729, 730.

[1] The finding that the plaintiff received and accepted the promissory note is based on sharply conflicting evidence, and is therefore conclusive on appeal.

[2] The collateral securities referred to in the findings consisted of a large number of shares of preferred stock of the Jennings Corporation and the contractor's promise to deliver in pledge a large number of shares of the common stock of the First Mortgage Corporation "when, and only when, permission has been received from the corporation commissioner." Such permission has never been given. It appears without contradiction, from affidavits used on plaintiff's motion for a new trial, that "on or about December 26, 1923, preferred stock of Jennings Corporation * * * was absolutely worthless"; that "soon after December 26, 1923, the Jennings Corporation became defunct and went out of business"; that "the common stock of the First Mortgage Corporation was valueless on December 26, 1923"; that, "in fact, it was a liability at that time"; and that "since then, the First Mortgage Corporation was acquired by another corporation and the common stockholders realized nothing for their stock." Upon satisfying the obligation of his principal, a surety is entitled to the benefit of securities held by the creditor. *Civ. Code*, §§ 2848 and 2849. The sureties in this case, however, tendered no such issue, and if the alleged securities are of any value the sureties still may enforce their right of subrogation. *Cawston Ostrich Farm v. Salomon*, 72 Cal. App. 550, 237 P. 808.

[3-5] It is not perceived on what theory it can be held that the sureties were discharged by the alleged stated account between the plaintiff and the contractor. The obligation of the sureties is not to pay the purchase price of the materials originally agreed upon by the plaintiff and the contractor, or the amount agreed upon in the stated account, but the reasonable value of such materials. "An account stated is a mere unperformed promise by one party to pay a stated sum to another." *Bennett v. Potter*, 180 Cal. 736, 744, 183 P. 156, 159. "It is a complete account stated if it contains a signed and written acknowledgment of a present, unqualified indebtedness or liability with a promise to pay a named sum." *Gardner v. Watson*, 170 Cal. 570, 574, 150 P. 994, 995. The execution and acceptance of a promissory note for the balance of an unsettled account constitute the stating of an account between the parties. *Kinley v. Thelen*, 158 Cal. 175, 183, 110 P. 513; *Bledsoe v. Stuckey*, 47 Cal. App. 95, 98, 190 P. 217. If stating an account in a case such as this discharges the sureties, then they would be discharged in all cases where a promissory note is accepted for the balance of an account, contrary to a long line of decisions, a few of which are hereinafter cited.

[6, 7] Respondent contends that the giving and acceptance of the note constituted an extension of the time of payment and that by reason thereof the sureties were discharged. It is neither alleged nor found that the plaintiff and the contractor made any specific agreement as to the time of payment for materials prior to December 26, 1923, when the note was executed. The finding, in the language of the answer, that the indebtedness "was an ordinary book account and the same was and had been payable on or before the 10th day of August, 1923," the day on which the plaintiff's contract was completed, does not imply a specific agreement to make payment at any particular time. Neither does the evidence show that any definite agreement as to the time of payment was made prior to the execution of the note. The time of payment not being fixed, the presumption arises that it was due and payable immediately or on demand when plaintiff's contract to furnish the materials was completed. *Civ. Code*, § 1657; *Newhall v. Sherman, Clay & Co.*, 124 Cal. 509, 511, 57 P. 387; *Sunset Lumber Co. v. Smith* (Cal. App.) 272 P. 1068. This presumption applied, of course, in the cases hereinafter cited, where the time for payment had not been specifically agreed upon prior to the acceptance of notes payable at a future date. In construing statutory provisions similar to those of *Code Civ. Proc.* § 1183, it is said:

"Decisions of this court have made it clear that the statute and bonds given under it must be construed liberally, in order to effec-

tuate the purpose of Congress as declared in the act. In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the act. Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute." *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 37 S. Ct. 614, 616, 61 L. Ed. 1206.

In the leading case of *United States Fidelity & Guaranty Co. v. United States*, 191 U. S. 416, 24 S. Ct. 142, 144, 48 L. Ed. 242, the Circuit Court of Appeals had certified to the Supreme Court of the United States the question whether the act of the company which had furnished materials in taking two promissory notes of the contractor for the amount of its account, "then due and payable, one of said notes running for thirty days and the other for sixty days," operated to discharge the surety. In answering the question in the negative the court said:

"In an ordinary guaranty the guarantor understands perfectly the nature and extent of his obligation. * * * In such cases he contracts in reliance upon the exact terms of his principal's undertaking, and has a right to suppose that no change will be made without his consent; and the courts have gone so far as to hold that any change will exonerate him, though it really redound to his benefit.

"This covenant, however, is inserted for an entirely different purpose from that of securing to the government the performance of the contract for the construction of the building. * * * The guarantor is ignorant of the parties with whom his principal may contract, the amount, the nature, and the value of the materials required, as well as the time when payment for them will become due. These particulars it would probably be impossible even for the principal to furnish, and it is to be assumed that the surety contracts with knowledge of this fact. Not knowing when or by whom these materials will be supplied, or when the bills for them will mature, it can make no difference to him whether they were originally purchased on a credit of sixty days, or whether, after the materials are furnished, the time for payment is extended sixty days, and a note given for the amount maturing at that time. If a person deliberately contracts for an uncertain liability, he ought not to complain when that uncertainty becomes certain. * * * The rule of strictissimi juris is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against

a failure of performance on the part of the principal obligor."

In *First Congregational Church of Christ v. Lowrey*, 175 Cal. 124, 126, 165 P. 440, 441, it is said:

"Neither our statute law nor our decisions under it have ever recognized that there is any distinction between a compensated and uncompensated surety or guarantor, nor between a corporate surety and an individual surety, nor between a corporation or an individual engaging in the business of suretyship or guarantyship for compensation and a corporation or individual who enters into a like contract without compensation."

The decision in *United States Fidelity & Guaranty Co. v. United States*, supra, has been followed generally by federal and state courts. *Maryland Casualty Co. v. Ohio River Gravel Co.* (C. C. A.) 20 F.(2d) 514; *United States Fidelity & Guaranty Co. v. United States* (C. C. A.) 178 F. 692; *Chaffee v. United States Fidelity & Guaranty Co.* (C. C. A.) 128 F. 918; *State v. Adams*, 187 Ind. 165, 118 N. E. 680; *George H. Sampson Co. v. Commonwealth*, 202 Mass. 339, 88 N. E. 916; *Watanabe v. Ota*, 137 Wash. 368, 242 P. 379, 43 A. L. R. 1368. In several of the cases cited stress is laid upon the fact that the surety was not prejudiced by the extension of the time of payment. In an action by the owner against the sureties on a building contractor's bond, it is said that if there has been "a change in the contract in any material respect, the inquiry there ends and the guarantor is exonerated, and that it is not a subject of inquiry whether the alteration has or has not been to his injury." *First Congregational Church of Christ v. Lowrey*, supra. This holding, however, was expressly limited in its application by the decision in *Roberts v. Security Trust & Savings Bank*, 196 Cal. 557, 565, 238 P. 673, which also was an action between the owner and the sureties on a building contractor's bond. No case in this state has been cited which holds, in a suit by laborers or materialmen against the surety on a bond in the terms of the one involved herein, that "it is not a subject of inquiry whether the alteration has or has not been to his injury."

In a case similar in principle to this, in which the defendant surety claimed a discharge from liability for the purchase price of grapes by reason of the taking of trade acceptances by the creditor, it is said:

"The bond was given to insure payment of the grapes received by Herman and which he sold on credit. The agreement between the parties with reference to payments to be made by Herman was silent as to any particular due date. At most, the trade acceptances definitely fixed such date. There never was an extension of the time of payment, for without a due date a subsequent agreement

fixing such date is not an extension. Such an agreement merely establishes the maturity of the obligation which theretofore had been indefinite." *Earl Fruit Co. v. Herman* (Cal. App.) 266 P. 592, 594; *Tyson v. Reinecke*, 25 Cal. App. 696, 145 P. 153.

Respondents rely on *American Bonding Co. v. United States* (C. C. A.) 233 F. 364, 368. In that case, however, there was a definite agreement as to the time of payment, but the terms of the agreement were not observed. The company furnishing the materials "accepted numerous notes from Wells [the contractor] for such amounts as were agreed upon from time to time * * * and discounted the notes at several banks. These notes were often renewed, the extension sometimes being as much as a "year."

The finding that "subsequent to the execution of said note there was a novation of indebtedness sued on herein" is without support in the evidence.

[8] The answer alleges that the "note was secured by the assignment to plaintiff of certain accounts due and to become due said contractor, * * * and * * * that said plaintiff has collected and received sufficient money from said accounts and securities to pay the claim herein sued on in full." The court made no finding responsive to this allegation, but the evidence in relation thereto is undisputed. As found by the court, the amount of the note was made up of the balances due for materials used "in various buildings theretofore constructed by said contractor." Collections were made by the plaintiff from the owners of two of these buildings and credited in part payment of the balances due for materials used therein. No collection was made by the plaintiff from Geissler. It seems too clear for argument that the sureties on one contract are not entitled to a reduction of their liability on account of partial payments made to their creditor on another contract.

The court found that the reasonable value of the materials furnished by the plaintiff and used by the contractor in the Geissler building is \$4,756.03. All other facts are found in the plaintiff's favor except those from which the court concluded that the sureties were discharged from liability. Since the facts found in favor of the sureties are not sufficient to warrant the conclusion reached, there appears to be no good reason to send the case back for a retrial.

The judgment in favor of the plaintiff against defendant Richardson Building & Engineering Company, Inc., is affirmed. The judgment in favor of defendants Ella W. Richardson, E. Will Richardson, and W. C. B. Richardson against the plaintiff is reversed and the trial court is directed to enter judgment on the findings in favor of the plaintiff against said defendant Ella W. Richardson,

E. Will Richardson, and W. C. B. Richardson for the sum of \$4,756.03 and costs of suit.

We concur: THOMPSON, J.; PLUMMER, J.

HAMMOND LUMBER COMPANY (a Corporation), Plaintiff and Appellant, v. **RICHARDSON BUILDING & ENGINEERING COMPANY, Incorporated, et al.** (a Corporation), Defendants and Respondents. (Civ. 3783.)★

District Court of Appeal, Third District, California. Aug. 26, 1929.

Rehearing Denied Sept. 25, 1929. Hearing Granted by Supreme Court Oct. 24, 1929.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.
Superseding opinion in 278 P. 263.

R. L. Horton, of Los Angeles, for appellant.
Stephens & Stephens and G. C. De Garmo, all of Los Angeles, for respondents.

PER CURIAM. The questions involved in this case are in all respects the same as those in *Hammond Lumber Co. v. Richardson Building & Engineering Co., Inc.*, et al. (Civil No. 3782) 280 P. 158, this day decided by this court, except that the court found in this case that the reasonable value of the materials furnished by the plaintiff is \$7,936.68.

On the authority of the decision in that case, the judgment herein in favor of the plaintiff against defendant Richardson Building & Engineering Company, Inc., is affirmed. The judgment in favor of defendants Ella W. Richardson, E. Will Richardson, and W. C. B. Richardson against the plaintiff is reversed, and the trial court is directed to enter judgment on the findings in favor of the plaintiff against said defendants Ella W. Richardson, E. Will Richardson, and W. C. B. Richardson for the sum of \$7,936.68 and costs of suit.

100 Cal. App. 439

PEOPLE v. FAIN et al. (Cr. 1036.)

District Court of Appeal, Third District, California. Aug. 26, 1929.

Larceny §55—Evidence held sufficient to sustain conviction for theft of automobile.

In prosecution of occupant of automobile arrested with driver for theft thereof, evidence held sufficient to sustain conviction.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

J. W. Fain was convicted of theft of an automobile, and he appeals. Affirmed.

Murle C. Shreck, C. E. O'Neil, and George E. Foote, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendants, J. W. Fain and Bennie Bridgeman, were charged with the theft of an automobile, a Ford coupé, the property of R. K. Hamada. Bridgeman entered a plea of guilty and Fain one of not guilty. Fain was duly convicted and his motion for a new trial was denied. He has appealed from the judgment and the order denying a new trial. Appellant's only contention is that the evidence is insufficient to warrant his conviction.

Hamada testified that he parked the automobile on one of the streets of Sacramento at 9 o'clock in the evening of February 5, 1929, and that when he returned at 10 o'clock the same evening the automobile was gone, and that his registration certificate was "on the steering post" in "plain sight, so everybody could see it."

A police officer of the city of Stockton testified that, in that city, "around 3:30 in the morning" of February 6, 1929, the defendants "were riding along in this Ford coupé and I * * * stopped them. I asked them what they were doing out in that part of town, and they said they were lost. I asked them where they were going, and they said they were going to Los Angeles. * * * I asked * * * the driver of the car * * * what his name was, and he said his name was Turner. Later on he said his name was Bridgeman. * * * I put my flashlight on the certificate in the car, and I saw it was registered to a Japanese by the name of R. K. Hamada, 2125 Fourth Street, Sacramento. * * * I asked the driver of the car, Mr. Bridgeman, if the car belonged to him, and Mr. Fain spoke up and says: 'No, it don't belong to him, it belongs to his brother.' * * * I asked him if his brother was a Japanese, and he would not answer, so I accused them both of stealing the car, and neither one said anything, so I put them under arrest. * * * I took Mr. Fain down to the station with me. * * * I tried to get him to tell me where they stole the car, but he wouldn't do it. He said he didn't know anything about the car, that he was out getting some cigarettes or something, and he didn't know anything about the car being stolen." The defendant Fain testified that he had served a term in Folsom prison for the crime of stealing an automobile in Los Angeles; that he was released from that prison January 21, 1929; that during the evening of February 5th he was invited by Bridgeman to ride with him to Stockton, "and I asked him about this car. I says: 'I didn't know you owned a car.' I says: 'Whose car is it?' He says: 'My brother's car.'" The appellant further testified that he had no information that the automobile was stolen until his arrest.

The jurors were not required to believe the

appellant's explanation. His presence in the stolen automobile, his false statement to the Stockton policeman that the automobile belonged to Bridgeman's brother, and his silence when the policeman accused him of the theft, are sufficient to establish his guilt. *People v. Lang*, 142 Cal. 482, 76 P. 232; *People v. Cole*, 141 Cal. 88, 74 P. 547; *People v. Hunter*, 59 Cal. App. 444, 210 P. 968; *People v. Edwards*, 79 Cal. App. 514, 249 P. 1090.

The judgment and the order are affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

100 Cal. App. 201

HUNTLY v. ZURICH GENERAL ACCIDENT & LIABILITY INS. CO. et al. (Civ. 6955.)

District Court of Appeal, First District, Division 2, California. August 1, 1929.

1. Dead bodies ☞1—There is no property right in dead body in absence of statutory provision (Pen. Code, § 294).

In absence of statutory provision, there is no property right in a dead body; Pen. Code, § 294, providing that person charged by law with duty of burying body of deceased person is entitled to custody for purpose of burial, not conferring property right.

2. Limitation of actions ☞31—Wife's cause of action arising from mutilation of body of deceased husband held one for injury to her person within one-year limitation (Code Civ. Proc. § 340, subd. 3).

Where gravamen of cause of action by wife for mutilation of deceased husband's body as alleged was shock to wife's mental and physical structure, and wife introduced testimony as to her physical and mental condition as indicated by insomnia, hysteria, and nervousness, together with physician's testimony along same lines, cause of action was one for injury to person within Code Civ. Proc. § 340, subd. 3, requiring action for injury to person to be brought within one year.

3. Limitation of actions ☞31—Force and violence or battery inflicted upon plaintiff causing injury is not necessary to constitute "injury to person" within one-year limitation (Code Civ. Proc. § 340, subd. 3).

Under Code Civ. Proc. § 340, subd. 3, requiring an action for an injury to person to be brought within one year, it is not necessary that act of force and violence or battery be inflicted upon plaintiff to constitute an "injury to the person," since when bodily injury occurs law considers action as one for personal injuries, regardless of nature of breach of duty, and adopts nature of damage as test.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Injury to the Person.]

4. Limitation of actions ☞31—One-year limitation on actions for injuries held intended to apply to actions for damages "on account" of personal injuries (Code Civ. Proc. § 340, subd. 3).

Code Civ. Proc. § 340, subd. 3, requiring an action for injury to another to be brought within one year, held intended to refer to actions for damages "on account" of personal injuries.

5. Limitation of actions ☞31—Amendment to one-year limitation held intended to embrace within its terms all infringements of personal rights, as distinguished from property rights (Amendment to Code Civ. Proc. § 340, subd. 3, by St. 1905, p. 232).

Amendment to Code Civ. Proc. § 340, subd. 3, by St. 1905, p. 232, bringing within one-year limitation causes of action for injury to or death of one caused by wrongful act or neglect of another, held intended to embrace within its terms all infringements of personal rights, as distinguished from property rights.

6. Coroners ☞11—Coroner, having reasonable ground to suspect possibility of death by hand of deceased or through instrumentality of some other person, has discretion to hold inquest (Pen. Code, §§ 1510, 1512).

Under Pen. Code, §§ 1510, 1512, authorizing coroner to inquire into cause of death in certain instances and hold post mortem examinations, coroner, having reasonable ground to suspect death of person was sudden or unusual and of such a nature as to indicate possibility of death by hand of deceased or through instrumentality of some other person, has discretion to hold inquest, and should not be held responsible simply because at conclusion of inquest it has been determined that deceased died natural death.

7. Coroners ☞11—Coroner may order autopsy without consent of deceased's family, when in his judgment that is appropriate means of ascertaining cause of death (Pen. Code, §§ 1510, 1512).

Under Pen. Code, §§ 1510, 1512, authorizing coroner to inquire into the circumstances of death in certain instances and to hold inquest, coroner may order an autopsy when in his judgment that is appropriate means of ascertaining cause of death, and this he may do without consent of family of deceased.

8. Evidence ☞83(4)—Presumption exists, in absence of contrary showing, that coroner's official duty has been regularly performed (Code Civ. Proc. § 1963).

It is presumed, in absence of contrary showing, that official duties of coroner have been regularly performed, in view of Code Civ. Proc. § 1963, raising presumption that official duty has been regularly performed.

9. Coroners ☞11—Coroner held authorized to hold inquest and perform autopsy, where deceased's wife contended death was not natural and inquest had not previously been held (Pen. Code, §§ 1510, 1512).

Where autopsy on body of deceased was performed in another county but no inquest was held, and, upon arrival of body of deceased, wife was dissatisfied with finding of autopsy surgeon

and represented that husband's death was caused by terrible fall or violence of some sort and was not result of natural causes, coroner held to have acted within authority in ordering inquest and authorizing autopsy surgeon to proceed in usual manner under Pen. Code, §§ 1510, 1512.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Emma L. Huntly against the Zurich General Accident & Liability Insurance Company and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Raymond Perry, of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondent Strange.

John J. O'Toole, City Atty., and Henry Heidelberg, Asst. City Atty., both of San Francisco, for respondent Coroner Leland.

J. Hampton Hoge, of San Francisco, for respondents Insurance Company, Suhr, H. F. Suhr Co., Ophuls, and Newlin.

LAMBERSON, Justice pro tem. Plaintiff appeals from orders of the superior court granting defendants' motions for nonsuit and from the resulting judgment entered in favor of defendants.

The action is one to recover damages from the defendants arising from their alleged acts in jointly causing an autopsy to be performed upon the body of Thomas H. Huntly, deceased, husband of plaintiff herein.

Mr. Huntly died in the county of Los Angeles on March 22, 1926. A partial autopsy was performed upon the body by a surgeon occupying the position of autopsy surgeon in the office of the coroner of Los Angeles county, under the authority of the coroner, but no inquest was held in that county. The body was shortly thereafter shipped to San Francisco, which was the home of the deceased and his wife. Upon its arrival in San Francisco the body was received by representatives of the defendants Suhr and H. F. Suhr Company, and taken to their undertaking establishment.

It appears that the autopsy surgeon at Los Angeles determined that the cause of death was angina pectoris, and the coroner issued a death certificate upon such finding. Apparently dissatisfied with the result of the examination in Los Angeles, the plaintiff asked the defendant Suhr to give her the name of some surgeon who could make a further examination of the body and determine for her benefit the nature of a bruise appearing upon the forehead of the deceased. Mr. Suhr referred plaintiff to defendant Strange, who was then occupying the position of autopsy surgeon under the defendant Leland, who was coroner of the city and county of San Francisco. In an interview with Dr. Strange, plaintiff asked him some questions about the

possible effect of a blow on the forehead of the deceased. Dr. Strange asked if there had been an autopsy, and if the people who performed such autopsy had examined the head.

According to the testimony of Dr. Strange, who was called as a witness on behalf of plaintiff, plaintiff asked him to do a private autopsy upon the body of her husband. He asked her what kind of a death it was, and upon being informed that the deceased died while at work and as the result of an accident, Dr. Strange informed her that he did not believe he would have a right to perform a private autopsy on a violent death case, and that plaintiff informed him that she wanted to have the skull opened to find out if there was a fracture, because she thought she was entitled to certain insurance as the result of a death by accident; that she was not satisfied that the cause of death was angina pectoris, and wanted Dr. Strange to open the head to find out if there was a fracture of the skull, and Dr. Strange informed her that the matter should be taken up through the coroner's office.

The matter was reported to the coroner, who was informed, according to the testimony, that a partial autopsy had been performed at Los Angeles. He ordered that an inquest be held, and that an autopsy be performed, and the body was later removed to the office of the coroner, where the autopsy was performed by Dr. Strange, who testified that there had been a prior incision, and that he opened the body by cutting the stitches; that the organs had all previously been cut loose and examined. He found the arteries hardened, and took small samples from the heart, as well as from other organs of the body. He also opened the head and examined the skull to see if there had been a fracture, and examined the brain to ascertain whether there had been a contusion or laceration of the brain. The organs, with the exception of the specimens, were returned to the body. The specimens, which included samples from the brain, heart, lungs, spleen, kidneys, and liver, were placed in a six-ounce bottle, containing a fluid, and were delivered to the defendant Ophuls for microscopic and other examination. Ophuls, who was in the employ of the defendant insurance company, was not present at the autopsy and did not see the body of Mr. Huntly, but received the samples from attendants at the coroner's office.

In her opening brief appellant states that the defendants are sued as joint tort-feasors; the defendant insurance company for having employed the defendant Newlin to employ defendant Ophuls to remove the specimens; the defendant Newlin, who was present at the autopsy, for unlawfully witnessing the mutilation and employing Dr. Ophuls to remove the specimens; defendant Ophuls for an unlawful examination and removal of specimens; defendant H. F. Suhr Company and Fred Suhr for the unlawful removal of the body

from their parlors for the purpose of mutilating it; defendant Leland for unlawfully granting permission to perform the mutilation, for permitting the use of his office for an unlawful mutilation, and for permitting the unlawful removal of specimens; and the defendant Strange for performing the mutilation. Plaintiff claims that the autopsy was performed without her consent or knowledge, and that she was not informed of the same until the defendant Newlin informed her of it at his office at some later date.

The plaintiff alleges, in substance, that on the 22d day of March, 1926, the coroner of the county of Los Angeles ordered his assistant autopsy surgeon to perform an autopsy upon the body of Thomas H. Huntly, and said surgeon did on that date perform a legal autopsy upon said body; that the defendants, and each of them, knew on the 24th day of March, 1926, that "the legal and only lawful autopsy" had been performed by and under the authority of the coroner of the county of Los Angeles.

The complaint then alleges as follows:

"X. That on the 24th day of March, 1926, said defendants, with knowledge that a lawful autopsy had been performed upon the body of Thomas H. Huntly, did cause said body of the late Thomas H. Huntly to be removed from the undertaking establishment of H. F. Suhr Company in the City and County of San Francisco, State of California, to the office of the coroner of the City and County of San Francisco, State of California, without the consent, knowledge, or authority of the plaintiff, and did mutilate, desecrate, violate and outrage, and commit an act of irreverence and profanation upon the body of the late Thomas H. Huntly, in that without the permission of the plaintiff, the widow of the said Thomas H. Huntly, and the lawful owner and possessor of said body, and without authority of law, did perform in the City and County of San Francisco, State of California, a mutilation, desecration and violation upon said body of said Thomas H. Huntly in this: that said defendants did cause the skull of said Thomas H. Huntly to be opened and the brains removed; the body of said Thomas H. Huntly to be opened and specimens of the heart, lungs, kidneys, liver and spleen to be removed and said specimens of the heart, lungs, kidneys, liver, spleen and brains to be delivered to the defendant William Ophuls, as the agent and representative of the defendant Zurich General Accident and Liability Insurance Company, a corporation.

"XI. That said mutilation, desecration, violation and outraging of the head and the body of her deceased husband was repugnant to the plaintiff, was offensive to and indecently insulted the said plaintiff, and by reason of said acts, and each of them, did cause the plaintiff a shock to her mental and physical equipoise, causing violent agitation of feeling and disturbances of her mind and wrecking

her mental and physical equipoise, to her horror, mental anguish and extreme disgust, and disturbing permanently her peace of mind.

"XII. That by reason of the said acts of the defendants aforesaid the plaintiff has been damaged in the sum of \$75,000.00."

The complaint was filed on May 6, 1927.

Upon the trial, and at the close of plaintiff's case, motion for nonsuit was made upon behalf of each of the defendants upon the ground, among others, that the action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure, and the motion was granted as to each of the defendants upon that ground.

Plaintiff contends that the cause of action stated in the complaint falls within the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, which reads in part as follows: "Within two years. 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision 2 of section 337 of this code. * * *"

Defendants contend, on the other hand, that the action is one to recover damages for an injury to the person of the plaintiff, caused by the wrongful act of the defendants in mutilating, as alleged, the body of the deceased, and is barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure, which reads in part as follows: "Within one year * * * 3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another."

The subdivision just quoted has undergone several amendments since its original enactment.

As enacted in 1872, it read "an action for libel, slander, assault, battery or false imprisonment." In 1874 (Amendments to the Codes 1873-74, p. 292, § 34), the words "or seduction" were added, and in 1905 (St. 1905, p. 232), there were added the words "or for injury to or for the death of one caused by the wrongful act or neglect of another."

The primary question for consideration is the nature of the right upon which the plaintiff bases her cause of action.

[1] In the absence of statutory provision, there is no property in a dead body. *Enos v. Snyder*, 131 Cal. 68, 63 P. 170, 53 L. R. A. 221, 82 Am. St. Rep. 330.

Various statutes have been enacted for the purpose of enforcing, as well as protecting, the duties which we owe to the bodies of the dead, as well as the public welfare and health. Among them is section 294 of the Penal Code, which provided at the time of the incident under examination as follows: "The person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it; except that in the case in which an inquest is required by law to be held upon a

dead body by a coroner, such coroner is entitled to its custody until such inquest has been completed."

The reservations and safeguards which have been placed around the right of possession by the relatives to the body of a deceased person have caused confusion in some cases with the right of ownership, and have led to the use of the expression "quasi property." Numerous authorities, however, from earliest times to the present, support the conclusion of the courts of this state that there can be no ownership in a human body after death. An interesting discussion of the law, civil, common, and ecclesiastical, is found in the case of *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 242 (14 Am. Rep. 667). Therein the court said: "Although, as we have said, the body is not property in the usually recognized sense of the word, yet we may consider it as a sort of quasi property, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it, and we think that a court of equity may well regulate it as such, and change the custody if improperly managed."

In the case of *Darcy v. Presbyterian Hospital*, 202 N. Y. 259, 95 N. E. 695, 696, Ann. Cas. 1912D, 1238, the Court of Appeals of New York said: "The most elaborate consideration of the question in the courts of this country appears in the case of *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, in which, after an examination of the authorities both in this country and in England, the conclusion is reached that, while no action can be maintained by the executor or administrator upon the theory of any property right in a decedent's body, the right to the possession of a dead body for the purpose of preservation and burial belongs to the surviving husband or wife or next of kin, in the absence of any testamentary disposition; and this right the law will recognize and protect from any unlawful mutilation of remains by awarding damages for injury to the feelings and mental suffering resulting from the wrongful acts, although no pecuniary damage is alleged or proved. * * *

In the case of *Beaulieu v. Great Northern Ry. Co.*, 103 Minn. 47, 52, 114 N. W. 353, 355 (19 L. R. A. [N. S.] 564, 14 Ann. Cas. 462) the court said: "The rule laid down in the *Larson Case* expresses the modern view of the question, and extends a remedy where otherwise none would exist. There being no property in dead bodies, and the wrong complained of being only the invasion of an intangible legal right, no actual damages for the wrongful mutilation of the body can be recovered, and

the courts award solatium for the bereavement of the next of kin as the only appropriate relief. Without the element of mental distress, the action would be impotent of results and of no significance or value as a remedy for the tortious violation of the legal right of possession and preservation."

In the case of *Hasselbach v. Mt. Sinai Hospital*, 173 App. Div. 89, 159 N. Y. S. 376, the court held that it is well settled that there are no property rights in the ordinary commercial sense in a dead body, and the damages allowed to be recovered for its mutilation are never awarded as a recompense for the injury done to the body as a piece of property.

[2] Having come to the conclusion that there is no ownership in the body of a deceased human being, the next question for determination is the nature of the wrong for which damages are being sought in this action.

It is plaintiff's contention that her right to maintain an action arose out of the mutilation of the body, and that "the measure of damages is the mental suffering. Therefore, the damages for mental suffering are not the gist of the cause of action."

The injury upon which plaintiff bases her cause of action was an injury to her person.

In the case of *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 P. 320, 322, 32 L. R. A. 193, the court said: "The real question presented by the objections and exceptions of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause

of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind."

The language of that opinion was expressly approved in *Lindley v. Knowlton*, 179 Cal. 298, 176 P. 440.

In the case of *Johnson v. Sampson*, 167 Minn. 203, 208 N. W. 814, 46 A. L. R. 772, the court had under consideration an action in which false charges of unchastity had been made against a school girl 15 years of age, resulting in alleged mental and bodily injuries. In its discussion of the case, the court said: "On the whole we see no good reason why a wrongful invasion of a legal right, causing an injury to the body or mind which reputable physicians recognize and can trace with reasonable certainty to the act as its true cause, should not give rise to a right of action against the wrongdoer, although there was no visible hurt at the time of the act complained of."

In the case of *Morton v. Western Union Tel. Co.*, 130 N. C. 299, 41 S. E. 484, 485, the court, in discussing the meaning of the phrase "or other injury to the person," said: "In law the word 'person' does not simply mean the physical body, for, if it did, it would apply equally to a corpse. It means a living person, composed of body and soul. Therefore any mental injury is necessarily an injury to the person. Personal injuries may be either bodily or mental, but, whether one or the other, they infringe upon the rights of the person, and not of property. A learned author has said that: 'The mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally upon the other.'"

The allegations of injury to the plaintiff, as set forth in the complaint, have already been stated. The gravamen of the cause of action, as alleged, was the shock to the plaintiff, mental and physical. Without such injury to her, personally, there could have been no cause of action for the reasons heretofore discussed. In support of her case, the plaintiff introduced testimony as to her physical and mental condition as indicated by insomnia, hysteria, and nervousness.

Her physician testified that she was suffering from "exhaustion psychosis," which he defined as a lowered condition of her nervous and physical system, a low blood pressure, a lowered mental condition, a slow power of concentration, a tardy memory, general weakness of her nervous system, and as an anemia due to an interference of the nervous system that controls the blood mechanism and blood nutrition.

We think that the inescapable conclusion from the allegations of the complaint, and from the testimony offered on behalf of plaintiff, must be that the injury that was inflicted

was to the person of the plaintiff, as a result of the acts of the defendants.

[3] It is not necessary that an act of force and violence, or a battery, be inflicted upon the plaintiff in order to bring the case within the meaning of subdivision 3 of section 340 of the Code.

In the case of *Basler v. Sacramento, etc., Ry. Co.*, 166 Cal. 33, 134 P. 993, the plaintiff's wife sustained a personal injury by reason of the negligence of the defendant, and the plaintiff sued for the loss of his wife's services and for the expense incurred in her medical care.

[4] The court held that the action was barred under the provisions of subdivision 3 of section 340 because it was one for personal injuries and not upon an obligation or liability not founded upon an instrument in writing. In the discussion of the case at page 36 of 166 Cal. (134 P. 994), the court said:

"It has been held that the word 'for' means 'by reason of,' 'because of,' and 'on account of,' and that a statute prescribing a limitation on 'actions for injury to the person * * * caused by negligence' should be interpreted to mean 'actions "by reason of" or "because of," or "on account of" injuries to the person caused by negligence,' *Sharkey v. Skilton*, 83 Conn. 503, 77 A. 952. Applying this rule to our own statute, we must hold that the language of section 340 quoted above refers to actions for damages 'on account of' personal injuries. In *Sharkey v. Skilton*, supra, the plaintiff was the husband of the injured woman, and there, as here, counsel sought to make a distinction between the direct injury to the wife and the indirect damage and loss to the husband, but the court held that both harmful results had their efficient cause in the accident to her, and that therefore the same statute of limitations applied to actions in which the wife was a party, and to those in which the husband sued alone because of his relative rights.

"*Maxson v. Delaware, Lackawanna & Western R. R. Co.*, 112 N. Y. 560, 20 N. E. 544, was a case similar to this, in which the husband sued for the loss of his wife's services because of injuries received by her on account of the defendant's negligence. It was held that his cause of action was governed by the statute prescribing the time within which an action might be commenced for a 'personal injury, resulting from negligence.'

"We see no escape from the reasoning of the foregoing authorities."

It is unnecessary to cite numerous cases in other jurisdictions which are in accord with the conclusion of our courts that there need be no physical contact with the body of a person to constitute a cause of action for personal injury. When a bodily injury occurs, the law considers the action as one for personal injuries, regardless of the nature of the breach of duty. It adopts the nature of

the damage as the test, and not the nature of the breach.

In the case of *Groff v. Du Bois*, 57 Cal. App. 343, 207 P. 59, which was an action for damages for an injury alleged to have been suffered by plaintiffs as the result of an unlawful and malicious attempt by the defendants to eject them from certain premises of which they were in lawful and peaceful possession, and which it was alleged resulted in one of the plaintiffs suffering a miscarriage, the court held that the action was one brought for injury to the person, and should have been commenced within one year. In accord are *Krebenios v. Lindauer*, 175 Cal. 431, 166 P. 17; *Harding v. Liberty Hospital Corp.*, 177 Cal. 520, 171 P. 98.

[5] We are of the opinion that by the amendment to subdivision 3 of section 340 introducing the clause "or for injury to or the death of one caused by the wrongful act or neglect of another," it was intended to embrace therein all infringements of personal rights as distinguished from property rights.

In this case plaintiff's cause of action arose solely from her relationship to deceased, and the effect the mutilation of his body had upon her, personally. If there had been an estrangement between herself and her husband, or an absence of affection, or such an attitude of mind that the alleged desecration occasioned no anguish or distress or injury, then the plaintiff would have had no cause of action. As pointed out by respondents, the right which she sought to exercise in caring for her husband's body in death was one strictly personal to her, and which could not have been exercised by others.

[6] The objection has also been made that the trial court erred in granting a motion for nonsuit against the defendant Leland, which was made upon the additional ground that the evidence introduced failed to show any carelessness or negligence upon the part of that defendant, or any breach of duty upon his part owing to the plaintiff.

Section 1510 of the Penal Code provides that: "When a coroner is informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, he must go to the place where the body is * * * and summon not less than nine nor more than fifteen persons, qualified by law to serve as jurors, to appear before him forthwith, at the place where the body of deceased is, to inquire into the cause of the death."

Section 1512 provides that the coroner "may summon a surgeon or physician to inspect the body, or hold a post-mortem examination thereon, or a chemist to make an analysis of the stomach or the tissues of the deceased and give a professional opinion as to the cause of the death."

If the coroner has reasonable ground to

suspect that the death or killing of a person was sudden or unusual and of such a nature as to indicate the possibility of death by the hand of the deceased, or through the instrumentality of some other person, he has authority to hold an inquest. He has latitude in determining whether the case falls within section 1510 of the Penal Code. He may act upon information, and it should not be held that simply because at the conclusion of an inquest it has been determined that the deceased died a natural death, he had no right, therefore, to hold an inquest. *Morgan v. County of San Diego*, 3 Cal. App. 454, 86 P. 720.

[7] A coroner may order an autopsy when, in his judgment, that is the appropriate means of ascertaining the cause of death, and this he may do without the consent of the family of the deceased. *Young v. College of Physicians & Surgeons*, 81 Md. 358, 32 A. 177, 31 L. R. A. 540.

In the case of *People v. Devine*, 44 Cal. 452, at page 458, the court said: "At common law, as well as under the statute of Edward I, and our statute concerning coroners, which are but declaratory of the common law, the coroner holding an inquest super visum corporis is in the performance of functions judicial in their character (*R. v. White*, 3 E. & E. R. 144; *Rep. Const. Ct. So. Ca.* 231; 32 *Mis. R.* 375); so distinctly judicial that he is protected under the principles which protect judicial officers from responsibility in a civil action brought by a private person. (*Garnett v. Ferrand*, 6 *Barn. & Cress.* 611)."

[8] It is presumed, in the absence of a contrary showing, that an official duty has been regularly performed. *Morgan v. County of San Diego*, supra; *Code Civ. Proc.* § 1963.

[9] The evidence offered by plaintiff shows that no inquest was held in Los Angeles county. The performance of an autopsy was not the holding of an inquest. It also shows that upon the arrival of the body in San Francisco, plaintiff was dissatisfied with the findings of the autopsy surgeon in Los Angeles; that she represented that her husband's death was sudden; that he had had a "terrible fall." She further expressed the idea that his death had been occasioned by violence of some sort and was not the result of natural causes. Under the circumstances, the body being within the city and county of San Francisco, and within the jurisdiction of the defendant Leland, and he having been informed that no inquest had been held in the county of Los Angeles, and there being a question as to the cause of death as expressed by the plaintiff, the coroner acted within his authority in ordering an inquest held, and in authorizing his autopsy surgeon to proceed in the usual manner.

The decision of the question as to whether an inquest is necessary rests in the sound discretion of the coroner, and there is nothing in the record to counteract the presumption that

he regularly performed his duty as coroner, and there was no breach of any duty which he owed to the plaintiff.

It is our opinion that the motions for non-suit, based upon the ground that the cause of action was barred within one year, were properly granted; and that the motion for non-suit as to the defendant Leland, based upon the ground that the evidence introduced in the case failed to show any carelessness or negligence on the part of the defendant Leland, or any breach of duty on the part of such defendant owing to plaintiff, was also properly granted. We deem it unnecessary to discuss the other objections made by plaintiff to the judgment entered herein.

The judgment is affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

100 Cal. App. 428

PEOPLE v. WILSON. (Cr. 1800.)

District Court of Appeal, Second District,
Division 1, California. Aug. 23, 1929.

1. Criminal law $\S$ 829(7)—Refusal of instruction on alibi defense to robbery charge, notwithstanding instructions on burden of proof and presumption of innocence, held prejudicial error (Pen. Code, $\S$ 1096, as amended by St. 1927, p. 1039, $\S$ 1).

In prosecution for robbery, refusal of requested instruction on defense of alibi, notwithstanding court had already instructed on burden of proof beyond reasonable doubt of each and every material fact relevant to issue and had instructed on presumption of innocence, under Pen. Code, $\S$ 1096, as amended by St. 1927, p. 1039, $\S$ 1, held prejudicial error.

2. Criminal law $\S$ 829(18)—Statute authorizing court to decline further instruction on reasonable doubt held inapplicable to defense from which reasonable doubt of guilt may be inferred (Pen. Code, $\S$ 1096, as amended by St. 1927, p. 1039, $\S$ 1, and $\S$ 1096a, as added by St. 1927, p. 1039, $\S$ 2).

Pen. Code, $\S$ 1096a, as added by St. 1927, p. 1039, $\S$ 2, providing that, in charging jury, court may read section 1096, as amended by St. 1927, p. 1039, $\S$ 1, on presumption of innocence, and no further instruction on subject of presumption of innocence or defining reasonable doubt need be given, held to refer merely to right of trial court to refuse offered instruction by which reasonable doubt is further defined, and has no application to instruction covering a defense as shown by evidence, such as alibi, from which reasonable doubt of guilt may be inferred.

York, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Albert Wilson was convicted of robbery, and he appeals. Reversed.

George A. Glover and Peter J. Youngdahl, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

HOUSER, J. From a judgment following his conviction on each of two counts in an information wherein he was charged with the commission of the crime of robbery, and from an order by which his motion for a new trial was denied, defendant has appealed to this court.

Although on the trial of the action defendant was identified by the sole victim in each of the robberies as the person who committed the crime, by the testimony of each of several apparently reputable witnesses, it was made to appear that, at the time when such robbery was committed, defendant could not have been present thereat; in other words, disregarding any question of the credibility of such witnesses, a complete and perfect alibi for defendant was established by the evidence presented by him. After instructing the jury as to the duty of the prosecution to establish beyond a reasonable doubt "each and every material fact relevant to the issue" and that in meeting such evidence the defendant was only required to present sufficient evidence to raise in the minds of the jury a reasonable doubt as to the truth of any such material fact, the trial court gave to the jury the time-honored instruction set forth in section 1096 of the Penal Code, as amended by St. 1927, p. 1039, $\S$ 1, as follows:

"A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'"

[1] The appeal herein is predicated upon the refusal of the trial court to give to the jury certain instructions requested by defendant which related to the law as applied to the evidence affecting the alibi of defendant. Such requested instructions were to the effect that, if from the evidence the jury believed "that the defendant was not present at the time it was alleged or proven that the crime was committed, and therefore could not have committed the crime charged in the in-

formation, and did not aid or abet in its commission," the verdict should be "not guilty." The reply of the respondent to such claim is that, since the trial court fully instructed the jury with reference to the doctrine of reasonable doubt, as well as to the bounden duty of the prosecution to establish beyond a reasonable doubt "each and every fact relevant to the issue," and since the presence of defendant at the place where and at the time when the robbery was committed was one of such necessary or essential facts, it should follow that the point presented by the requested instructions by defendant was fully covered by the instruction given, and consequently that the trial court committed no error in refusing to give either of the several instructions requested by defendant.

In each of the cases of *People v. Fong Ah Sing*, 64 Cal. 253, 28 P. 233, and *People v. Wong Loung*, 159 Cal. 520, 114 P. 829, the right of a defendant to have given to the jury a special instruction of the nature of that here under consideration is clearly recognized. The situation in each of the cases of *People v. Visconti*, 31 Cal. App. 169, 160 P. 410, 411, and *People v. Vasquez* (Cal. App.) 269 P. 549, was nearly identical with that in the instant case; and the ruling in each of such cases was that by the refusal of the trial court to give the requested instruction the defendant was prejudiced in his substantial rights. The only authorities to which attention has been directed and which might be considered as indicating a principle at variance with the rule announced in the cases cited are distinguished in the case of *People v. Vasquez*, supra.

[2] Notwithstanding the certainty of expression in the language of the Supreme Court and the District Court of Appeal to the effect that a defendant is entitled to a special instruction covering a defense of alibi, respondent particularly urges that, by reason of the provision contained in section 1096a of the Penal Code (adopted in 1927 [St. 1927, p. 1039, & 2]), no error was committed by the trial court in refusing to give to the jury either of the instructions requested by defendant. The statute on which reliance is thus placed reads as follows:

"In charging a jury, the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given."

So far as is here material, it may be noted that, having given to the jury an instruction in the language of section 1096 of the Penal Code, the trial court is authorized to decline to give to the jury any "further instruction * * * defining reasonable doubt. * * *" One of the instructions requested by defendant and refused by the trial court was as follows:

"You are instructed that if the defendant was at some other place at the time of it is

alleged or proven that the crime was committed, it is what in law is called an alibi. When satisfactorily proven it is a good defense in law. Whether or not an alibi was proven and established to your satisfaction in this case, is a fact for you to decide from all the evidence introduced before you and if you believe that the defendant was not present at the time it was alleged or proven that the crime was committed, and therefore could not have committed the crime, charged in the information, and did not aid or abet in its commission, then you should find him not guilty."

Respondent refers to certain authorities, to wit, *People v. Lloyd* (Cal. App.) 275 P. 1010, 1012; *People v. Cohen* (Cal. App.) 270 P. 377; *People v. Knocke* (Cal. App.) 270 P. 468; *People v. Leddy* (Cal. App.) 273 P. 110; *People v. Williams* (Cal. App.) 273 P. 1087, as indicating a ruling to the effect that, whenever an instruction embodying the rule of law as contained in section 1096 of the Penal Code is given to the jury, no other instruction relating to the subject of reasonable doubt need be given to the jury. A consideration of the authorities just cited discloses the fact that none of them is directly applicable to the situation here presented. They are either directed toward "the subject of the presumption of innocence," or to the definition of reasonable doubt, and each of them is readily distinguishable from the instructions requested herein by defendant. It is manifest that a vast difference might exist between an instruction by which reasonable doubt would be defined and one in which might be stated the law with reference to some fact from which the jury would be authorized to form a conclusion as to whether a reasonable doubt of the guilt of the defendant would follow. The language of the statute merely refers to the right of the trial court to refuse an offered instruction by which the doctrine of reasonable doubt is further defined; and has no application to an instruction covering a defense as shown by the evidence in the case from which reasonable doubt of the guilt of the defendant may be inferred. In other words, without infringing in any manner on the provision of the statute by attempting to further define reasonable doubt, a defendant would still have the right to direct attention to the evidence from a consideration of which a reasonable doubt of his guilt might be engendered. It is manifest that, so far as an instruction to the jury covering the defense of alibi is concerned, the right of a defendant thereto is governed by the authorities to which reference has been had herein, and that such right is unaffected by the provisions of section 1096a of the Penal Code.

In the instant case, it appearing that by the refusal of the trial court to give to the jury the instructions relating to the claimed alibi of defendant he has been prejudiced in his substantial rights, it follows that the

Judgment and the order denying defendant's motion for a new trial should be reversed. It is so ordered.

I concur: CONREY, P. J.

YORK, J. I dissent. I believe that the instructions refused were too involved to be given to the jury.

100 Cal. App. 469

In re IZEDORIO'S ESTATE.*

SILVA et al. v. BELLO et al.

(Civ. 6862.)

District Court of Appeal, First District,
Division 1, California. Aug. 31, 1929.

Rehearing Denied Sept. 30, 1929. Hearing Denied by Supreme Court Oct. 28, 1929.

1. Executors and administrators ⇨39—Title of intestate's realty vests in heirs on his death, subject to administration and sale only to pay expenses and debts.

When owner dies intestate, title to realty vests immediately in his heirs subject to administration, and cannot be sold or disposed of unless it is necessary to pay expenses of administration and claims of creditors.

2. Executors and administrators ⇨404—Proceeds of sale of decedent's homestead, after payment of funeral and administration expenses, held distributable to heirs exempt from creditors' claims (Civ. Code, § 1265; Code Civ. Proc. § 1485).

Under Civ. Code § 1265, and Code Civ. Proc. § 1485, proceeds of sale of decedent's homestead, after payment of funeral and administration expenses, should be considered as realty and not personal property, distributable to decedent's heirs, exempt from claims of creditors, as against contention that, because purchaser of homestead at probate sale took property free and clear of debts and claims arising prior to decedent's death, proceeds were not exempt, and heirs had no rights superior to those of creditors.

3. Executors and administrators ⇨404—Failure of heirs to object to sale of homestead to pay funeral and administration expenses did not waive their rights to balance of proceeds (Civ. Code, § 1265; Code Civ. Proc. § 1485).

Where it was necessary to sell intestate decedent's realty to pay funeral and administration expenses, failure of heirs to object to sale did not waive rights of heirs to have balance of proceeds distributed to them exempt from creditors' claims under Civ. Code, § 1265, and Code Civ. Proc. § 1485, since objection would have availed them nothing.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Final accounting of Anna I. Silva, as administratrix of the estate of Antonio Izedorio, also known as Antonio Izedorio Betten-court and Antonio Izidorio, deceased, involving claim of Manuel R. Silva, a creditor, and

a petition for distribution, to which account Amelia Bello and others, heirs at law of decedent, filed exceptions. From a decree settling the account and directing distribution, administratrix and claimant appeal. Affirmed.

F. I. Lemos, of Hayward, for appellant Anna I. Silva as administratrix.

C. W. White, of Hayward, for appellant Manuel R. Silva, a creditor.

E. H. Christian, of Oakland, for respondent Mary Fernandez.

Jo. Lawrence and Richard Liebman, both of Oakland, for other respondents.

DEASY, Justice pro tem. On the 30th day of October, 1909, Antonio Izedorio, resided with his wife and family in a dwelling house situated upon a piece of real property in the city of Hayward. The property was community property, and on said date said Antonio Izedorio duly executed a declaration of homestead thereon, which was thereafter duly recorded in the office of the recorder of Alameda county, Cal. No abandonment of said homestead was ever made or recorded, and said real property belonged to said Antonio Izedorio and his wife as a homestead until her death, some time in 1925. Upon his wife's death said Antonio Izedorio became the successor to the homestead and the sole owner of the property. By appropriate proceedings the title was declared vested in him by the superior court, such proceedings having taken place after his death.

On the 6th day of December, 1927, said Antonio Izedorio died intestate, leaving as his heirs at law five children, all of whom were over the age of 21 years. The only estate left by said decedent was the piece of property above referred to.

On the 23d day of January, 1928, after due proceedings, one of his daughters, Anna I. Silva, was appointed administratrix of the estate of said decedent by order of the superior court of the county of Alameda, and thereafter she duly qualified and is still such administratrix. She caused notice to creditors to be given as required by law, and the following claims were presented and were allowed by the administratrix and by the court:

P. F. Kearny, M. D., services in last illness	\$ 110 00
Manuel R. Silva, for care of deceased	1,080 00
Manuel R. Silva, board and lodging	300 00
Mary Correia, services as nurse	60 00
Lottie Vieira, services as nurse	12 00
Sorenson Bros., funeral expenses	285 70
Rev. J. Viladomat, funeral services	25 50

Making a total of..... \$1,873 20

The administratrix received no money or personal property belonging to said estate, and in order to pay the expenses of administration and the claims that had been filed she sold the real property above referred to.

All of the heirs at law of said decedent received notice of the proceedings relative to said sale, and none of them made any objection thereto. The sale was confirmed by the court and the sum of \$3,400 was received by the administratrix. She thereafter filed her first and final account, which showed a balance in her hands of \$1,702.27, and also stated that none of the claims against the estate heretofore mentioned had been paid. With the account the administratrix filed a report asking that the court make an order for the payment of said claims, and she also filed a petition for distribution asking that the court make its order bringing the administration of said estate to a close, and discharging her as such administratrix.

Thereafter exceptions to said account were filed by Amelia Bello, Izedorio V. Izedorio, Manuel Izedorio, and Mary Fernandez, the remaining four heirs at law of said decedent. The items excepted to were the sum of \$190 paid for a monument, and all of the claims which had been presented. The principal ground of objection stated was that the whole of the property belonging to said estate was subject to a homestead exemption, by reason of the declaration of homestead made by said Antonio Izedorio on October 30, 1909.

The court heard the matter of the settlement of said final account and the exceptions thereto, and ordered the administratrix to pay the item of \$190 for the monument, and the claim of Sorenson Bros. for funeral expenses amounting to \$285.50, and the claim of Rev. J. Viladomat for funeral services amounting to \$25.50.

Thereafter the administratrix filed a supplemental account showing that said amounts had been paid, and that there was a residue in her hands of \$1,391.07. Manuel R. Silva, one of the creditors, also filed a petition asking for an order directing the administratrix to pay to him the amount of his two claims. To this petition the heirs at law, other than Anna I. Silva, filed written objections upon the ground that the property was subject to a homestead exemption as claimed in their exceptions to the account of the administratrix.

After a further hearing the trial court sustained the objections of the heirs, denied the prayer of the administratrix for a settlement of her account, denied the prayer of the petition of Manuel R. Silva, and directed that the balance of said estate in the hands of the administratrix, to wit, \$1,391.07, be divided share and share alike amongst the five heirs at law of said Antonio Izedorio. A decree of settlement of account and final distribution to that effect was subsequently entered by the superior court, and from that decree the administratrix and said Manuel R. Silva have appealed. Both appeals were argued and submitted as one because they involve the same points.

[1, 2] The question presented is: Does the

homestead exemption extend to the proceeds of the sale remaining after the expenses of administration and the funeral expenses had been paid? This question has not been directly passed upon by the courts of this state, but there are many well-settled principles of law that we can rely upon for its solution.

Had the property not been sold at probate sale, the heirs at law would have taken it free and clear of all claims and demands of creditors which arose prior to the death of the decedent. *Estate of Fath*, 132 Cal. 609, 64 P. 995; *Estate of Muntz*, 69 Cal. App. 404, 231 P. 371. Appellants concede that these two cases correctly state the law, but they seek to distinguish them from the case at bar by reason of the sale of the property and its conversion into money. It is well settled that when the owner of real property dies intestate the title to the property vests immediately in his heirs, subject to administration. The property cannot be sold or disposed of, except the necessity should arise which would compel a sale to pay the expenses of administration and the claims of creditors. In this case the record shows that it was necessary to sell the real property in order to pay the funeral expenses and the expenses of administration. The only power which the court had to confirm the sale arose out of that necessity. *Estate of Packer*, 125 Cal. 396, 58 P. 59, 73 Am. St. Rep. 58. If the real estate were not exempted as a homestead, the proceeds of the sale could be used to pay any of the claims. But where the homestead exemption exists, the heirs cannot be deprived of their vested rights in the real property to pay any claims that arose prior to the death of the owner of the homestead. Section 1265, Civ. Code; section 1485, Code Civ. Proc. Therefore, after the funeral expenses and the expenses of administration have been paid out of the proceeds of the sale of a homestead, the balance of funds in the hands of the administratrix should be considered, not as personal, but as real property, and in such case the heirs would be entitled to have it distributed to them. *Estate of Hills*, 176 Cal. 232, 168 P. 20.

Appellants contend, however, that under the provisions of section 1485, Code of Civil Procedure, the purchaser at the probate sale took the property free and clear of all debts and claims arising prior to the death of the decedent, and that therefore the proceeds of the sale were not exempt, and the heirs had no rights superior to those of the creditors.

There is neither principle nor authority to sustain this contention. The purpose of the homestead exemption is to protect the "family," or the "heirs" of the declarant, and that purpose would be defeated, and the evident intent of the law set aside, if the protection were denied to the heirs and extended to a stranger, merely because he became a purchaser at a probate sale.

For these reasons we conclude that the proceeds of the probate sale of the land in question in this case, after deducting the funeral expenses and the expenses of administration, were exempted from the claims of the other creditors by reason of the homestead declaration, and that the court correctly distributed the residue to the heirs of Antonio Izedorio, deceased.

[3] Appellants make the further contention that by failing to object to the sale of the real property the heirs have waived such rights as they might otherwise have had under the provisions of section 1265, Civil Code, and section 1485, Code of Civil Procedure. It seems to follow clearly, however, from what has already been said, that no question of waiver can arise in this case. It was necessary to sell the real property in order to pay the funeral expenses and expenses of administration. Had the heirs objected, it would have availed them nothing, as the court was in duty bound to confirm the sale so that money could be obtained for these purposes. The heirs should certainly not be compelled to do a vain and idle act, under the penalty of forfeiting their vested rights to the property. The failure to object to the sale did not, therefore, constitute any waiver by them.

We do not find any error in the record, and the decree appealed from is affirmed.

We concur: KNIGHT, Acting P. J., CASH-IN, J.

100 Cal. App. 462

HOWLAND v. LAMPTON, County Clerk, etc.
(Civ. 6699.)

District Court of Appeal, Second District,
Division 1, California. Aug. 28, 1929.

Execution §158(2)—Where sufficient undertaking to stay execution pending appeal was given before execution of judgment, mandamus requiring clerk to issue execution was discharged.

Where sureties on defendant's undertaking to stay execution of judgment pending appeal failed to justify whereupon new undertaking was filed which was insufficient in form, after which defendant filed third undertaking, which was apparently sufficient, before execution of order directing execution to issue, plaintiff was not entitled to mandamus requiring clerk to issue execution on judgment, since the Code of Civil Procedure fixes no time within which undertaking to stay execution is required to be filed and therefore undertaking may be given any time before execution of judgment.

Application by R. S. Howland for writ of mandamus prayed to be directed to L. E. Lampton, County Clerk and Clerk of the Superior Court of the County of Los Angeles,

requiring him to issue execution upon a certain judgment. Writ discharged.

Salisbury & McNeil, of Los Angeles, and M. W. Conkling, of San Diego, for petitioner.

Crail, Shutt, Penprase & Miller, of Los Angeles, for respondent.

HOUSER, J. So far as concerns a decision on the application herein for a writ of mandate, the essential facts are that in an action pending in the superior court judgment was rendered in favor of the plaintiff, R. S. Howland, and against the defendant, Sallie O. Scott. An appeal was taken by defendant from the judgment rendered against her, and an undertaking to stay execution of the judgment was duly filed. The sureties on the undertaking failed to justify. Thereafter a new undertaking was filed. In due course an objection by the plaintiff to the effect that said second undertaking was insufficient in form was sustained by the trial court. Plaintiff refused to stipulate that a third undertaking might be supplied by the defendant in which the defects appearing in the second undertaking would be corrected; and on the ground of lack of jurisdiction in the premises the trial court refused to grant an order by which the defendant would be permitted to make the necessary correction in the undertaking. At the same time the trial court ordered execution to issue on the judgment. Before such order could be executed, defendant appealed therefrom; and also filed a third undertaking to stay execution of the judgment, which undertaking is alleged by respondent herein to be sufficient in form, and which fact is not denied by the petitioner.

The purpose of the petition herein is to secure a writ of mandate to compel the clerk of the lower court to issue execution on the judgment.

Without consideration of the effect on the stay of execution of the appeal by the defendant in the action from the order of the trial court directing execution to issue, from a reading of the opinion in the case of *Bradley Co. v. Mulcrevy*, 166 Cal. 325, 136 P. 60, 61, it is apparent that petitioner is not entitled to the writ for which he prays. In that case, in which the situation was substantially identical in principle with the facts in the instant case, among other things, the court said: "The Code of Civil Procedure fixes no time within which an undertaking to stay execution must be filed. The undertaking may be given at any time before execution of the judgment. *Hill v. Finnigan*, 54 Cal. 493. The right to stay execution by the filing of a stay-bond had not, therefore, expired by limitation of time when the second bond was filed. * * * But the situation is entirely different where the original bond fails, in substantial respects, to comply with the form

required by statute. Such bond is not effective to stay the execution at all. The respondent has the right to enforce execution at once, and his right is of course not impaired by the fact that he may have instituted proceedings for the justification of sureties. We have, then, the case of an appellant who has filed a paper which is entirely void as an undertaking to stay execution. The position of both parties is just the same as it would be if no bond had been filed. The fair conclusion is that a second bond, sufficient in form, may be filed at any time before the judgment has been enforced, as it unquestionably could be if no steps had theretofore been taken to obtain a stay."

The writ is discharged.

We concur: CONREY, P. J.; YORK, J.

100 Cal. App. 163

WRIGHT v. SHOENHAIR. (Civ. 3762.)

District Court of Appeal, Third District, California. July 29, 1929.

1. Bills and notes  92(1)—Note for price of land, title to which was conveyed to maker, had sufficient consideration.

Where one to whom title to land was transferred executed note in favor of vendor, note was supported by sufficient consideration.

2. Bills and notes  176—Indorsement of part interest in note was invalid (Civ. Code,   3113).

Assignment or indorsement of part interest in note, under Civ. Code,   3113, was invalid, and conveyed no interest to assignee; statute requiring that an indorsement must be of entire instrument.

3. Evidence  441(11)—Defense that note sued on was payable from funds received from maker of another note held not available to maker, where no fraud or mistake was alleged or proven.

Where no fraud or mistake was alleged in answer, or proven or attempted to be proven at trial of action on note, defense that note was executed and delivered with understanding that it should be paid out of funds received from maker of another note was not available to maker of note sued on.

4. Evidence  441(11)—Testimony of oral agreement with payee of note sued on as to its payment held inadmissible, where fraud or mistake was not shown.

In action on note, objection to testimony given by defendant maker in support of alleged oral agreement with payee that note was to be paid out of funds received from maker of another note in payment thereof should have been sustained, where no fraud or mistake was alleged or proven.

5. Bills and notes  443(3)—Assignee of note could sue thereon in own name, despite death of payee after assignment (Civ. Code,   3132).

Where payee of note before his death assigned and delivered it to plaintiff suing thereon, plaintiff's right to proceed to collect note was not affected in any way by death of payee, and plaintiff had right to sue thereon in his own name, and payment to him discharged note, as provided by Civ. Code,   3132.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by F. J. Wright against George J. Shoenhair. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank W. Wheeler and Charles W. Hackler, both of Los Angeles, for appellant.

Perry F. Backus, of Los Angeles, and Leonard Wright and Turrentine & Wright, all of San Diego, for respondent.

PRESTON, Justice pro tem. This is an appeal by defendant, George J. Shoenhair, from a judgment entered against him upon a promissory note for \$6,000, together with interest, costs, and attorney's fees.

In the spring of 1921 appellant, George J. Shoenhair, was in Atlantic, Iowa, trying to negotiate an exchange of several pieces of land owned by him in California, with a man name Chunning, for lands and securities in North Dakota. While in Iowa, appellant met Peter Hopley, an old acquaintance, who owned 160 acres of land in Merced county, California, adjoining a tract of land owned by appellant. Peter Hopley, at the request of appellant, conveyed his property in California to appellant, and in October, 1921, appellant succeeded in consummating a deal by which he exchanged his California properties and those belonging to Peter Hopley for lands and securities in the state of North Dakota. All the lands and securities received in consideration for the exchange were taken in the name of appellant. Among the securities received by appellant was a note for \$14,049.87, given by one B. E. Latham, and secured by a mortgage on real property in the state of North Dakota. Six thousand dollars was agreed upon between appellant and Peter Hopley as the value of Peter Hopley's equity in his California land. To pay Peter Hopley this \$6,000, appellant indorsed on the back of the Latham note, of \$14,049.87, the following: "I hereby assign a \$6,000 interest in the within note to Peter Hopley. [Signed] Geo. J. Shoenhair." This arrangement was not satisfactory to Peter Hopley. Thereafter, and on January 18, 1922, appellant made, executed, and delivered to Peter Hopley a promissory note for \$6,000, due three years after date, with interest at 7 per cent., payable annually, which is the note sued upon in this action. Thereafter, and on March 14, 1924,

Peter Hopley assigned and delivered said note to F. J. Wright, the plaintiff and respondent herein. No part of said note, or interest thereon, was ever paid, and this action was commenced to collect said note and interest on March 3, 1925. Peter Hopley died before this case was tried.

[1] Appellant contends that there was an entire want of consideration for this \$6,000 note. How appellant can seriously urge this contention we are unable to understand. Peter Hopley transferred to appellant title to 160 acres of land in Merced, California, valued at \$6,000, and received this note and the purported indorsement of a part of the Latham note in payment therefor. Neither Hopley in his lifetime, nor respondent, nor any one else, since his death, has ever received one cent, either for the land conveyed to appellant, or on account of the \$6,000 note, or on account of the Latham note.

[2] Furthermore, this so-called assignment or indorsement of the \$6,000 interest in the Latham note is invalid, and conveyed no interest to Peter Hopley. Section 3113, Civ. Code.

Appellant next contends that said note was made, executed, and delivered upon the condition, and for the specific purpose, set forth in the answer of appellant. This contention is equally without merit. In appellant's answer it is alleged: "That the said note was executed and delivered by this defendant to the said Peter Hopley, with the statement, agreement, and understanding that the same should be paid out of funds received by this defendant from the said B. E. Latham in payment of his note so held by Peter Hopley, and not otherwise. * * * That said note of B. E. Latham to R. L. Chunning has not been paid, nor has any part or portion thereof been paid, and because of these facts the note of this defendant to the said Peter Hopley has not become due, nor has any part or portion thereof become due and payable."

The trial court made the following finding, which is amply supported by the evidence, to wit: "The court further finds that said six thousand dollar (\$6,000.00) note was not to be paid by the defendant out of funds derived from the note known as the B. E. Latham note, but that the said promissory note became due and payable according to its terms, and at all times since the making, execution, and delivery thereof was a valid and subsisting obligation of the said defendant."

[3] Furthermore, no fraud or mistake was alleged in the answer, or proven or attempted to be proven at the trial. Therefore the law is well settled that such a defense as was attempted to be raised by appellant by his answer above set forth is not available to him. *San José Savings Bank v. Stone*, 59 Cal. 187; *Cashman v. Harrison*, 90 Cal. 304, 27 P. 283; *Bradford Investment Co. v. Joost*, 117 Cal. 210, 48 P. 1083; *Leonard v. Miner*,

120 Cal. 403, 52 P. 655; *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 767, 118 P. 92; *Rottman v. Hevener*, 54 Cal. App. 478, 202 P. 329, and cases there cited; *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 109 P. 499; *Consolidated Lumber Co. v. Frew*, 32 Cal. App. 118, 162 P. 430.

In *Leonard v. Miner*, supra, the court said: "It is a thoroughly well-settled principle of evidence that a written contract cannot be contradicted or varied by evidence of an oral agreement entered into by the parties before or at the time of making such a contract. Consequently, parol evidence of an oral agreement alleged to have been made at the time of the drawing or making of a bill of exchange or promissory note cannot be admitted to vary, qualify, or contradict, or add to or subtract from the absolute terms of the written instrument. 2 *Parsons on Bills and Notes*, p. 501. As was said by Lord Coke in *Countess of Rutland's Case*, 5 Coke, 25: 'It would be inconvenient that matters in writing, made by advice, and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory.' Evidence of a contemporary oral agreement between the parties to a bill or note, whereby the order or promise contained in the instrument is rendered null or conditional, or whereby the fact of payment is made to depend upon some contingent future event, comes within the same principle [citing cases]. We know of no subject upon which the authorities are more numerous and uniform than that indicated above."

In *Cashman v. Harrison*, supra, the court said: "Except for the purpose of proving want of consideration, fraud, accident, or mistake, which might nullify the instrument, parol evidence is inadmissible to vary or contradict a bill of exchange. 'Therefore, if a bill or note be absolute upon its face, no evidence of a verbal agreement made at the same time, qualifying its terms, can be admitted.' If the bill is payable on demand, 'it cannot be shown by verbal testimony that it was agreed that it should not be paid * * * until the amount was collected from certain sources; nor until a certain draft was received; * * * nor that a note or bill in which no time for payment is expressed, and is therefore constructively payable on demand, was to be paid at a specified time; * * * nor that the liability of the drawer, maker, or other party was not to be enforced; * * * nor that it was to be paid out of a particular estate.'"

[4] Therefore it is clear that respondent's objection to the testimony given by appellant, in support of the alleged oral agreement with Peter Hopley, should have been sustained.

[5] Appellant also contends that respondent had no title or interest in the note, and no

right to continue this action after the death of Peter Hopley. These contentions are likewise without merit. Plaintiff's right to proceed to collect the note was not affected in any way by the death of Peter Hopley. Peter Hopley, before his death, assigned and delivered the note to plaintiff, and plaintiff had the right to sue thereon in his own name and payment to him discharged the note. Section 3132, Civ. Code.

In *Kelley v. Hampton*, 22 Cal. App. 68, 133 P. 339, 340, the court said: "But an assignment for collection, without any consideration being paid by the assignee, vests the legal title in the assignee, which is sufficient to enable him to recover, though the assignor retains an equitable interest in the thing assigned. This is of no concern to the debtor." See, also, *Greig v. Riordan*, 99 Cal. 316, 33 P. 913.

Other contentions are made by appellant, but we deem them unworthy of special consideration.

We think the appeal in this case is devoid of any merit whatever. The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

100 Cal. App. 481

PEOPLE v. CHAVEZ. (Cr. 1088.)

District Court of Appeal, Third District, California. Sept. 3, 1929.

Criminal law ⇨1182—Where no appearance was made, for defendant convicted of murder, at hearing before Supreme Court, case was affirmed (Pen. Code, § 1253).

Where defendant, convicted of murder in the first degree, appealed, but filed no brief, and cause was regularly placed on calendar for oral argument, and no appearance was made in behalf of defendant at time case was called for hearing, judgment is affirmed, under express provisions of Pen. Code, § 1253.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Nick Chavez was convicted of murder in the first degree, and he appeals. Affirmed.

Alva A. King, of Colusa, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Colusa county of a felony, to wit, the crime of murder in the first degree. The transcript on appeal was filed in this court July 9, 1929. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on September 3, 1929. No appear-

ance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

100 Cal. App. 87

SOBERANES v. ESPINOSA. (Civ. 6771.)

District Court of Appeal, First District, Division 1, California. July 22, 1929.

1. Judgment ⇨564(1)—Decree in partition became final and conclusive, in absence of appeal therefrom.

Decree in partition correcting mistake in including in trust estate more land than grantor owned became final and conclusive, in absence of an appeal therefrom.

2. Trusts ⇨315(3)—Trust estate, and not estate of decedent creating trust, was responsible for payment of compensation to trustee.

Trust estate, and not estate of decedent creating trust, was responsible for payment of compensation to trustee of an express trust.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Action upon a rejected claim against an estate by B. A. Soberanes against Manuel D. Espinosa, as administrator of the estate of Salvador Espinosa, deceased. From an adverse judgment, plaintiff appeals. Affirmed.

Z. B. Stuart and Charles P. Johnson, both of Los Angeles, for appellant.

Charles B. Rosendale and Edson G. Thomas, both of Salinas, for respondent.

KNIGHT, J. The plaintiff, B. A. Soberanes, appeals from an adverse judgment in an action to recover on a rejected claim presented by him against the estate of Salvador Espinosa, deceased, for compensation alleged to be due him as trustee of an express trust created by the decedent about nine years prior to his death. Respondent contended before the trial court, as here, that the trust estate, and not the estate of the decedent, was responsible for the payment of any such compensation; and we are of the opinion that this contention must be sustained.

It appears that the decedent was the owner of an undivided one-eighth interest in a large acreage of land in Monterey county, and on April 12, 1917, by an instrument in writing, created a trust as to an undivided two-thirds of his undivided one-eighth interest in said lands, allotting to each of the beneficiaries therein named a definite number of acres. The trust instrument appointed Z. B. Stuart trustee with power to name his successor in the event he relinquished his trust, and provided that the trustee's compensation should

be fixed on a percentage basis calculated on the value of the trust property handled by him. The remaining one-third of the decedent's one-eighth interest in the larger tract was retained by him for his own use and benefit. Subsequent to the creation of the trust the decedent was declared incompetent by the superior court in and for Monterey county, and George S. Gould was appointed guardian of his person and estate. Thereafter, and on April 25, 1919, Stuart relinquished his trusteeship, and plaintiff claims that he was appointed by Stuart to succeed him. In the meantime an action was commenced to partition the lands in which the decedent owned an undivided one-eighth interest, and included as parties defendants therein were Stuart, Soberanes, the plaintiff herein, Gould as guardian, all of Espinosa's co-owners in the larger tract of land, and all of the beneficiaries named in Espinosa's declaration of trust. On March 8, 1924, an interlocutory decree was entered which, besides directing that all of said lands be partitioned in conformity with the proportionate interests of the respective parties as the same were established by said decree, adjudged that certain provisions of the Espinosa trust be reformed, particularly with reference to the number of acres of land the trustor attempted to include therein. It was further decreed that Soberanes never was appointed trustee of said trust estate, and consequently Gould was appointed to such trusteeship with directions to convey the trust property to the beneficiaries as set forth in said decree, upon the death of Espinosa. On January 7, 1926, a final decree was entered in said action, which, among other things, set apart in severalty to Gould as trustee and to Espinosa individually their respective two-thirds and one-third shares in and to one-eighth of the larger tract of land. On May 5, 1926, Espinosa died, and respondent herein was appointed administrator of his estate; and shortly thereafter Gould as trustee, in conformity with the directions contained in said decree in partition, conveyed to the beneficiaries of the trust estate the interests to which they were entitled, and as guardian transferred or surrendered the remainder of Espinosa's one-eighth interest to the administrator of Espinosa's estate.

[1] Appellant concedes it to be the law that "the trustee must follow or look to the trust property for his compensation," but he as-

serts that in the present case Gould, "without any authority whatsoever, intermingled the funds and the real property of Espinosa's general estate with the trust estate," and that subsequently the administrator of Espinosa's estate, "with the assistance and advice" of Gould, intermingled the trust property with "the general estate in probate" so that there was "no property, real or personal, left in the trust estate whereby plaintiff and appellant could enforce his claim for his compensation against the property of the trust, * * *" and that therefore he "was forced to file his claim against the general estate of Salvador Espinosa, deceased. * * *" But appellant has not pointed out, nor have we been able to find any evidence whatever to substantiate his assertion, that the property of the two estates was so intermingled, or that any part of the trust property was transferred to or included within the assets of the estate of Espinosa. It is true that the total number of acres conveyed by Gould to the beneficiaries was less than was called for in said trust instrument, but this is readily accounted for by the fact, as found in the partition proceeding, that Espinosa had mistakenly included in the trust estate 212.18 acres more than he owned; and this mistake was corrected by the decree in partition, which became final and conclusive in the absence of an appeal therefrom.

[2] Appellant's further contention that respondent's answer admits the estate's liability for the payment to the trustee's fees is also without merit, it being apparent that the denials set forth in the answer are legally sufficient to raise that issue. The objection appellant urges against the validity of the findings and decree in the partition proceeding, whereunder his purported appointment as trustee was declared of no effect and Gould was appointed as trustee, is not the proper subject of consideration here, because it constitutes a collateral attack upon a proceeding which in the absence of an appeal became final and conclusive; and even though it be held that the action of the court in the respect above mentioned was erroneous, the situation with reference to the source of payment of the fees appellant claims to be due him as trustee would not be altered thereby.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

100 Cal. App. 78

PEOPLE v. HARRIS. (Cr. 1538.)

District Court of Appeal, First District, Division 1, California. July 20, 1929.

- 1. Embezzlement** $\Rightarrow$ 44(1)—Evidence showing amount collected for freight charges by defendant cashier was never turned in held to sustain conviction of grand theft.

In prosecution for grand theft, evidence showing beyond reasonable doubt that amount collected by defendant as cashier of steamship company for freight charges was never turned in to company held sufficient to sustain conviction.

- 2. Embezzlement** $\Rightarrow$ 23—Neither intent to restore nor actual restoration of money appropriated would constitute defense to charge of grand theft (Pen. Code, §§ 490a (added by St. 1927, p. 1047), 512, 513).

Where cashier in freight department of steamship company collected account, but failed to turn it in to company, neither intent to restore nor actual restoration of money would constitute defense to charge of grand theft, in view of Pen. Code, § 490a, added by St. 1927, p. 1047, and sections 512, 513, in substance providing that intent to restore property embezzled is no ground of defense or mitigation of punishment, and that voluntary restoration may be ground in mitigation of punishment.

- 3. Criminal law** $\Rightarrow$ 1170(4)—Error, if any, in not permitting defendant on cross-examination to ask whether check was cashed, when witness and defendant went to bank, held not prejudicial.

In prosecution for grand theft, refusing to allow defendant on cross-examination to ask witness, against objection, whether he understood that check appropriated by defendant was cashed by defendant at time witness and defendant went to bank together, was not prejudicial error, if any, where witness testified that he did not enter bank with defendant, and was permitted to relate fully conversation between them.

- 4. Embezzlement** $\Rightarrow$ 44(5)—Entry of check in cashier's handwriting on company's books held sufficient to justify conclusion that cashier, charged with grand theft, received check.

In prosecution for grand theft by cashier, whose duty it was to accept payment of freight charges from various shippers, entry of amount of check alleged to be appropriated in cashier's handwriting on company's books was sufficient to justify jury in concluding that defendant received check.

- 5. Criminal law** $\Rightarrow$ 400(8)—Testimony of bank auditor that check alleged to be taken in grand theft prosecution did not appear on deposit slips was not error.

In prosecution for grand theft by cashier of steamship company, authorized to collect freight charges, permitting auditor of bank with which company deposited funds to testify over objection that he had examined deposit slips covering period in question, and did not find amount of check alleged to be taken by cashier,

was not error, since testimony was relevant to question whether check was ever deposited by cashier to credit of employer.

- 6. Criminal law** $\Rightarrow$ 562—Although jury acquitted defendant on one charge and convicted on another, evidence was sufficient to support conviction, though transactions were similar.

Where cashier of steamship company was charged with two offenses, namely, theft of two sums of money, and was convicted on first charge and acquitted on second, though transactions were similar, evidence was sufficient to support conviction.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

James W. Harris was convicted of grand theft, and he appeals. Affirmed.

Boyd Oliver, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

PER CURIAM. An information was filed in the superior court of the city and county of San Francisco, charging the defendant with two offenses, namely, the theft of two sums of money from the Robert Dollar Company, which is a corporation engaged in carrying passengers and freight. He was convicted upon the first charge and acquitted on the second. The appeal is from the judgment of conviction and an order denying a motion for a new trial.

It is contended that the verdict is unsupported, that the conduct of the trial judge was prejudicial to the substantial rights of the defendant, and that the court erred in its rulings upon the admissibility of certain evidence.

The defendant was employed as a cashier in the freight department of the company at San Francisco. It was his duty to accept and account for payments of freight charges from the various shippers. The count in the information upon which he was convicted charged him with the theft of \$954.98. The evidence shows that on February 7, 1928, this amount was due the company for freight from S. M. Archbald, and so charged upon its books; that on that day Archbald, who had received a statement of account from the company, brought to its office for the purpose of paying the account a cashier's check for \$1,010.92, which had been issued and made payable to him by the American Trust Company of San Francisco. Defendant's assistant was present at the time; the defendant being temporarily absent. The check was indorsed and presented, but, being for more than the amount due, neither the assistant nor the defendant was authorized to pay the difference to Archbald. It was the duty of both under such circumstances to procure this amount

from their superior officers, either in cash or in the form of a check payable to the debtor. On this occasion the assistant stamped the statement rendered as paid, but declined to accept the check. While the transaction was in progress, the defendant returned and the check was delivered to him. Thereupon, accompanied by Archbald, he went to the Pacific National Bank, whose office was situated on the first floor of the building. The defendant entered the bank, while Archbald remained at the door. Shortly thereafter the defendant returned with a sum in cash equal to the difference between the charge and the amount of the check, which upon their return to the office of the company the defendant paid to Archbald, who, according to his testimony, also received at that time the receipted statement. The evidence shows that the defendant did not cause the check to be cashed, but that the same was indorsed by him and deposited to his own account in the bank mentioned.

The evidence further discloses that on the same day a check for \$1,019.14, payable to the company, was received from Mitsui & Co., Inc., in payment of certain freight charges entered against the Southern Pacific Company and Overland Freight Company, but in the payment of which it appears that the maker of the check was interested. The amount of this check was entered upon the books of the company in the handwriting of the defendant to the credit of two debit charges against Archbald, one being the charge above referred to for \$954.98, the other being for \$112.50, and no credit therefor was given either to Mitsui & Co., Inc., the Overland Freight Company, or the Southern Pacific Company. Defendant contends that the discrepancy shown might have been due to errors in bookkeeping, and, further, that it does not appear that the amount paid by Archbald was not received by the company.

[1, 2] That mistake was an element in the transaction was, in view of the circumstances, improbable. The question was one for the jury, and their conclusion to the contrary is sustained by the evidence. The testimony of an auditor employed by the company shows beyond a reasonable doubt that the amount Archbald paid was never turned in to the company. Moreover, no intent to restore nor an actual restoration would constitute a defense to the charge. Pen. Code, §§ 490a (added by St. 1927, p. 1047), 512, 513.

The record shows nothing which reasonably justifies the contention that the conduct of the trial court was prejudicial to the rights of the defendant, or that he was not given a fair and impartial trial.

[3] The witness Archbald was asked by the defendant on cross-examination whether he understood that his check was cashed by the defendant at the time they together visited

the Pacific National Bank. An objection to the question, on the ground that it called for a conclusion of the witness, was sustained. The error, if any, was not prejudicial, as the witness, who testified that he did not enter the bank with the defendant, was permitted to relate fully the conversation between them on that occasion.

[4] Defendant also claims that the prosecution failed to show that he received the check from Mitsui & Co., Inc. The entry of the amount in his handwriting on the books of the company was sufficient to justify the conclusion of the jury in this respect.

[5] The auditor of a bank with which the company deposited its funds testified over objection that he had examined the deposit slips of the company, which he produced in court, covering a period which included and followed February 7, 1928, and that the amount of the Archbald charge, namely, \$954.98, did not appear thereon. This testimony was relevant to the question whether the amount paid by Archbald was ever deposited by the defendant to the credit of the company, and was properly admitted.

[6] There is no merit in the further contention that, the jury having acquitted the defendant on the second charge, it follows that the evidence supporting the first—the transactions being similar—was insufficient. It is our conclusion, after a review of the whole record, that the findings of the jury are fully supported, and that no error is disclosed which can fairly be said to have resulted in a miscarriage of justice.

The judgment and order are affirmed.

100 Cal. App. 478

Ex parte HUDSPETH. (Cr. 1880.)

District Court of Appeal, Second District, Division 1, California. Sept. 3, 1929.

1. Criminal law ⇨10—Common law relating to criminal matters is in force, in absence of statutory provisions at variance therewith.

Common law relating to criminal matters is in force as law, in absence of statutory provisions at variance therewith.

2. Criminal law ⇨1216(6)—Sentence of misdemeanor convicted in municipal court held to commence from issuance and delivery of commitment, excluding detention pending appeal (Pen. Code, § 1470, and § 1461a as added by St. 1925, p. 943).

Where defendant convicted of misdemeanor in municipal court was sentenced to seven months in city jail, and pending appeal remained in custody, on affirmance of conviction defendant was not entitled to credit for time served while appeal was pending, but sentence commenced from time commitment was issued and delivered in accordance with Pen. Code, § 1470,

since appeal operated by its own inherent force as a supersedeas of all proceedings on judgment and such rule was applicable to conviction in municipal court in view of Pen. Code, § 1461a, as added by St. 1925, p. 943.

Habeas corpus by Marshall Hudspeth, prayed to be directed to the Chief of Police of the City of Los Angeles to secure release of petitioner from custody. Prisoner remanded.

M. H. Broyles, of Los Angeles, for petitioner.

Lloyd S. Nix, City Prosecutor, and Joe W. Matherly and F. W. Fellows, Deputy City Prosecutors, all of Los Angeles, for respondent.

CONREY, P. J. On petition of the applicant a writ of habeas corpus was issued and served. Return was duly made and the matter is submitted for decision.

In the municipal court of the city of Los Angeles petitioner was convicted on a misdemeanor charge, and on January 18, 1929, was sentenced to a term of seven months in the city jail. Immediately he gave notice of appeal, and the court ordered that he be admitted to bail in the sum of \$2,500. No undertaking of bail was filed, and the defendant remained in custody during the pendency of the appeal and has continuously been in custody of the chief of police and in the city jail since the 18th day of January. The judgment was affirmed, and a certified copy of the order of affirmance having been filed in the municipal court, a commitment was issued and delivered to the chief of police on the 11th day of March, 1929. This was in accordance with section 1470, Penal Code, except that the commitment went to the chief of police and not to the sheriff.

[1, 2] Petitioner claims that he has been imprisoned under the judgment since the 18th day of January, and that therefore his term of seven months' imprisonment has been completed. Respondent contends that said seven months' term did not begin until the commitment was issued as above stated. If the period of time while the appeal was pending is to be computed as part of the time of sentence served, the petitioner is entitled to his liberty; otherwise, he should be remanded to custody. It was the rule at common law that a writ of error operated by its own inherent force as a supersedeas of all proceedings on the judgment. 3 Cor. Jur. p. 1272. The common law is in force as law in this state in the absence of statutory provisions at variance with the common law. There does not appear to be any statutory provision in this state, either in the Penal Code or elsewhere, changing the common-law rule as to the effect of an appeal or writ of er-

ror upon the right of enforcement of a judgment of a justice's court or municipal court in a misdemeanor case. Accordingly it was held in *People v. Treadwell*, 66 Cal. 400, 5 P. 636, that an appeal from judgment of a justice's court operated as a suspension of the judgment of the lower court for all purposes, and that during the pendency of the appeal there was no judgment of the justice's court presently capable of being carried into effect. It is provided by section 1461a of the Penal Code (as added by St. 1925, p. 943) that the procedure to be followed in misdemeanor cases in the municipal courts shall be the same as is provided for in the chapter containing said section for proceedings in justices' and police courts, as specifically provided in certain numbered sections of said Code, and except where other provisions of law provide for different procedure.

The suggestion is made that under circumstances like those presented in this case it is unjust that a defendant who remains in custody during pendency of his appeal shall not be allowed credit for the time of his actual detention in jail while the appeal is pending. If so, that would be a proper subject for legislative consideration. It might be appropriately noted, however, that there may be circumstances under which an appealing defendant would claim full benefit of his right of appeal and insist that while detained in custody for want of bail, pending the appeal, he should not be held to be serving his sentence under the judgment. This may be illustrated by reference to section 1613 of the Penal Code, which provides that: "Persons confined in the county jail under a [final] judgment of imprisonment rendered in a criminal action or proceeding, may be required by an order of the board of supervisors to perform labor on the public works or ways in the county." This is a long-standing provision of the Code, except that the word "final" was inserted therein by the statutes of the present year. Amendment was so made probably in recognition of the law that such requirement as to labor on the public works might not be enforced against a defendant whose sentence had not become final. This would appear to be the correct rule in accordance with the principle that while the appeal is pending, the judgment is not enforceable against the defendant. A detention during pendency of the appeal (subject to his right to be admitted to bail) is of the same character as a detention on the charge made against him during the pendency of the action in the trial court down to the time of pronouncement or judgment and taking of the appeal.

The prisoner is remanded to custody.

We concur: HOUSER, J.; YORK, J.

100 Cal. App. 477

Ex parte ST. JOHN. (Cr. 1882.)

District Court of Appeal, Second District, Division 1, California. Sept. 3, 1929.

Habeas corpus ⇨25(1)—Petitioner, put in contempt and financially able to pay alimony under court order, held not entitled to discharge by habeas corpus.

Where evidence in contempt proceeding for failure to pay alimony was sufficient to justify court in finding defendant was financially able to make payments required by court's order, petitioner was not entitled to discharge in habeas corpus proceeding.

Application by A. St. John for a writ of habeas corpus, prayed to be directed to the Sheriff of Los Angeles County, to secure release of petitioner from custody under commitment for failure to pay alimony. Petitioner remanded to custody.

Dave F. Smith, Walter T. Casey, and Olin N. Mackay, all of Los Angeles, for petitioner. Harry Chamberlin, of Los Angeles, for respondent.

PER CURIAM. It appears that the evidence before the superior court in the contempt proceeding was sufficient to justify that court in finding that the defendant was then and there financially able to make the payments required of him by the court's order. In *re Rasmussen*, 56 Cal. App. 368, 205 P. 72.

It is therefore ordered that the petitioner be and he hereby is remanded to custody.

100 Cal. App. 416

PURDY v. JOHNSON et al. (Civ. 6542.)

District Court of Appeal, First District, Division 1, California. Aug. 22, 1929.

1. Costs ⇨2—"Costs" are incidental damages, authorized to reimburse successful party to action or proceeding.

"Costs" are allowances authorized to reimburse successful party to an action or proceeding, and are in nature of incidental damages to indemnify party against expense of successfully asserting his rights.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Costs.]

2. Appeal and error ⇨1199—Trial court is without power, on remand for modification after affirmance, in no manner affecting costs, to modify provisions of its own judgment awarding costs.

Where judgment carrying costs has been appealed from and affirmed, and certain modifications ordered, which in no manner concern

or affect judgment for costs, trial court is without power or authority, when case is remanded for modification in accordance with decision of appellate court, to modify provisions of its own judgment awarding costs.

3. Costs ⇨237—Order awarding costs, which are incidental to judgment, falls with reversal of part of judgment on which it is based, and with modification casting balance on other side.

Costs on appeal are merely incidental to judgment appealed from, and order awarding costs falls with a reversal of that part of judgment on which it is based, there being no distinction between formal reversal of judgment and a modification of such judgment, which results in casting balance on other side, since judgment for trial costs necessarily rests on balance originally found in plaintiff's favor, and falls with reversal of judgment, or with what in effect is same thing, a modification, which results in a new judgment, showing a balance against plaintiff.

4. Judgment ⇨580—Judgment is not final determination of rights of parties pending appeal (Code Civ. Proc. § 1049).

Judgment is not final determination of rights of parties pending an appeal, in view of Code Civ. Proc. § 1049, providing that action is deemed to be pending at time of its commencement until final determination on appeal.

5. Costs ⇨230—Where, on recasting of trustee's account as directed, trustees were found to be prevailing parties, trial court was required to relieve trustees of costs, if trustees were blameless.

Where, on recasting of trustee's account as directed by Supreme Court on appeal, it was determined that trustees, instead of plaintiffs, were prevailing parties, court had power, and it was its duty, to relieve trustees, if they were without fault, of costs assessed against them, since successful party is never required to pay costs incurred by unsuccessful party.

6. Costs ⇨230—Trustees, against whom costs had been assessed, held entitled to be relieved therefrom, where they were later found to be prevailing parties, though not having filed cost bill (Code Civ. Proc. § 1033).

In action against trustees for accounting, where trustees, on recasting of account as directed by Supreme Court, were found to be prevailing parties, instead of plaintiff, trustees were entitled to be relieved of costs assessed against them, notwithstanding they had not complied with Code Civ. Proc. § 1033, requiring filing of cost bill as condition precedent to recovery of costs.

7. Trusts ⇨309—Direction to allow interest against trustees, sued for accounting on balance due plaintiff, held intended to allow interest on annual intermediate balances.

Where, on trustee's appeal in action against them for accounting, Supreme Court directed that simple interest only be charged against trustees for amount found to be due plaintiff, plaintiff was entitled to interest on balance found to be due at end of accounting period, and on annual intermediate balances.

8. Appeal and error ⇨1207(3)—**Trial court, on recasting trustee's account and finding trustees successful party, could consider on remand costs, where judgment had not become final.**

Where Supreme Court, on appeal by trustees in accounting proceeding, directed that trustee's account be recast, which made trustees successful party, instead of plaintiff, and was equivalent to reversal, and judgment appealed from was not final determination of parties' rights until termination of appeal, nor until modified in accordance with remittitur issued out of Supreme Court, trial court, on remand, had authority to consider matter of costs.

Appeal from Superior Court, San Benito County; John L. Hudner, Judge.

Action by Anita Christal Purdy against Robert F. Johnson and another, as trustees under the will of Alberto Trescony, deceased, to enforce a trust, and for an accounting. From an order modifying a judgment theretofore made and entered in accordance with the direction of the Supreme Court (248 P. 764), defendants appeal. Reversed in part, and affirmed in part, and remanded, with directions.

C. F. Lacey, of Salinas, for appellants.

Houghton & Houghton and Edward T. Houghton, all of San Francisco, for respondent.

PER CURIAM. This appeal is from an order modifying a judgment theretofore made and entered in accordance with the direction of this court (Purdy v. Johnson, 78 Cal. App. 310, 248 P. 764), and is the third appeal in this case.

Appellants urge two questions: The first has reference to the trial costs allowed plaintiff, amounting to \$905.30, and the other to charging defendants with interest upon certain annual balances due plaintiff.

The action involves an accounting of a trust created by the last will and testament of Alberto Trescony, deceased. At the first trial a balance of \$8,996.17 was found in favor of defendant trustees, but upon appeal by plaintiff this judgment was reversed. Purdy v. Johnson, 174 Cal. 521, 163 P. 893. At the second trial, a balance of \$10,981.74 was found in favor of plaintiff, for which she was given judgment, including her costs of both trials, amounting to the sum of \$905.30. Upon defendants' appeal, this judgment was modified, and the trial court was directed to cast a new account, to include items which had been rejected, and affecting interest charges against the trustees, and with this modification the judgment was affirmed. Upon the recasting of the account and allowing the rejected items, the trial court found a balance in favor of the defendants in the sum of \$2,473.30. In view of this new balance being in favor of defendants, they

moved the court to take up and rule on the matter of trial costs; that is to say, whether either party should recover costs or that the costs should be apportioned. The trial court denied this motion upon the ground that, under the decision of this court, it was without jurisdiction.

[1] Costs are allowances which are authorized to reimburse the successful party to an action or proceeding, and are in the nature of incidental damages to indemnify a party against the expense of successfully asserting his rights. "The theory upon which they are allowed to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant, that the plaintiff sued him without cause. Thus the party to blame pays costs to the party without fault. * * * While costs are frequently allowed to both parties, or to many parties, payable out of a fund, 'the general rule is that the successful party, although he may be denied costs, never pays them.'" *Stevens v. Central National Bank of Boston*, 168 N. Y. 560, 61 N. E. 904, 906, 907.

Here, while this court directed the trial court to "strike a new account, in which the trustees be credited with the \$2,500 item expended by them for the support and maintenance of the beneficiaries, that the trustees be allowed a reasonable sum for their compensation in accordance with equitable principles, and that simple interest only be charged against them for the amount, if any, found to be due the plaintiff. With this modification the judgment will stand affirmed"—upon the trial court recasting the account as directed, and finding that the balance was in favor of the appellant trustees, instead of in favor of respondent, the judgment in effect became a reversal of the former judgment, and, if a reversal, clearly appellants cannot be required to pay to respondent her costs.

[2] Respondent contends that a court of equity has not authority, once having exercised its discretion in the matter of awarding costs, to later amend its judgment, so as to withhold costs, and it must be held that, where a judgment carrying costs has been appealed from and affirmed, with certain modifications ordered, which in no manner concern or affect the judgment for costs, the trial court is without power or authority, when the case is remanded for modification in accordance with the decision of the appellate court, to modify the provisions of its own judgment awarding costs.

The precise point here presented appears to be one of first impression in this state. It is true that in *Stevens v. Central National Bank of Boston*, supra, it is said: "The plaintiffs, for instance, having recovered the costs of the last appeal to the general term by a judgment which has not been disturbed in that respect, cannot be deprived of their right to

those costs; for the judgment is an adjudication that they were entitled to the costs of that court, and that the defendants were not. So long as the judgment stands, it is conclusive upon the question. An award of the same costs to the defendants would, in effect, deprive the plaintiffs of the benefit of their judgment without their consent. * * * If a new trial had been granted by the federal court, or if there were no judgments for costs in favor of the plaintiffs, standing undisturbed by the action of the various appellate courts through which they have passed, a different question would be presented; but, with those judgments in force, we think the special term had no power to award the costs under consideration to the defendants."

There the mandate of the Supreme Court of the United States made its opinion a part of the judgment, and, as said by the Court of Appeals of New York, "both the mandate and the opinion must be read together, in order to learn what the court did. When thus read, it is clear that the judgments of the state courts were left undisturbed in substance, and reversed or modified only to the extent of striking out the injunction and the order of reference, both of which were incidental to the main relief granted."

It is likewise true that in *Gennert v. Butterick Pub. Co., Ltd., et al.*, 133 App. Div. 86, 117 N. Y. S. 801, 803, the court says: "The rule is very well settled that while the court, after judgment, may not alter its decision upon the merits, so as to affect the substantial rights of a party, yet it has a general and incidental power to grant an amendment which is in the line of correcting a mistake, or of supplying any omission obviously due to an oversight by the trial judge. * * * The order was erroneous, however, in so far as it struck out the award of costs to the plaintiff as against the Carey Printing Company. In an equitable action the costs are within the discretion of the trial court, and, when that court has once exercised its discretion by awarding costs, it cannot afterwards amend its decision and judgment by withholding them. *Kiernan v. Agricultural Ins. Co.*, 3 App. Div. 26, 37 N. Y. S. 1070."

In that case the action was brought to restrain the operation of certain printing presses and for incidental damages. One of the court's findings of fact was that the actual damages sustained to plaintiff's freehold was \$1,491.85, and judgment was awarded for actual damages in that sum, in addition to injunctive relief. At the same time the court found, at the request of defendant, "that on the resumption of the trial * * * (which had been suspended for certain experiments) the plaintiff waived any right to any damages." Instead of appealing, the plaintiff moved before the trial court to amend the decision and judgment, which motion was granted and a finding that the plaintiff had waived any damages was inserted in the

former decision and the award of costs to plaintiff was stricken out. It will be seen that in neither of these cases were costs assessed against the prevailing party, or the party finally determined to be without fault, but against the party at fault; the modification of the judgments being merely incidental to the relief granted.

[3] In the present case, had a formal reversal been ordered upon the last appeal, there can be no question but that the matter of trial costs would have been set at large. Costs upon appeal are merely incidental to the judgment appealed from (*McCallion v. Hibernia, etc., Society*, 98 Cal. 442, 445, 33 P. 329), and an order awarding costs falls with a reversal of that part of the judgment upon which it is based (*Taylor v. New York Life Ins. Co.*, 148 App. Div. 815, 133 N. Y. S. 746). With reference to the matter of trial costs, we fail to see wherein lies the difference between the formal reversal of a judgment, and a modification of such judgment which results in casting the balance on the other side. The judgment for trial costs necessarily rested upon the balance originally found in plaintiff's favor, and falls with a reversal of the judgment, or with what, in effect, is the same thing, a modification which results in a new judgment showing a balance against the plaintiff.

[4, 5] A judgment is not a final determination of the rights of the parties pending an appeal (*Estate of Ricks*, 160 Cal. 467, 117 P. 539; *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, 37 L. R. A. [N. S.] 934, Ann. Cas. 1912B, 1148), and an action is deemed pending while an appeal from the judgment is pending (*Code Civ. Proc.* § 1049; *Gillmore v. American C. I. Co.*, 65 Cal. 63, 2 P. 882), and we think, when it was made to appear upon a recasting of the account, as directed by this court, that defendants and not plaintiff were the prevailing parties, the court had the power, and it was its duty, to relieve defendants, if they were without fault, of the costs assessed against them, as the successful party is never required to pay the costs incurred by the unsuccessful party (*Couch v. Millard*, 41 Hun (N. Y.) 212, 215; *Stevens v. Central National Bank of Boston*, supra).

We find nothing in *Whiting v. Squeglia*, 70 Cal. App. 108, 232 P. 986, nor in *Silva v. Angelo*, 52 Cal. App. 75, 198 P. 56, cited by respondent, contrary to this conclusion. The *Whiting Case* was one in claim and delivery, brought to recover possession of an automobile. Defendant in the action answered the complaint and by stipulation filed a cross-complaint alleging fraud in the sale of the car on a conditional sales contract, and the judgment went for defendant on his cross-complaint. The court held that the trial court did not err in striking plaintiff's cost bill from the files and awarding costs to defendant, although the judgment, which was entered in favor of defendant, was to the

effect that he was entitled to retain possession of the automobile until he was paid \$3,500, with his costs; that, while the judgment apparently runs in favor of the plaintiff, the substantial result of the judgment was a victory for defendant. The Silva Case merely follows the section of the Code, holding that, as the judgment for plaintiff was for the sum of \$538.85, such judgment carried costs as a matter "of course," which means as a matter of right.

[6] Respondent urges that appellants cannot recover costs, they not having filed a cost bill as required by section 1033 of the Code of Civil Procedure. While this is true, it may be said that appellants are not claiming that they are entitled to costs, but merely ask to be relieved of the costs assessed against them.

[7] The controversy over the question of interest involves but \$60.30, being the aggregate of the following three interest items: "Nov. 30, 1894. Interest on \$1,663.55, balance favor Anita Christal Purdy as of March 9, 1894, less \$1,000—\$663.35 for 8 months and 22 days, \$33.81. Nov. 30, 1895. Interest on \$1,179.63, balance favor Anita Christal Purdy as of Nov. 30, 1894, less \$1,000 for 1 year, \$12.57. Nov. 30, 1903. Interest on \$1,198.79, balance favor Anita Christal Purdy as of Nov. 30, 1902, less \$1,000 for 1 year, \$13.92." The \$1,000 for which interest was not allowed was an amount the court found the trustees were justified in retaining in their hands to meet current expenses. The remittitur issued out of this court directed "that simple interest only be charged against them [the trustees] for the amount, if any, found to be due the plaintiff."

Appellants contend that this language was intended to refer only to any balance found to be due the plaintiff at the end of the accounting period, January 1, 1909, that is, the final balance, and was not meant to apply to intermediate balances. We do not so interpret this language of the former opinion. Furthermore, as suggested by counsel for respondent, appellants' asserted interpretation of this clause of the former opinion would, if applied, deprive them of interest on the annual balances in the account as restated in their favor, aggregating \$997.62, and which have been credited to them in that account.

[8] It is pointed out by appellants that this court in the former opinion stated that the \$1,000, which was permitted to be retained by the trustees for current expenses, was "entirely inadequate for a number of years there is no question." This statement as to the original account is correct, but such is not the case with respect to the new account struck by the trial court in obedience to the remittitur. At no time during the entire period covered by this accounting do the disbursements exceed the receipts by the sum of

\$1,000. The account, as recast for the years 1894, 1895, and 1902—the only years in which interest is charged against the trustees—shows that at only one time was that figure closely approached, and that in only one month during those three years did disbursements exceed receipts by more than \$500. This demonstrates that the allowance of a deduction of \$1,000 from the annual balances in favor of the beneficiary upon recasting the account was sufficient and adequate to cover current expenses, and that the court did not err in charging defendants interest upon the balances in excess thereof.

We are, however, of the opinion that as the recasting of the account, as directed by this court, changed the successful party in the litigation from the plaintiff to the defendants, and is, therefore, equivalent to a reversal, and as the judgment was not a final determination of the rights of the parties until the termination of the appeal, nor thereafter until it was modified in accordance with the remittitur issued out of this court, that the trial court had authority to consider the matter of costs.

The judgment appealed from must therefore be reversed, in so far as it awards costs to plaintiff, and otherwise affirmed, without costs in this court to either party, and the cause is remanded, with direction to the trial court to exercise its discretion in the allowance of costs as provided in the statute.

100 Cal. App. 464

PEOPLE v. BOWLES. (Cr. 1824.)

District Court of Appeal, Second District, Division 1, California. Aug. 29, 1929.

1. Criminal law —419, 420(12)—Introduction of memorandum attached to check when returned unpaid and allowing bank officer to testify in regard thereto, in prosecution for passing fictitious check, held not error.

In prosecution for passing fictitious check, permitting introduction of memorandum attached to check when returned from drawee bank unpaid and allowing assistant cashier to testify with regard thereto, memorandum being in usual form used by banks in returning checks and indicating thereon reason why check was returned, was not error.

2. False pretenses —44—Permitting testimony in prosecution for passing fictitious check showing check deposited was taken for collection only held not error.

In prosecution for passing fictitious check, overruling defendant's objection to testimony offered to show check deposited was taken for collection only was not error, since mere fact that defendant deposited check did not establish that amount on deposit to his credit.

3. Criminal law ☞1169(11)—Error, if any, in allowing evidence showing another check drawn on same day as alleged fictitious check was paid held harmless.

In prosecution for passing fictitious check, error, if any, in permitting evidence that another check drawn by defendant on same day as alleged fictitious check was paid by bank, held harmless.

4. Criminal law ☞1202(3)—Contention, in prosecution for passing fictitious check, that court erred in admitting copies of judgments of prior convictions, held without merit.

In prosecution for passing fictitious check, contention that trial court erred in permitting introduction in evidence of certified copies of judgments of prior convictions, which exhibits were in proper form and conformed to requirements of statute, held without merit.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

M. V. Bowles, alias F. E. Nesbit, was convicted of passing a fictitious check, and he appeals. Affirmed.

Fred Duffy, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Albert Ford, Dist. Atty., and W. Earl Redwine, Chief Deputy Dist. Atty., both of Riverside, for the People.

HAHN, Justice pro tem. The defendant was charged by information filed by the district attorney of Riverside county with the crime commonly known as "issuing a bank check without sufficient funds." The information also charged the defendant with having suffered two prior convictions of felonies. A plea of not guilty was entered to the check charge. As to the charges of prior convictions, the defendant asserted that they were untrue.

The jury returned a verdict of guilty as to the check charge, and found that each of the prior convictions charged was true.

It appears without conflict that the defendant, on Saturday, August 11, 1928, about 2 o'clock in the afternoon, entered the store of the Franzen Hardware Company in Riverside and negotiated for the purchase of certain merchandise. Before the sale was consummated, he made inquiry as to whether or not the store would accept a check which he had in the sum of \$85, drawn upon a Los Angeles bank by one E. M. Burgwald, and made payable to F. E. Nesbit, the name under which the defendant was going in Riverside. Defendant stated that he had recently come to Riverside and had rented a house on St. Andrews boulevard, that his family would arrive a few days later, and that he wished to purchase certain articles for use in the house. He further stated that he had opened an account at the First National Bank of River-

side, to support which he displayed to the credit manager a passbook made out to F. E. Nesbit, which showed a deposit of \$185. When the credit manager refused to take the \$85 check drawn upon the Los Angeles bank, defendant asked him if he would take his check for a sum in excess of the amount of his proposed purchase, drawn on the First National Bank of Riverside; that, it being Saturday afternoon, he wanted some cash to enable him to make a trip to Idyllwild. The credit manager of the store finally agreed to accept his check for \$60, and, when defendant had selected the articles he desired, which amounted to \$37.50, the defendant was given \$22.50 in cash. With regard to the time of delivery of the goods, defendant stated that he would be occupied for a while in shopping, but that he would be at the house about 4 o'clock, at which time it was agreed that the goods should be delivered. When the goods arrived at the house at the time agreed upon, the defendant was not there. The goods were left upon the porch.

One Clarence Brown, teller at the First National Bank of Riverside, testified that on Saturday morning, August 11th, the defendant opened an account at the bank, depositing \$10 in cash and a check drawn by one E. M. Burgwald, dated August 9, 1928, for the sum of \$75 payable at the main banking room of the Security Trust & Savings Bank, at Fifth and Spring streets, Los Angeles; that, when taking the deposit, he stated to the defendant that it would take several days for the \$75 check to clear, and not to draw checks on it until it had time to clear, to which defendant replied that he had plenty of money and would not find it necessary to draw on his account until returns had been received. On Tuesday of the following week the \$75 check was received back by the First National Bank of Riverside with the report that the drawer of the check had no account in the bank upon which it was drawn. Immediately the defendant's account at the First National Bank was charged with the \$75 check, leaving but the \$10 deposited in cash to his credit. When the \$60 check, given by the defendant to the Franzen hardware store, was presented to the bank, it was returned because of insufficient funds to meet it. It also appears from the evidence that the defendant had never leased the house on St. Andrews boulevard, as represented by him to the credit manager of the Franzen hardware store. Evidence was also presented showing that the defendant had issued on the same Saturday two other checks, one for \$10 and the other for \$25, drawn on the First National Bank of Riverside. The \$10 check was paid, but the \$25 check was returned unpaid. The auditor of the Security Trust & Savings Bank testified that he had made an examination of the records of his bank in Los Angeles, and found

that E. M. Burgwald did not have an account in that bank on August 9, 1928, or at any other time.

The defendant himself did not take the stand, but called as his only witness the assistant cashier of the First National Bank of Riverside, by whom he undertook to prove that, some five days after the issuance of the check in question, the bank had received \$117 by Western Union telegraph from La Jolla, which was placed to the credit of defendant. This evidence was objected to by the district attorney and the objection sustained by the court.

[1] In urging a reversal of the judgment, appellant contends that the court erred, first, in permitting the assistant cashier of the bank to testify with regard to a certain memorandum, which was attached to the \$75 check drawn on the Security Trust & Savings Bank of Los Angeles, when the same was returned from the Los Angeles bank unpaid. This memorandum was in the usual form used by banks in returning checks. On it was indicated the reason why the check was returned. The memorandum in question was identified by the auditor of the bank on which the check was drawn, and he further testified that he had examined the record of the bank and that E. M. Burgwald had no account at that bank.

No error was committed by the court in overruling the defendant's objection to the introduction of the memorandum attached to the returned check, nor to the witness' testimony identifying it. In any event, the testimony of the bank's auditor that E. M. Burgwald had no account in the bank fully covered the point.

[2] The second point urged by appellant is that the court committed error in overruling his objection to certain testimony offered to the effect that the \$75 check drawn on the Los Angeles bank was taken by the First National Bank of Riverside for collection only. In support of this contention, appellant cites *People v. Frey*, 165 Cal. 140, 131 P. 127. The case cited does not support appellant in his contention. The *Frey* Case holds that the burden is upon the prosecution to prove that the defendant had not sufficient funds in the bank to meet the check at the time it was drawn. In the case at bar it clearly appears that defendant did not have sufficient funds

to his credit in the First National Bank of Riverside to meet the \$60 check. The fact that he had deposited on that day a check drawn on the Los Angeles bank for \$75 did not establish that amount on deposit to his credit. The undisputed evidence was that the check was taken for collection only, and the evidence clearly shows that on August 11, the day on which he drew the \$60 check in question, he had \$10 and no more on deposit in the First National Bank of Riverside in the account on which he drew the check.

[3] It is next urged that the court erred in allowing evidence of the check drawn by the defendant on the same day payable to H. F. Grout & Co. for the sum of \$10, which was paid by the bank. While we are unable to perceive any reason for the introduction of this check, it is not pointed out in what respect, if at all, its introduction was injurious to the defendant. We are satisfied the error, if any, was harmless.

[4] Appellant next urges that the court erred in permitting to be introduced in evidence certified copies of the judgments of convictions relating to the charges of prior convictions of the defendant set forth in the information. Admitted in evidence as *People's Exhibit B* is a certified copy of the judgment of conviction of the defendant in the superior court in and for the county of Orange, and a certified copy of his commitment to the penitentiary, and as *Exhibit H* a certified copy of the judgment of conviction in the superior court in and for the county of San Bernardino, wherein the defendant pleaded guilty to the crime of burglary. Both exhibits are in proper form and meet the requirements of the statute.

The remaining points urged by appellant as error relate to instructions, some given by the court and others that were refused. We have carefully examined each of the instructions referred to, and are satisfied that no prejudicial error was committed by the trial court in the rulings complained of. We feel that nothing will be gained by extending at length in this opinion the instructions referred to.

As we find no error in the record, the judgment and order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

100 Cal. App. 177

FARIA v. FARIA et al. (Civ. 6756.)

District Court of Appeal, First District, Division 1, California. July 30, 1929.

1. Fraudulent conveyance ⇨174(3)—Grantor, conveying premises in fraud of creditors, is not entitled to recover property conveyed.

Where purpose of deed was to hinder, delay, and defraud creditors, law will not allow grantor to recover back such property, and as soon as fraudulent purpose of conveyance is disclosed by evidence, trial court will leave parties where it finds them.

2. Appeal and error ⇨931(1)—Conflict in testimony must on appeal be resolved in support of conclusions reached thereon by trial court.

On appeal, all conflict in testimony must be resolved in support of conclusions reached thereon by trial court.

3. Deeds ⇨211(3, 4)—Evidence, in husband's action against wife and children to set aside deeds, held insufficient to establish undue influence or actionable fraud.

In action by husband against wife and children to set aside deeds, evidence held insufficient to establish, as against wife, undue influence or actionable fraud, although at time of execution of deed relationship between parties as husband and wife was one of confidence and trust.

4. Deeds ⇨211(4)—Mere relationship of husband and wife does not constitute prima facie evidence of undue influence against wife.

Mere relationship of husband and wife does not constitute prima facie evidence of undue influence against wife, in obtaining deeds to property from husband.

5. Deeds ⇨196(3)—Presumption does not exist that voluntary conveyance or gift from husband or wife is result of undue influence.

There is no presumption that a voluntary deed of conveyance or gift from husband or wife is result of undue influence.

6. Deeds ⇨196(3)—Undue influence of wife over husband is not presumed, unless it appears from transaction or proof that marital confidence was abused (Civ. Code, § 1575, subd. 1).

While it may be presumed that wife has influence over her husband, influence is not presumed to be undue, under Civ. Code, § 1575, subd. 1, unless it appears from face of transaction or from proof that marital confidence was used to take unfair advantage, or that confidence was subsequently violated.

7. Deeds ⇨211(3)—Evidence and circumstances in husband's action to set aside deeds held insufficient to sustain finding that wife's promises, inducing conveyance, were not made in good faith, or that marital confidence was abused.

In action by husband against wife and children to set aside deeds, evidence and circumstances showing cruel and inhuman treatment of wife, warranting her in leaving home, and

constituting grounds on which wife obtained divorce, held insufficient to sustain finding that, at time wife made representations and promises which induced conveyance, she well knew that same were false and untrue, and were made with intent and purpose to defraud husband, since under circumstances wife was not morally or legally bound to continue marital relation, and her departure cannot be deemed in law a violation of marital confidence or breach of agreement on her part.

8. Deeds ⇨70(6)—Where confidential relations exist, it is not always necessary that confiding party must indispensably have had independent advice before transfer is valid.

It is not necessary in all cases of confidential relations, even where utmost good faith is required to be shown, that, before transfer can be shown to be valid and binding, confiding party must indispensably have had independent advice.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Frank F. Faria against Adeline Faria and others. Judgment for plaintiff, and defendants appeal. Reversed.

O. H. Speciale and Owen D. Richardson, both of San Jose, for appellants.

E. H. Christian, of Oakland (E. S. Leslie, of Oakland, of counsel), for respondent.

PER CURIAM. This is an appeal by defendants from a judgment setting aside two deeds to a ranch in Alameda county.

The plaintiff, Frank F. Faria, and the defendant Adeline Faria were married in 1912, and in July, 1926, Mrs. Faria obtained an interlocutory decree of divorce upon the ground of extreme cruelty. The other two defendants are the minor children of that marriage. The ranch contains approximately 17 acres of land, and was purchased in 1915 for \$15,200, title thereto being taken in plaintiff's name. An initial cash payment of \$9,000 was made on the purchase price, and the balance of \$6,200 was secured by a mortgage, which was paid off out of the ranch earnings prior to the commencement of the present controversy. The \$9,000 in cash used in making the initial payment was part of \$12,500 received by plaintiff from the sale of a dairy, which he owned prior to and at the time of his marriage. The Farias and their children lived on the ranch in question, and the same was impressed with a homestead.

On November 20, 1923, Faria was sued jointly with others as copartners by a man named Campbell for \$50,000 damages, on account of the death of Campbell's wife, who was killed in a collision between a truck belonging to said copartners and Campbell's automobile, and approximately five months subsequent to the commencement of that action, to wit, on April 4, 1924, plaintiff conveyed the ranch to his wife by deed of gift, and the deed was immediately placed on rec-

ord. The present controversy arises out of the circumstances attending the execution of that deed, it being alleged in the complaint and found by the trial court that said deed was obtained by Mrs. Faria by fraudulent means and as a result of undue influence. The second deed was one of gift, made by Mrs. Faria to the children following the divorce action, and was made without consideration. Upon the grounds mentioned, both deeds were set aside, subject only to the homestead rights, if any, of Mrs. Faria.

Appellant contends that heretofore, in an action brought against her husband and herself, it was judicially determined that her husband's purpose in conveying the ranch to her was to defraud his creditors, and that consequently he is precluded now from seeking to recover back that which he has fraudulently conveyed, and moreover, that the evidence in the present case, aside from showing the fraudulent purpose of her husband above mentioned, is wholly insufficient as a matter of law to prove that her activities in connection with the execution of said deed amounted either to a fraud against her husband or an undue influence over him.

It appears that, prior to the commencement of the present action, one Brandon, a judgment creditor of Faria's in the sum of \$432.78, commenced an action (No. 93935) against Faria and his wife to set aside the deed of April 4, 1924, upon the ground that it was made for the purpose of hindering, delaying, and defrauding creditors. In that action Faria defaulted, but Mrs. Faria contested the same. Faria became a witness for Brandon, and testified that he conveyed the property to his wife, so that it would not be lost to them as a possible result of the Campbell suit, and the trial court found, in conformity with the allegations of the complaint, that said deed was made for the purpose of defrauding creditors. At the time of answering, however, Mrs. Faria deposited in court the amount Brandon claimed was due him, and consequently the judgment in the action, which was entered on June 13, 1927, directed merely that the sum deposited in court be applied to the payment of Brandon's demand.

In the meantime Mrs. Faria brought suit for divorce upon the ground of extreme cruelty. Faria defaulted, and on July 26, 1926, Mrs. Faria was granted an interlocutory decree of divorce, together with an allowance for the maintenance of the children. Neither the validity of the deed in question here nor the title to the property was involved in the divorce action; nor was any assignment made therein of the homestead. On October 27, 1926, Mrs. Faria conveyed the property by deed of gift to her children, reserving therein a life estate unto herself. Several months later Brandon obtained a second money judgment by default against Faria in the sum of \$2,829.30 (action No. 96338), and after causing an execution to be levied on the ranch

instituted supplemental proceedings for the appraisal and setting apart of the homestead. Mrs. Faria and the children contested those proceedings, upon the ground that by virtue of Faria's deed of gift of April 4, 1924, he parted with all interest in the property; but on October 18, 1927, the proceeding was determined adversely to their claims, and on appeal the trial court's action was affirmed by this court (*Brandon v. Faria et al.*, 279 P. 192), and with respect to the trial court's decision in *Brandon v. Faria* (No. 93935), finding that the deed from Faria to his wife was void as against creditors, this court held that the facts there found "were prima facie evidence of an intent to defraud subsequent creditors (*Hemenway v. Thaxter*, 150 Cal. 737, 90 P. 116). * * *

It further appears that, following the rendition of the judgment in the action of *Brandon v. Faria* to collect the sum of \$2,829.30 (No. 96338), the defendants herein sought to enjoin the levy of the execution on the ranch upon the ground that Faria had no interest therein, but the injunction was denied; and on appeal the Supreme Court affirmed the order of denial (*Faria et al. v. Brandon*, 276 P. 106), declaring with reference to the trial court's decision in *Brandon v. Faria* (No. 93935), that it had been "duly adjudged that Faria conveyed to his wife without consideration, and when he was insolvent, and for the purpose of hindering, delaying, and defrauding his creditors."

[1] It thus appears that twice have the courts of appellate jurisdiction recognized the decision in *Brandon v. Faria* (No. 93935) as being a determination of the fact that the purpose of the gift deed of April 4, 1924, from Faria to his wife was to hinder, delay, and defraud creditors; and indeed, during the trial of the present action, it was stipulated by Faria's counsel that such was its purpose, but it was claimed that the same was made "at the solicitation" of Mrs. Faria. If such was the purpose of the deed, the law will not allow Faria to recover back the property he has fraudulently conveyed, for the rule in such case is that, as soon as the fraudulent purpose of the conveyance is disclosed by the evidence, the trial court will leave the parties where it finds them. 12 Cal. Jur. 1026, and cases cited.

But Faria contends here, as he did before the trial court, that the fraudulent conveyance of April 4, 1924, was made at the solicitation of Mrs. Faria, and as a result of misrepresentation, fraud, and undue influence on her part, and that consequently it was immaterial that the effect of such conveyance was to defraud creditors; and in support of such contention he cites cases which hold that the general rule, to the effect that a court of equity will not grant relief to one who has made a deed to defraud creditors, has no application where the deed was procured by the fraud and undue influence of the defend-

ant, who will not be allowed to perpetrate a greater fraud, and to take advantage of his own wrong and of the absence of free consent of the grantor, and who, under such circumstances, under express statutory provision, takes as trustee of the grantor. *Donnelly v. Rees*, 141 Cal. 56, 74 P. 433.

In this regard the allegations of the complaint herein, charging those elements and upon which the judgment is grounded, are summarized in respondent's brief as follows: " * * * That beginning about the 4th day of December, 1923 (which was shortly after the filing of the Campbell action for damages), and continuously thereafter until the date of said deed of gift, defendant Adeline Faria earnestly and persistently solicited and requested plaintiff to make said deed, in consideration of the love and affection of plaintiff for his said wife, and upon the repeated representation that she would always permit and allow plaintiff to occupy, use, possess, and enjoy said lands, together with all the rents, issues, and profits thereof, during the natural life of plaintiff." Also that defendant represented to plaintiff "that, unless he would execute said deed, she would leave and abandon plaintiff and take with her the minor children of the parties." The only evidence set forth in respondent's brief to support said allegations consists of the testimony given by respondent himself, the essential portions of which are as follows:

"Q. Now, shortly after the time that you received the summons in that \$50,000 suit, your wife had certain conversations with you about the property? A. Yes, sir.

"Q. And what did she say to you about this property, shortly after you received the papers in the Campbell suit? A. She wanted me to pass the ranch, so that we wouldn't lose the ranch.

"Q. And you have seen, or did see, your attorney, Mr. Mitchell, about the matter—that is, about the Campbell suit—about at the same time that she started to talk to you about the ranch? A. Yes, sir; just as soon as I got the papers, I went to see my attorney.

"The Court: What was the date of that suit?

"Mr. Christian: November 20, 1923.

"Q. Now, when she first asked you to pass the ranch over to her, what did you say to her? A. I told her I didn't want to pass it, because it was the only thing I had. * * *

"Q. Now, did she say anything else to you about it? A. She used to talk about that every day, so that I would pass the ranch to her.

"Q. What did she say? A. She said I could stay on the ranch just the same as before, sell all the fruit, and run the ranch, and stay there just as before.

"Q. And did she tell you that upon many occasions? A. Yes, sir.

"Q. Now, when she told you that at first,

what was your answer? A. I told her I wouldn't pass her the ranch.

"Q. And did she keep asking you to make a deed? A. Yes, sir.

"Q. Now state whether or not, during any of these conversations, she stated that she was going to leave you, and take the children along with her. A. Yes, sir.

"Q. Now, just tell the court just what she did say. A. She said that, if I wouldn't pass the ranch over to her, she was going to go away with the children, and herself, and was going to go to court and take a divorce from me. * * *

"Q. State whether or not you made up your mind to make this deed a long time, or short time, before the 4th day of April, 1924. A. Just about that time I made up my mind.

"Q. State whether or not the constant request from your wife had any effect on your mind. A. Yes, sir; it would bother my head.

"Q. And state whether or not you had any fear of losing the ranch in the beginning; that is, from the time that your wife started to ask you to pass the ranch into her name. A. No, sir.

"Q. Will you tell the court when, if ever, with respect to the date of the transfer of the property, did you have any fear because of the representations of your wife of losing the property? A. Near the time of making the deed; that is just about the time I fear.

"Q. And state whether or not the fact that your wife persistently and constantly asked you to make this deed—if that is the reason why you had the fear of losing the ranch. A. Yes, sir."

He further testified that the deed in question was drawn by and executed before an attorney in Oakland, with whom his wife had previously consulted, but that before executing the deed he consulted alone with said attorney about the matter, and the next day returned to the attorney's office, accompanied by his wife, and executed the deed; that, after delivering the deed to his wife, it was left with the attorney to be recorded; and that said attorney told him that, if he did not convey the property to his wife, they would likely lose the ranch and "be thrown out in the street." He also testified that he would not have deeded the property to his wife, if it had not been for such importunities and representations.

The evidence shows without dispute that, following the execution of the deed from Faria to his wife, they continued to live together upon the premises as husband and wife for over two years, at the end of which period Mrs. Faria left the ranch, taking the children with her, because, as she claimed, of Faria's cruel treatment; that afterwards she lived with her parents, and shortly after leaving the ranch commenced the suit for divorce, which, as stated, Faria allowed to go by default; that, soon after Faria was served

with summons in the divorce action, he quit the ranch voluntarily and did not return. The evidence shows that Faria was the owner also of another ranch, referred to as the Creek ranch, which he sold about the same time he conveyed the ranch in question to his wife, for the purpose, as he claims, of paying certain creditors; but he admits having testified on behalf of Brandon, in the latter's suit to set aside the present deed, that he conveyed the ranch in question to his wife to avoid the possible consequences of the Campbell suit.

Mrs. Faria admitted having talked with her husband about the Campbell suit, but denied having importuned him to convey the ranch to her, stating that "he wanted to deed the property to her." She also denied having made any of the representations above mentioned. She also contradicted Faria's testimony as to the circumstances attending the execution of the deed. She stated that, soon after the commencement of the Campbell suit, Faria declared his intention of conferring with said attorney in Oakland, and that she told him she would go with him; that the deed was prepared at the request of Faria, and that the attorney told him at that time that he must not afterwards "blame him for making the deed, because he wanted to make the deed himself." She further testified that she was compelled to leave the ranch and take refuge with her parents because of Faria's cruel treatment; that he called her vile names, threatened to kill her, struck her in the face, chased her with pruning scissiors and with a fork, and declared his intention to sell whisky on the ranch. Faria denied having committed the acts of cruelty above mentioned, but it appears from the record that said acts constituted the main grounds for divorce, which, as stated, Faria allowed to go by default.

[2-6] Admittedly, under the rule governing the determination of appeals, all conflict in the testimony must be resolved in support of the conclusions reached thereon by the trial court; but, after so resolving such conflict, we are of the opinion that the evidence here is legally insufficient to establish, as against the appellant, a case of undue influence or actionable fraud. It is conceded, of course, that at the time of the execution of the deed from Faria to his wife their relationship was one of confidence and trust. But, as held in the case hereinafter cited, the mere relationship of husband and wife does not constitute prima facie evidence of undue influence against the wife (*Wilcox v. Wilcox*, 171 Cal. 770, 155 P. 95; *McDougall v. McDougall*, 135 Cal. 316, 67 P. 778), nor is there any presumption that a voluntary deed of conveyance or gift from husband or wife is the result of undue influence; and while it may be presumed that a wife has influence over her husband, this influence is not presumed to be undue (*McDougall v. McDougall*, *supra*), unless it

appears from the face of the transaction or from the proof that the marital confidence was used to take an unfair advantage or that this confidence was subsequently violated (*Dimond v. Sanderson*, 103 Cal. 97, 37 P. 189; *Yordi v. Yordi*, 6 Cal. App. 20, 91 P. 348; *Hensley v. Hensley*, 179 Cal. 284, 183 P. 445). In other words, as declared in *Brison v. Brison*, 90 Cal. 323, 27 P. 186, 190, "the influence which the law presumes to have been exercised by one spouse over the other is not an influence caused by any act of persuasion or importunity, but is that influence which is superinduced by the relation between them, and generated in the mind of the one by the confiding trust which he has in the devotion and fidelity of the other. Such influence the law presumes to have been undue, whenever this confidence is subsequently violated or abused. Civ. Code, § 1575, subd. 1."

[7] Applying the foregoing legal rules to the peculiar circumstances confronting the Farias at the time of and immediately preceding the execution of the deed in question, with reference to the demands then being made upon them by Faria's creditors, and the fear entertained by them that as a possible outcome of the Campbell suit they might lose the ranch, it is evident that Mrs. Faria's activities in importuning and persuading her husband to execute the deed in question, and the influence she may have exercised over him in that respect, did not constitute undue influence within the meaning of said legal rules, unless it can be held that the promises and statements made by her at the time were not made in good faith, or, if so made, that the marital confidence which moved her husband to execute the deed was subsequently violated or abused.

As to the representation that she "would always permit and allow said plaintiff to occupy, use, possess, and enjoy the whole of said real property hereinafter described, together with all the issues, rents, and profits thereof, and each and every part thereof," there is no evidence that she ever refused plaintiff any such rights or privileges while they lived together on the ranch, and plaintiff admits that after he was served with the papers in the divorce proceeding he left the ranch of his own accord and did not return. In this connection it may be stated that at the time he was served with summons in the divorce action he was served also with a temporary injunction restraining him "from injuring plaintiff, or annoying or harassing or interfering with plaintiff's custody of their minor children," and that said injunction was read to him by the officer at the time it was served; and Faria claimed that, owing to his limited knowledge of the English language, he thought he was ordered to leave the ranch. But the evidence shows that, as soon as the papers were served upon him, he consulted with and was advised by two attorneys of his own selection.

And with reference to Mrs. Faria's statement that, unless her husband conveyed the ranch to her, she would leave and abandon him and take the children with her, it must be assumed that such statement was based upon the implied understanding that, if she did continue to live with him, she would be treated with kindness and respect. It appears from the record of the divorce proceeding, however, that during the two years following the execution of the deed, Faria struck her about the face with his fists and threatened to kill her; that he threatened to cut her stomach with a pair of large pruning shears, and that he called her vile and offensive names; that on several occasions she was obliged to seek refuge elsewhere because of his violence and threats to kill her; that during the year 1926, at the home of said parties, without any cause or provocation, Faria "told her to go away, and that he will be satisfied if she goes away, because he cannot stand to see her any longer, and to get out of his sight."

Manifestly, under such circumstances, it cannot be held that, in order to maintain her legal rights under the deed of gift, she was compelled, morally or legally, to continue the marital relation with him or to remain longer on the ranch; nor can her departure under such circumstances be deemed in law to be a violation of the marital confidence or a breach of the agreement on her part. In other words, as held in *Tillaux v. Tillaux*, 115 Cal. 663, 47 P. 691, a husband cannot take advantage of his wife's failure to carry out her promises, when he has made it impossible for her to do so. And it is not claimed here that there was any promise made by Mrs. Faria to convey back the property under any circumstances.

For the reasons stated we are unable to sustain the trial court's finding that, at the time Mrs. Faria made the representations, statements, and promises above mentioned, she well knew that the same "were false and untrue, and were made with the intent and purpose to defraud plaintiff and to induce him to transfer" the ranch to her.

[8] In support of the judgment, respondent further contends that in executing said deed he acted on the advice of his wife and her attorney, and did not have any independent legal advice. The evidence shows, however, that soon after he was served with summons in the Campbell suit, and prior to the execution of the deed in question, he consulted with two attorneys; and, moreover, he makes no claim here that, when he executed the deed, he was not acting freely, voluntarily, or without a full knowledge of the facts or the effect of the transfer, but only that he was persuaded by his wife to make the deed to the property to her upon the representations and statements above mentioned. In

any event, it is not essential in all cases of confidential relations, even where the utmost good faith is required to be shown, that before a transfer can be shown to be valid and binding the confiding party must indispensably have had independent advice. 9 Cal. Jur. 230.

The judgment is reversed.

100 Cal. App. 373

BOVO v. ABRAHAMSON. (Civ. 6665.)

District Court of Appeal, First District, Division 2, California. Aug. 20, 1929.

1. Appeal and error ⇨931 (1)—Substantial evidence is resolved in favor of findings on conflicting evidence.

Any substantial evidence must be resolved in favor of findings of trial court, where evidence is conflicting.

2. Mortgages ⇨369(7)—Evidence showed agreement was option to purchase within 18 months after sale under trust deed, and not redemption agreement.

Evidence, in action to set aside sale under trust deed and to quiet title, *held* to justify court's finding that agreement made between parties, whereby defendant promised to convey real property to plaintiff if she should deliver to him within 18 months after his purchase at trustee's sale purchase price and sums owing to defendant, and sums paid for taxes and street improvement bonds together with interest, was mere option to purchase property within 18 months, and was not redemption agreement.

3. Mortgages ⇨369(7)—Evidence showed plaintiff before action did not tender or offer amount due defendant purchasing at trustee's sale under agreement to reconvey.

Evidence, in action to set aside sale under trust deed and to quiet title, *held* sufficient to establish that plaintiff never at any time before commencement of action tendered to defendant or offered to pay amount due defendant under agreement by which he agreed to reconvey if plaintiff acted within 18 months.

4. Appeal and error ⇨1071(5)—Findings that allegations not found true were untrue and not supported by evidence held immaterial, where court found, upon sufficient evidence, facts sustaining judgment.

Where court found, upon sufficient evidence, facts sustaining judgment, findings complained of that all other allegations of the pleadings other than those specifically found to be true were untrue and not supported by evidence were immaterial.

5. Vendor and purchaser ⇨15—Agreement to reconvey property purchased at sale under trust deed to owner on repayment of sums expended held without consideration.

Where purchaser at sale under trust deed paid consideration for trustee's deed, agreement made by parties, whereby purchaser agreed to reconvey to owner on repayment of

sums expended by purchaser constituting an option to purchase and no money or other thing of value having passed between parties, and owner not having waived any right in consideration thereof, *held* without consideration.

6. Frauds, statute of Ⓒ103(5)—Verified answer stating facts concerning oral option to purchase land did not satisfy statute where option had expired (Civ. Code, § 1624, subds. 1, 5; Code Civ. Proc. § 1973, subds. 1, 5).

Where oral agreement of purchaser at sale under trust deed to reconvey to owner had expired years before verification of answer in suit to quiet title and set aside sale, that defendant in verified answer stated facts concerning agreement was insufficient to satisfy statute of frauds (Civ. Code, § 1624, subds. 1, 5, and Code Civ. Proc. § 1973, subds. 1, 5).

7. Adverse possession Ⓒ85(3)—Evidence showed former owner occupied premises purchased by defendant at sale under trust deed as tenant at will, and that defendant had title by adverse possession.

Evidence, in action by former owner to set aside sale under trust deed and to quiet title, *held* sufficient to sustain findings of court that plaintiff occupied premises defendant purchased as tenant at will of defendant, and that defendant owned premises by adverse possession.

8. Frauds, statute of Ⓒ44(4), 74(2)—Oral agreement to reconvey property purchased at sale under trust deed within 18 months on repayment of sums expended held unenforceable (Civ. Code, § 1624, subds. 1, 5; Code Civ. Proc. § 1973, subds. 1, 5).

Agreement, whereby purchaser of property at sale under trust deed agreed to reconvey to owner within 18 months on payment of certain sums, constituted an option to purchase, and, not being in writing nor to be performed within one year, *held* unenforceable under Civ. Code, § 1624, subds. 1, 5, and Code Civ. Proc. § 1973, subds. 1, 5.

9. Mortgages Ⓒ369(5)—Action to enforce agreement to reconvey property purchased at sale under trust deed, brought more than nine years thereafter, *held* barred by laches.

Action to set aside sale under trust deed and to quiet title, under agreement whereby purchaser of property under trust deed agreed to reconvey to plaintiff within 18 months on reimbursement of sums expended, *held* barred because of staleness of demand, where action was not commenced until more than nine years later and during all such time purchaser was improving property and exercising rights of an owner with full knowledge of plaintiff and without any protest on her part.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Maria S. Bovo, also known as Mary S. Bovo, also known as Mary S. Marcucci, against Henry R. Abrahamson, in which the defendant cross-complained. Judgment adverse to plaintiff, and she appeals. Affirmed.

Dunn, White & Aiken and W. M. Nold, all of Oakland, for appellant.

C. L. Colvin, of Oakland, for respondent.

BURROUGHS, Justice pro tem. The plaintiff appeals from a judgment denying her a right to redeem from defendant, as trustee, the real property described in her pleadings and also quieting defendant's title to the same property. In support of the appeal it is contended that certain findings of fact are without support in the evidence; that others are contrary to the undisputed evidence; that others are contrary to the undenied allegations of the complaint; and that still others are contrary to the express admissions of the defendant.

The court made a blanket finding of fact as follows: "That all the allegations in the complaint, amended complaints and supplemental complaints, and all pleadings in said action other than hereinafter found, are untrue and not supported by the evidence, and the court further finds that the following facts are true and that all others alleged in said pleadings are untrue." The court then finds specifically that on and prior to June 14, 1916, plaintiff was the owner of the lands described in her complaint; that on said day and prior thereto plaintiff was indebted to the Farmers' & Merchants' Bank of Hayward, Cal., in the sum of \$7,883 evidenced by a promissory note in the principal sum of \$7,500, the balance being accrued interest; that said indebtedness was secured by a deed of trust upon the property described in the pleadings and constituted a first lien thereon; that plaintiff was indebted to other parties in sums aggregating \$2,000, which constituted second liens on said property; that on June 14, 1916, the plaintiff was also indebted to the defendant herein in the sum of \$2,552.20 for remodeling the buildings on said property, said last-named sum being the reasonable amount expended in said work, including therein a 10 per cent. commission for his services; and that plaintiff was unable to pay any of said amounts and referred the defendant to the Farmers' & Merchants' Bank of Hayward, telling defendant that said bank would pay him the amount due to him as aforesaid. The court also found as a fact that said last-named bank was anxious to have repaid to it the amount due from the plaintiff as aforesaid and notified her in writing that the loan to it must be taken care of and unless a payment of the same was made it would foreclose its deed of trust; that the defendant was informed by a Mr. Mount of the Central National Bank of Oakland that his right to a mechanic's lien on said premises was subject and subsequent to the three liens secured by deeds of trust as aforesaid, and advised the defendant to purchase the property at the trustee's sale under the deed of trust held by

the Farmers' & Merchants' Bank of Hayward, and that by so doing he would secure the property free and clear of the second liens and also of all claim by the plaintiff; that in pursuance of said advice and with the intention of securing said property free and clear of any of the said secondary claims, or any claims of plaintiff, and without any agreement with her in relation thereto, defendant bought said property at said trustee's sale; and that thereafter the defendant received the trustee's deed therefor as a complete and absolute conveyance to him of all claims subsequent to the execution of the trustee's deed, and as a complete and absolute conveyance of all the right, title, and interest of the plaintiff therein. The court further found that after said transaction had been fully completed the defendant, at the earnest request of the plaintiff, agreed that if she would pay him all sums of money that he had paid to purchase the property, and all sums owing to him for remodeling said property, and all sums of money paid for taxes and street bonds, and other sums due thereon, together with interest on said several sums within a period of 18 months from said date, he would convey said property to her, the said plaintiff; that after the execution to him of the trustee's deed he took possession of the property and employed an agent to obtain tenants for him; that after the execution of said trustee's deed defendant entered into an agreement with the plaintiff that in consideration of her paying the light and water bills and taking care of the steps and hall, and collecting rent from other tenants and paying it over to defendant, and acting as manager of said apartment house, she might occupy one of the apartments in said house free and clear of rental therefor, and in pursuance of said agreement plaintiff did remain in one of the apartments as a tenant at will and did perform said services, and made no claim of ownership to said premises until a short time prior to the commencement of this action; and that since the execution to him of the trustee's deed for said premises, the defendant has treated the property as his own, has built garages thereon to be used in connection with the house, has paid all street bonds affecting the property, and has paid all taxes levied or assessed against the same with full knowledge on the part of the plaintiff and without any claim by her of ownership therein. The court further found that since on or about June 15, 1916, defendant has held the same by adverse possession and that the plaintiff has never paid nor offered to pay any taxes thereon, and did not make any claim of ownership thereto until a short time prior to the commencement of this action. Then follow appropriate findings concerning the changes made in the building itself; that the apartment occupied by plaintiff has a reasonable rental value of \$35 per month;

that the plaintiff has never paid defendant the sums he paid at the trustee's sale, nor any other sums due him, and did not make any tender of the same prior to the commencement of this action; and that the agreement to convey was without consideration, was oral, and constituted a mere option to purchase; and that the cause of action, if any ever existed, was barred by subdivisions 1 and 5, § 1624, of the Civil Code, and by subdivisions 1 and 5 of section 1973 of the Code of Civil Procedure and by sections 318, 320, 323 and 363 of the Code of Civil Procedure, and was also barred by laches.

[1] We will first consider appellant's specification of error that the findings are not sustained by the evidence. It is admitted, or appears from uncontradicted evidence, that on and prior to June 14, 1916, the plaintiff was the owner of the real property which is the subject of this action, subject, however, to the three deeds of trust mentioned in the foregoing findings; that on said date the property was sold by virtue of the power of sale under the first deed of trust to satisfy the indebtedness due the Farmers' & Merchants' Bank of Hayward; and that it was purchased by the defendant for the full amount due said bank. It was also proved by competent evidence that prior thereto the defendant had made improvements on said premises of the reasonable value of \$2,552.20. It also appears without conflict that at the time of the purchase by the defendant he had no agreement whatever with the plaintiff concerning the title to the property, and that on the evening of the day on which the sale under the trust deed was made as aforesaid, the defendant herein, Mr. Mount, the vice president and cashier of the Central National Bank of Oakland, Mr. J. A. Park, cashier of the Farmers' & Merchants' Bank of Hayward, and a Mr. Bovo, a son of the plaintiff, met in the Central National Bank in Oakland. As the only agreement ever made between the plaintiff and defendant concerning the said property was made at the aforesaid meeting, we deem it proper to quite fully present what occurred at that meeting. The record discloses that Mr. Mount was not available as a witness and Mr. Bovo is deceased. The witness J. A. Park testified that, "Mr. Bovo was there for the purpose of seeing about getting an agreement from Mr. Abrahamson to redeem the property within a period of two years." He further testified that: "Mr. Bovo wanted Mr. Abrahamson to agree that his mother could have the privilege of redeeming the property within a period of two years. Mr. Mount, who seemed to be Mr. Abrahamson's advisor all the way through, said, 'We will not give any agreement except a verbal one that we will return the property to Mrs. Bovo within a period of eighteen months, provided she can supply the money to pay all expenses and all claims

against the property which may rightfully belong to Mr. Abrahamson.' Mr. Abrahamson said, 'If they could pay me the money due me within a period of eighteen months from the date of the sale I would be glad to return the property to the former owner.'" It also appears from the evidence of this witness that the agreement was entirely oral, that Abrahamson refused to give a written agreement, that the Farmers' & Merchants' Bank of Hayward had no intention of renewing the loan, but as an accommodation to Mr. Mount of the Central National Bank it took a new loan from the defendant for the face of the original loan which they had made to the plaintiff and took a new note and deed of trust on the property from the defendant. This witness further testified that the amount of defendant's bid was approximately the market value of the property and that there would have been a very small equity over that amount. The witness further testified that Mrs. Bovo sent Mr. Abrahamson to him to take care of the latter's claim for improvements made on the premises and that he told Mr. Abrahamson he could not consider it. The trustee's deed to the property was executed and delivered to the defendant Abrahamson after the parties entered into the foregoing agreement at the Central National Bank. The evidence as to the subsequent conduct of the parties is in many respects in sharp conflict, but any substantial evidence must be resolved in favor of the findings of the trial court. The defendant testified that on the day of the sale, but after he had bid in the property, he visited the premises and told the plaintiff he had purchased it; that she told him she had no place to go and he agreed to allow her to retain one of the apartments in the building provided she would pay the water bills, also the bills for the hall light, and take care of the steps and hall and collect some of the rentals; that she agreed to do so and thereafter did perform said services, and it also appears where she collected rents she always turned them over to the defendant. There was also some evidence that the defendant during the years following the execution of the deed admitted that he was holding the property for plaintiff; however, according to his own testimony, these statements were made during the eighteen months following the agreement above set forth, but not afterwards. It further appears from the evidence that upon the request of plaintiff's son, defendant rendered a statement of the amount due him, although demand therefor was not made until nearly two years from the date of the agreement made in the Central National Bank of Oakland and defendant testified that had the plaintiff offered to pay him at the time the statement was rendered, he would have accepted it and made her a deed, but that after the rendering of the statement and the failure of the plaintiff to pay him he kept

no further account of his expenditures. The evidence shows that no other request was ever made, nor was the statement rendered ever questioned as to the correctness, nor was any tender ever made to defendant of any amount due him until the commencement of the action of March 27, 1925. It also appears from the evidence that defendant has paid since the execution to him of the deed for the property all taxes, street improvement bonds, has built garages on the property, collected the rents, and exercised all the rights of ownership to the premises, and that his right so to do was never disputed by plaintiff nor anyone else until the commencement of this action.

[2, 3] Appellant claims that the agreement made at the Central National Bank is a redemption agreement that equity will enforce against the defendant. She cites in support of this claim *Webb v. Vercoe*, 201 Cal. 754, 258 P. 1099, 1101, 54 A. L. R. 1200, the cases therein cited and other cases, but the main reliance seems to be upon *Webb v. Vercoe*, supra. In our opinion there is a clear-cut distinction between the facts of the latter case and the facts in the case at bar. In the cited case the transaction involved the foreclosure of two mortgages, the junior mortgagee purchasing the property at the foreclosure sale. The evidence relied upon to establish a resulting trust in favor of the mortgagor consisted of certain letters written by the parties. In one of these the mortgagor appealed to the junior mortgagee to buy the property at said sale in her own name and allow him to redeem. To this the mortgagee agreed and and in pursuance thereof did buy the property. Some of the letters fixed the terms of the redemption. The Supreme Court held that the trial court "was well warranted in concluding that the written declarations of the defendant were to the effect that plaintiff need not attempt to redeem her property from the foreclosure sale, but could rely upon the defendant to furnish the money to purchase at such sale and to thereafter take a sheriff's deed, treating the transaction as a loan and holding the legal title as security for its repayment; this, too, upon the terms found by the court, to wit, interest at seven per cent. per annum; and that plaintiff should have an indefinite time within which to repay defendant and secure thereby title to the property." In the case at bar the defendant, without any agreement with plaintiff, bought the property at the trustee's sale, paying therefor an adequate consideration. Thereafter it was agreed that defendant would return the property to plaintiff within eighteen months, provided she could supply the money to pay all expenses and all claims against the property which belonged to the defendant. The latter specifically stated "if they could pay me the money due me within a period of eighteen months of the date of the sale, I would

be glad to return the property to the former owner." There is a further distinction between the two cases, in that the original transaction in *Webb v. Vercoe*, supra, involved a sale under foreclosure of a mortgage with a right of redemption in the mortgagor, while in the case at bar the transaction involved a trust deed and there was no right of redemption. We are satisfied from the foregoing evidence that the court was justified in its finding that the agreement made between the parties was a mere option to purchase the property within eighteen months and was not a redemption agreement. Furthermore the evidence establishes the fact that the plaintiff never at any time before the commencement of this action tendered to defendant, or offered to pay, the amount due defendant. If the foregoing conclusion that the agreement was an option to purchase and not an agreement permitting the plaintiff to redeem from the sale is correct, then no useful purpose is served by discussing the several questions pressed by appellant based upon the theory of a redemption agreement, or the further claim that the transaction constituted an equitable mortgage.

[4] Appellant complains of the blanket finding made by the trial court, that all other allegations of the pleadings, other than those specifically found to be true were untrue and not supported by the evidence. It is claimed by appellant that sixteen allegations of the pleadings other than those specifically found by the court are sustained either by the admissions of the pleadings or undisputed evidence. We agree with counsel that in some instances the findings objected to are subject to the criticisms made, but notwithstanding this, the court found, upon sufficient evidence, facts which sustain the judgment and the findings complained of are therefore immaterial.

[5] Appellant claims that because the respondent, in testifying concerning the transaction, used the word "advanced" in speaking of the payment of the purchase price by him, he should be held to a strict interpretation of the word as meaning "loan," and therefore the consideration for said deed was paid by appellant. However, the trial court held, upon sufficient evidence, against this construction. At the suggestion of the court, counsel stipulated both plaintiff and defendant were of foreign birth, and were not familiar with the English language. We are also satisfied that respondent, having paid the consideration for the trustee's deed, and the agreement made by the parties being an option to purchase and no money or other thing of value having passed between the parties, and appellant not having waived any right in consideration thereof, the agreement was without consideration.

[6] Appellant complains that the court erred in holding that the redemption agree-

ment was not evidenced by an instrument in writing, that the defendant in his verified answer having stated the facts concerning the agreement, that of itself is sufficient to satisfy the statute of frauds. The agreement being an option to purchase the land, and all rights of the appellant having expired years before the verification of the answer, we are of the opinion that the objection is not well founded.

[7] It is also contended that the court's findings that appellant occupied the premises as a tenant at will of the respondent, and that the latter owned the premises by adverse possession, are not sustained by the evidence. Upon this phase of the case the evidence shows that after respondent bid in the property at the sale he visited the premises, told appellant of his purchase, and at her request permitted her to continue to occupy one of the apartments in the building in consideration of her performing certain services in and about the property and paying the charge for the hall light in the building and the water rental of the premises. From that time forward defendant paid all taxes levied or assessed against the property, leased the apartments to others, received all rents for their use, constructed garages on the premises to be used in connection with the house, and claimed to own the same against the plaintiff and every one else, and his claim thereto was never disputed by appellant nor any one else. There is some evidence in the record that respondent admitted to others that he was holding the property for appellant, but respondent testified that such statements were made during the first eighteen months in accordance with his agreement that he would return the property to the appellant and were not made after that time. Such evidence sustains the findings of the court.

[8] The court found that the cause of action was barred by subdivisions 1 and 5 of section 1624 of the Civil Code and subdivisions 1 and 5 of section 1973 of the Code of Civil Procedure. The agreement being an option to purchase, and not being in writing nor to be performed within one year, the court's finding is correct.

[9] The court also held that the cause of action was stale. Upon this subject the evidence shows that the respondent purchased the property on June 14, 1916, and under her own evidence the oral agreement by which appellant could demand a return of the property was limited to eighteen months. The only effort made by plaintiff to fulfill the agreement, so far as respondent was concerned, was a request by her son made nearly two years after the making of the agreement, for a statement of the account. This was rendered, and nothing further was done until just prior to the commencement of this action, nine years later, and during all of that time the respondent was improving the

property and exercising all the right and power of an owner with the full knowledge of appellant and without any protest on her part. The court's action was correct.

The court also found that the cause of action was barred by other sections of the Code of Civil Procedure, but as we are of the opinion that the judgment must be affirmed, it would serve no useful purpose to discuss the objections raised thereto. There are many other points of error claimed by appellant, but after the conclusion we have reached as to the nature of the agreement, it is unnecessary to discuss or pass upon them.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, Acting P. J.

190 Cal. App. 474

CROWHURST v. CITY COUNCIL OF CITY OF ALBANY et al. (Civ. 7086.)★

District Court of Appeal, First District, Division 1, California. Aug. 31, 1929.

Rehearing Denied Sept. 30, 1929. Hearing Denied by Supreme Court Oct. 28, 1929.

Municipal corporations §31—Council's postponement of election on consolidation of municipalities more than eight months after resolution pursuant to electors' petition held unauthorized (Municipal Consolidation Act of 1913, § 2 [St. 1913, p. 577]).

Action of city council in fixing date of election, on the question of consolidation with another city, more than eight months after passage of resolution calling for election pursuant to electors' petition, held unauthorized and in violation of Municipal Consolidation Act of 1913, § 2 (St. 1913, p. 577), requiring council without delay to call special election and submit question of consolidation to electors.

Application by Frank G. Crowhurst for mandamus to be directed to the City Council of the City of Albany and others. Writ granted.

Clark, Nichols & Eltse, of Berkeley, for petitioner.

Lovett K. Fraser, of San Francisco, for respondents.

PER CURIAM. This is a proceeding in mandamus to compel the city council of the city of Albany and the individual members thereof to submit without delay to the electors of that city, at a special election to be called and held pursuant to the provisions of section 2 of the Municipal Consolidation Act of 1913 (Stats. 1913, p. 577), the proposition whether such municipality shall be consolidated with the city of Berkeley.

The electors' petition filed with the city council initiating the proceedings for the holding of such election was the second one of its kind to be filed for that purpose. The first was declared illegal by this court on March 15,

1929, upon the ground that it did not conform to the requirements of the statute. *Carter v. Green*, 276 P. 120. Before the judgment therein became final and on April 8, 1929, a new petition was filed with the city council, upon which it refused to act on the ground that the legal proceeding involving the validity of the first petition was still pending. Thereupon mandamus proceedings were instituted to compel the council to take action thereon, and on May 20, 1929, Division 2 of the District Court of Appeal, District 1, held adversely upon all objections raised by the council, and directed that the writ issue as prayed. *Crowhurst v. Green et al.*, 277 P. 886. Thereafter and on July 23, 1929, the petition was again brought before the council, at which time it was referred to the city clerk for certification of the signatures, and on August 12, 1929, the petition was certified as being legally sufficient. On the same day the city council passed a resolution calling the special election, but fixed April 14, 1930, as the date on which it should be held, which, as will be noted, is more than eight months subsequent to the date of the passage of the resolution calling the election.

Section 2 of said act provides in substance that whenever a petition conforming to the requirements of said act shall be filed with the legislative body of a city, "such legislative body must, *without delay call a special election and submit* to the electors of such municipal corporation the question whether such municipal corporations shall be consolidated" (italics ours), and that notice of such election shall be given by publication in a newspaper printed and published in such municipality at least once a week for the period of four successive weeks next preceding the date of such election; and furthermore that the date fixed for the holding of such election "shall be within 20 days after the publication of such notice."

It is clear from the mere reading of the provisions of section 2 of said act that the legislative body of a city has no judicial power to defer the holding of an election petitioned for in conformity with the requirements of said act, but must without delay call the election and must also without delay submit to the electors the proposition to be voted upon; and it is also clear that the statute contemplates that four weeks and twenty days is a reasonable time within which to hold the election after the passage of the resolution calling the same. It follows, therefore, that the action of the city council of the city of Albany in fixing the date of the election for a date more than eight months after the passage of the resolution calling the election was in violation of the letter and the spirit of the law. The excuses offered by respondents in justification of their action in thus delaying the holding of the election, as the same are pleaded in the answer, are in their nature

purely political, and while the same might be urged in opposition to the proposition to be voted upon, it is certain they do not serve as legal grounds for the suspension of the mandatory provisions of the statute requiring the council to submit the proposition to the electors of the city "without delay."

For the reasons stated it is ordered that the demurrer to the petition herein be overruled, and that a peremptory writ of mandate issue as prayed; that respondents forthwith rescind and set aside the former resolution of the city council passed on August 12, 1929, calling said election and fixing the date thereof for April 14, 1930, and forthwith thereafter take the necessary and appropriate proceedings in conformity with the terms of said act to hold said special election; and that the same be held, on a date not later than six weeks after the service of the writ herein upon a majority of the members of the city council of said city.

100 Cal. App. 441

MINOR v. FOOTE et al. (Civ. 6773.)

District Court of Appeal, First District, Division 1, California. Aug. 27, 1929.

1. Negligence $\S$ 136(26)—Only where no fact is left in doubt, and no deduction can be drawn from evidence, can court say as matter of law that contributory negligence is established.

Question whether plaintiff has been guilty of contributory negligence is primarily one to be determined by jury from all circumstances and physical conditions attending accident, and it is only where no fact is left in doubt, and no deduction can be drawn by jury from evidence, that court can say as matter of law that contributory negligence is established, and even where facts are undisputed, if reasonable minds might draw different conclusions therefrom, question is for jury.

2. Appeal and error $\S$ 930(1)—Appellate court will assume that prevailing party's testimony is true, and evidence will be construed to sustain jury findings.

On appeal, it will be assumed that testimony of prevailing party is true, and entire evidence will be construed in most favorable way to sustain findings of jury.

3. Appeal and error $\S$ 979(2)—Granting new trial for insufficiency of evidence is conclusive on appellate court, unless there has been abuse of discretion.

Where a new trial has been granted on ground of insufficiency of evidence, trial court's action is conclusive in appellate court, unless there has been abuse of discretion.

4. Automobiles $\S$ 244(50)—Evidence held sufficient to sustain finding that pedestrian, struck by automobile at intersection, was not contributorily negligent.

In action for injuries sustained by pedestrian, struck by automobile at street intersec-

tion, evidence held sufficient to sustain finding of jury that plaintiff was not guilty of contributory negligence.

5. Automobiles $\S$ 217(6)—Pedestrian is not contributorily negligent in failing to run, on observing automobile which strikes him.

A pedestrian, who is struck while crossing a street in a lawful and prudent manner, will not be deemed guilty of contributory negligence merely because he did not run, on observing approach of automobile which struck him.

6. Automobiles $\S$ 160(1)—Automobile driver must be vigilant and anticipate presence of others on street.

Driver of automobile has no right to assume that road is clear, but under all circumstances and at all times he must be vigilant, and must anticipate and expect the presence of others.

7. Automobiles $\S$ 160(3), 163(8)—Automobilist making left turn was required to see that crossing was clear, or to have automobile under sufficient control, if unable to see because of darkness.

Driver of automobile, in making a left turn at street intersection, was charged with duty of looking to see that crossing was clear before attempting to cross it, or, if unable to see crossing because of darkness, of having her automobile under sufficient control when she made the turn to avoid striking pedestrians already on the crossing.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Action by Sarah C. Minor against Georgena Foote and another. From an order granting a new trial, because the verdict for plaintiff was for a sum less than the amount stipulated by the parties as the special damages to plaintiff, defendant Foote appeals. Affirmed.

Joseph E. Reardon and Benjamin F. Curtaz, both of San Francisco (Ivores R. Dains, of San Francisco, of counsel), for appellant.

P. O. Solon, of San Francisco, for respondent.

PER CURIAM. Plaintiff brought this action to recover damages for personal injuries sustained as a result of being struck by an automobile belonging to defendant Adelaide MacSweeney and driven by defendant Georgena Foote. At the conclusion of the trial the action was dismissed as to Adelaide MacSweeney. Plaintiff sued for \$15,000 general damages and \$777.06 special damages. The defendant Georgena Foote, although denying liability for the accident, stipulated during the trial, which took place before a jury, that plaintiff had necessarily expended the sum of \$777.06 for the treatment of her injuries. The jury returned a verdict in plaintiff's favor, but, disregarding the stipulation above mentioned, awarded her damages for only

\$500. Judgment being entered for that amount, plaintiff moved for a new trial, and the motion was granted, upon the grounds of "insufficiency of the evidence to justify the verdict and that the verdict is against law, said verdict having been rendered in favor of the plaintiff for a sum less than the amount stipulated by the parties as the special damages to the plaintiff."

An appeal was taken by the defendant from the order granting the new trial, and in support thereof she contends that the evidence shows that plaintiff's own negligence was the sole proximate cause of her injury, and that defendant was not guilty of any negligence, and that therefore, "conceding for the purposes of argument that the damages awarded her were inadequate, it does not follow that an order granting a new trial for such reason may be sustained, if the evidence shows that plaintiff was guilty of negligence as a matter of law which proximately contributed to her injuries, or if the evidence fails to show negligence on the part of defendant and appellant."

The evidence shows that the accident occurred in Berkeley on September 16, 1926, at about 7:40 p. m., while plaintiff was attempting to cross Atherton street, where it joins Allston way. The latter street forms the south boundary of the grounds of the University of California, and is occupied by a double-track street railway line. Atherton street enters Allston way at right angles on the south side thereof, but does not cross Allston way. At the time of the accident it was dark, the darkness being intensified by trees and the absence of street lights. Immediately preceding the accident, Mrs. Minor, the plaintiff, who was 70 years of age, but active and in the full possession of her faculties of sight and hearing, and her daughter, Ruby Minor, were walking in a westerly direction along the sidewalk on the southerly side of Allston way. When they reached the southeast corner of the streets, they stopped "and made a survey of the conditions." Mrs. Minor testified that they first looked to the left down Atherton, then ahead (west) up Allston, and then continued on their course straight ahead to cross Atherton; that when they reached a point about the middle of the street she heard her daughter scream, and turning her head to the right she saw the light of an automobile; and that she was struck almost instantly. The testimony given by Mrs. Minor's daughter was substantially the same, but she stated that when they reached Atherton street, and before venturing across, they "looked in every direction to see if any automobiles were approaching," and, seeing none, they started across. Appellant was driving westerly up Allston way in the same direction in which the Minors were walking, and after reaching the center of the intersection of Atherton street made a left-hand turn to drive southerly down Atherton. Miss Mi-

nor testified that she saw the approaching automobile for the first time just as it was making the turn; that it was traveling "very fast," "between 25 and 30 miles an hour"; that she screamed, "Run, mother, run!" and started to run to the other side of the street; that while running she heard the impact, and realized that her mother had been struck.

Appellant was 22 years of age and a student at the University. She testified that upon reaching the intersection, and while making the left-hand turn, she was traveling at a speed of only 12 miles an hour or less; that the headlights of the Ford coupé which she was driving were lighted, and that the lights and the brakes were in good condition; that the weather was clear, and there was no traffic or other obstacles to obstruct her view of the crossing, but that she did not see Mrs. Minor until she was within 3 feet of her, at which time she applied the brakes and stopped the automobile within 6 feet beyond the point of the impact. She admitted, however, that at no time did she sound a horn, nor give any other warning of her approach, or of her intention to make the left-hand turn, except to give the regulation hand signal approximately 50 feet before reaching the intersection. She also admitted that the automobile was almost new, and that it "did not make an exceptional lot of noise." Furthermore, at the police station following the accident she made a written statement, in which she admitted "partial responsibility" for the accident.

[1-3] The question of whether or not a plaintiff has been guilty of contributory negligence is primarily one to be determined by the jury from all the circumstances and physical conditions attending the accident (*Jones v. Southern Pac. Co.*, 74 Cal. App. 10, 239 P. 429); and where the evidence of negligence consists of circumstances from which inferences may be drawn in favor of or against negligence, it is the province of the jury to determine whether or not there was negligence (*Keena v. United Railroads of S. F.*, 57 Cal. App. 124, 207 P. 35). It is only where no fact is left in doubt, and no deduction can be drawn by the jury from the evidence, that a court can say as a matter of law that contributory negligence is established; and even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one for the jury. *Katz v. T. I. Butler Co.*, 81 Cal. App. 747, 254 P. 679. Moreover, in reviewing the question on appeal it will be assumed that the testimony of the prevailing party is true, and the entire evidence will be construed in the most favorable way to sustain the findings of the jury. 2 Cal. Jur. p. 926. The law is well settled also that, where a new trial has been granted on the ground of insufficiency of the evidence, the action of the trial judge is conclusive in the appellate court, unless there has been an abuse of discretion.

Hanlon Drydock, etc., Co. v. Southern Pac. Co. (Cal. App.) 268 P. 385.

[4] We are of the opinion that the evidence above set forth is legally sufficient to sustain the finding of the jury that plaintiff was not guilty of contributory negligence, and that consequently the trial court did not abuse its discretion in not holding otherwise in ruling on the motion for a new trial.

[5-7] Appellant calls attention to the fact that plaintiff's daughter observed the lights of the automobile in time to avoid injury by running to the other side of the street, and appellant argues, therefore, that, "had plaintiff exercised the same degree of care as her daughter, she too would have avoided injury." The evidence shows, however, that plaintiff saw the lights instantly after her daughter observed them, and, bearing in mind plaintiff's advanced age, the jury may well have doubted whether she could have escaped injury by running. Moreover, we do not agree to the proposition, which appellant seems to urge, that a pedestrian who is struck while crossing a street in a lawful and prudent manner should be deemed guilty of contributory negligence merely because he did not run upon observing the approach of the automobile which strikes him. As held in *Devecchio v. Ricketts*, 66 Cal. App. 334, 226 P. 11, the right of drivers of automobiles to use public highways is not superior to that of the humblest pedestrian, and accordingly the driver of an automobile has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant, and must anticipate and expect the presence of others.

In the present case the evidence shows that plaintiff and her daughter had reached the middle of the crossing when appellant, without sounding any warning, suddenly came upon them by making a left-hand turn, and consequently appellant was charged with the legal duty of looking to see that the crossing was clear before attempting to cross it, or, if she was unable to see the crossing because of darkness, of having her automobile under sufficient control at the time she made the turn to avoid striking any pedestrians who were already on the crossing.

The facts of the cases emphasized by appellant in her brief are materially different from those of the case at bar. In *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 776, 89 P. 1109, 1112, the plaintiff was riding a bicycle between the street car tracks in the daytime, and was overtaken and struck by the car, and it was held that under such circumstances it was perfectly plain that his "failure to see or hear the car must have been the result of absolute inattention to his situation and surroundings, and that he exercised no care whatever." In *Finkle v. Tait*, 55 Cal. App. 425, 203 P. 1031, 1034, the opinion of the Supreme Court in passing upon a petition for a hearing be-

fore that court states that the pedestrian who was struck "either failed to take the trouble to look for automobiles on that side of the street as he crossed, or that he saw the automobile and carelessly walked in front of it," and that "there was evidence that he was carrying a box of raisins * * * on his shoulder, in such a position that it may have obscured his vision." In *Atkins v. Bouchet*, 65 Cal. App. 94, 223 P. 87, the undisputed facts were that "the plaintiff, while crossing the street, glanced neither to the right nor the left, and with her umbrella held down to her waist line had her view of traffic on her left completely cut off, and did not see the automobile at any time until after the collision, although the accident occurred in the middle of the day." And in *Ogden v. Lee*, 61 Cal. App. 493, 215 P. 122, the pedestrian looked twice in the direction of the automobile and saw its lights, and notwithstanding continued to walk across the street, with an umbrella pulled down over his face, until he was struck.

The order appealed from is affirmed.

100 Cal. App. 456

ROBERTS v. GRIFFITH CO. (Civ. 6709.)

District Court of Appeal, First District, Division 1, California. Aug. 28, 1929.

1. Animals ☞53—Permitting horses or mules to run untended on streets may be actionable negligence, regardless of their vicious character or scienter.

It may be actionable negligence to permit horses and mules to run at large and untended on streets of municipality, regardless of their vicious character or scienter.

2. Animals ☞55—Complaint alleging that defendant negligently allowed mules to run upon streets, and that they threw marshal to ground, breaking his leg, stated cause of action (Pen. Code, § 370).

Complaint, alleging that city was of sixth class, and plaintiff was deputy marshal thereof, and that defendant carelessly and negligently allowed mules to run at large without keeper or other supervision upon streets, thereby creating public nuisance and obstructing free passage of streets, in violation of Pen. Code, § 370, and that plaintiff while engaged in abating nuisance was thrown by mules violently to ground and his left leg broken to his damage, held to state cause of action.

3. Animals ☞55—Complaint alleging that defendant negligently permitted mules to run upon streets, and that mules threw marshal abating nuisance, breaking his leg, sufficiently showed how accident occurred (Pen. Code, § 370).

Complaint in effect alleging that defendant negligently permitted mules to be at large upon streets creating public nuisance by obstructing

free passage and use of streets in violation of Pen. Code, § 370, and that by reason of negligence plaintiff as deputy marshal, without negligence on his part, was while attempting to abate nuisance thrown down by mules resulting in breaking of deputy's leg, *held* sufficient to show how or in what manner accident occurred.

4. Pleading ⚡34(1)—In determining pleading's effect, allegations must be liberally construed (Code Civ. Proc. § 452).

In the construction of pleading for purpose of determining its effect, its allegations must be liberally construed with view to substantial justice between parties as provided by Code Civ. Proc. § 452.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Clarence W. Roberts against the Griffith Company. Judgment of dismissal, and plaintiff appeals. Reversed with directions.

Superseding former opinion in 277 P. 901.

Brewton A. Hayne and Ernest M. Torchia, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondent.

DOOLING, Justice pro tem. From a judgment of dismissal, entered pursuant to an order sustaining defendant's demurrer to plaintiff's complaint without leave to amend, plaintiff appeals.

The complaint, in substance, alleges that Lynwood is a city of the sixth class and plaintiff was and is a deputy marshal thereof; that defendant was and is a corporation, chiefly engaged in doing street work, and in connection therewith owned more than twenty mules; that on October 24, 1926, at the hour of 10 o'clock p. m., defendant carelessly and negligently allowed about 20 of its mules to run at large, without a keeper or other supervision, upon the public streets of Lynwood, thereby creating a public nuisance by unlawfully obstructing the free passage and use in the customary manner of said streets, in violation of section 370 of the Penal Code; that it thereupon became the duty of plaintiff, as a deputy marshal, to abate such nuisance, and while engaged with two other deputy marshals in driving such mules from the streets plaintiff was thrown by such mules violently to the ground and his left leg broken to his damage. The demurrer was both general and special.

[1] It is not contended by respondent that under the circumstances alleged in the complaint plaintiff was not acting in the performance of his duty in endeavoring to remove the mules from the city streets; but respondent does contend that no actionable negligence is pleaded because there is no allegation that the mules were vicious or of scienter on the part of respondent; and that the negligence, if any, in permitting them at

large was not the proximate cause of appellant's injuries. With these contentions we cannot agree. While there is a conflict of authority on the subject in the various jurisdictions, we are satisfied that the better rule is that it may be actionable negligence to permit horses or mules to run at large and untended on the streets of a municipality regardless of their vicious character or of scienter.

In *Goodman v. Gay*, 15 Pa. 188, 53 Am. Dec. 589, the court said:

"The owner has no right, either by law or custom, to turn a horse loose in the streets of a city. All men know that a horse which has been stabled and well fed will, when turned out, run and plunge, and become dangerous in the midst of people. If one man has the right to turn out his horse, every man has the same right; and if the one-fourth of people who own horses in a city would turn them out on the streets, not only the women and children, but even the men would have to abandon them.

"There is no reported case in which it was held that a person who turned out his horse in the streets of London or New York was not answerable, if he ran over a child or a woman unless the owner knew, when he turned him out, that he was vicious and prone to kick. But I may say that all horses are, when turned loose, more or less dangerous in confined streets; and all men know this. The gist of the action is that the defendant did an act not sanctioned by law or custom, from which he must have known that injury might result."

To the same effect are *Dickson v. McCoy*, 39 N. Y. 400; *Hardiman v. Wholly*, 172 Mass. 411, 52 N. E. 518, 70 Am. St. Rep. 292; *Baldwin v. Ensign*, 49 Conn. 113, 44 Am. Rep. 205; *Doherty v. Sweetser*, 82 Hun. 556, 31 N. Y. S. 649; *Wasmuth v. Butler*, 86 Hun. 1, 33 N. Y. S. 108; *Stern v. Hoffman Brewing Co.*, 26 Misc. Rep. 794, 56 N. Y. S. 188; *Drew v. Gross*, 112 Ohio St. 485, 147 N. E. 757, 758.

Of similar import are the following cases holding that it is actionable negligence to leave a horse or team untethered and unguarded on a public street: *Bowen v. Flanagan*, 84 Va. 313, 4 S. E. 724; *Phillips v. De Wald*, 79 Ga. 732, 7 S. E. 151, 11 Am. St. Rep. 458; *Griffiths v. Clift*, 4 Utah, 462, 11 P. 609; *Pierce v. Connors*, 20 Colo. 178, 37 P. 721, 46 Am. St. Rep. 279; *Rumsey v. Nelson*, 58 Vt. 590, 3 A. 484; *Moulton v. Aldrich*, 28 Kan. 300.

Respondent relies on the English case of *Cox v. Burbridge*, 13 C. B. (N. S.) 431, 143 Eng. Rep. 171, and the English cases following it, and the Indiana case of *Klenburg v. Russell*, 125 Ind. 531, 25 N. E. 596. In *Healey v. P. Ballantine & Sons*, 66 N. J. Law, 339, 49 A. 511, 514, the Supreme Court of New Jersey expressly disapproved the case of *Cox v. Bur-*

bridge, supra, in the following language: "Mr. Wood, commenting on the case of Cox v. Burbridge, says: 'The doctrine of this case does not commend itself to the court or profession, as being consistent with reason or sound policy. The horse was unlawfully in the highway. The child was lawfully there, and there seems to be no good reason why the owner or keeper of the horse should not be responsible for the injuries inflicted upon the child while the horse was so unlawfully at large.' Wood, Nuis., p. 190. Judge Redfield, in discussing the case of Cox v. Burbridge, says that that case 'has created some discussion in England, and provoked some unfriendly criticisms, as it seems to us not altogether without reason. It seems almost incomprehensible that anyone should require proof that the owner of a horse was made aware of its propensity to do damage when running at large in the highway. If the horse was wrongfully in the highway, and did damage in consequence to any person or thing rightfully there, the owner or keeper should be responsible, as it seems to us.' 4 Am. Law. Reg. (N. S.) pp. 140, 141. It may be safely asserted that the decision of that case was contrary to the great weight of authority in this country, and it seems to us not sustained on principle or by preceding authority in England."

With this criticism of the principle of Cox v. Burbridge and those cases which have followed it we fully agree. It would be intolerable to permit such animals, as horses, mules, and cattle to roam untended and untethered on the public streets of incorporated cities and towns without holding the owners liable for the natural consequences of their being so at large.

While the precise question has not come before our appellate courts, the early case of Ficken v. Jones, 28 Cal. 618, 625, is instructive. In that case plaintiff was injured by a steer which was being driven with other cattle through Brannan street in San Francisco. There was no evidence that the cattle were wild, untamed, or vicious, or that defendants had cause to believe they were so; but the court held that defendants were nevertheless bound to exercise care in driving them for the safety of people on the streets and would be liable for failure to do so which resulted in injury to person, saying: "The driving of cattle through the streets of a city is attended with danger to persons who are of right there, and who can justly demand that the care, diligence and skill essential to their safety shall be commensurate with the necessities of the case." If the driving of cattle through city streets is attended with danger to persons, the permitting of them to wander unattended is of necessity fraught with greater peril.

The Supreme Court of Ohio, in Drew v. Gross, supra, said of a horse at large on the highway: "What ordinary care demands de-

pends always upon the circumstances of the case, and a primary factor among those circumstances is the fact whether the injury could or could not have reasonably been anticipated from the acts done or left undone by the defendant."

[2] The real question in this case is whether the defendant could have reasonably foreseen that by allowing a band of twenty mules to be loose upon the streets an injury such as occurred to plaintiff might ensue. To that question there is only one reasonable answer. Any one who has had experience with animals in herds or bands, however docile they may ordinarily be, must know the danger attendant upon frightening, alarming, or startling them, and must equally know how unaccountable their actions may sometimes be.

We conclude that the complaint stated a cause of action.

[3] Respondent insists, however, that the judgment should not be reversed because it was urged as a ground of special demurrer that the complaint was uncertain as to how or in what manner the accident occurred. It is claimed that this ground of special demurrer was well taken, and since plaintiff did not ask leave to amend the judgment must be affirmed. The complaint in this regard, after alleging that the mules were negligently permitted to be at large on the streets of the town, contains the following averment: "The plaintiff, without any negligence on his part, was by said mules, violently thrown upon the ground." Respondent's criticism of this allegation is that the verb "thrown" is too indefinite to indicate in what manner the accident occurred and would be perfectly consistent with the fact that appellant was attempting to ride one of the mules without saddle or bridle. We think this criticism is unduly hypercritical. Among the definitions of the verb "to throw" in Webster's New International Dictionary we find: "To drive or impel by violence; to dash; force, to cause to fall; to prostrate; to cast down."

At least since the decision of Stephenson v. Southern Pacific Co., 102 Cal. 143, 34 P. 618, 619, 36 P. 407, it is the settled rule in California that negligence and proximate cause may be simply set forth, the classic example given in the Stephenson Case being: "For that the defendant so negligently drove his horse and carriage that the same struck against the carriage and horse of the defendant." And while in the Stephenson Case by way of dictum it was suggested that such a complaint might be vulnerable to a special demurrer, subsequent cases have held that it is not (Cunningham v. Los Angeles Ry. Co., 115 Cal. 561, 47 P. 452; Stein v. United Railroads, 159 Cal. 368, 113 P. 663). In effect the complaint alleges that respondent negligently permitted the mules to be at large, and that by reason of such negligence plaintiff without negligence on his part was by said mules thrown down. We think this is sufficient.

[4] In *Mix v. Yoakum*, 200 Cal. 681, at page 687, 254 P. 557, 559, the Supreme Court says: "The defendants insist upon the application of the rule that a pleading must be taken most strongly against the pleader. This rule received recognition in the earlier cases [citing cases] and the old rule seems to have received some, but we think, ill-considered notice in *Silvers v. Grossman*, 183 Cal. 696, 192 P. 534, where, on page 702 (192 P. 537), a quotation from *Joseph v. Holt* (37 Cal. 250) supra, is set forth. Since the enactment of section 452 of the Code of Civil Procedure in 1872, it has been generally recognized that, in the construction of a pleading for the purpose of determining its effect, 'its allegations must be liberally construed, with a view to substantial justice between the parties.'"

No case relied on by respondent dealt with a pleading at all similar to the one here.

Judgment reversed, with directions to the trial court to overrule the demurrer.

We concur: TYLER, P. J.; KNIGHT, J.

**PEOPLE v. SUPERIOR COURT IN AND
FOR IMPERIAL COUNTY et al.***
(Civ. 6570.)

District Court of Appeal, Second District, Division 1, California. Aug. 16, 1929.

Rehearing Denied Aug. 28, 1929. Hearing Granted by Supreme Court Oct. 14, 1929.

Criminal law ☞ §192—Trial court could not, after conviction and order denying defendant new trial were affirmed, admit him to probation with fine (Pen. Code, §§ 1203, 1263).

Where one was convicted for failure to stop and render assistance, as provided by Pen. Code, § 367c, after truck driven by him had collided with automobile, injuring an occupant thereof, and judgment and order denying his motion for new trial were affirmed, trial court was not authorized thereafter to modify judgment of imprisonment, and attempt to change it to judgment of fine in sum of \$500, and order probation on condition that defendant pay fine, under section 1263, requiring that, if affirmed, original judgment must be enforced, and notwithstanding that section 1203 authorizes trial court in granting probation, to require payment of fine as condition thereof.

Application by the People of the State of California for a writ of mandate, prayed to be directed to the Superior Court of the State of California in and for the County of Imperial and another, to require respondent court to enforce a judgment. Writ granted.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., Elmer W. Heald, Dist. Atty., and Edward B. Patterson, Deputy Dist. Atty., both of El Centro, for the People.

Hickcox, Trude & Johnson, of El Centro, and Edgar B. Hervey, of San Diego, for respondents.

R. B. Whitelaw and Utley & Nuffer, all of El Centro, for defendant Maggio.

CONREY, P. J. By information filed in respondent court (case No. 1947), one Salvatore Maggio was charged with the crime of violation of section 367c of the Penal Code (committed August 22, 1927), to wit, for failure to stop and render assistance, etc., after a truck driven by him had collided with an automobile and injured an occupant thereof. Maggio was convicted (November 16, 1928) and sentenced to imprisonment in the state prison, and he thereafter appealed from the judgment and from an order denying his motion for a new trial. The judgment and order were affirmed. *People v. Maggio* (Cal. App.) 266 P. 813. The remittitur was filed in respondent court on the 31st day of May, 1928. On the next day, June 1st, respondent court modified the judgment which had been thus affirmed, and attempted to change it to a judgment of fine in the sum of \$500. From this amending order the people appealed and the order was reversed. *People v. Maggio* (Cal. App.) 274 P. 611. The remittitur on this second appeal was filed in respondent court on the 24th day of February, 1929. Thereafter on the 15th day of March, 1929, the district attorney presented to said superior court a motion that the court direct commitment to be issued and delivered to the sheriff, together with a copy of the judgment and remittitur in the case, for the purpose of putting the original judgment into effect. This motion was denied, and in lieu thereof the court made an order admitting the defendant Maggio to probation, on condition that he pay a fine of \$500. Thereupon the people filed in this court their petition for writ of mandate, and the alternative writ was issued. Return having been made, this cause has been argued and submitted.

We are satisfied that, if it be held that the court was without authority to make such probation order, a proper case is presented for the issuance of a writ of mandate, notwithstanding any right of appeal which the people may have. The people contend that in a criminal action the trial court is without authority to grant an application for probation after the affirmation of a judgment of conviction on appeal. The reversal of the first order modifying the judgment (*People v. Maggio* [Cal. App.] 274 P. 611) was founded upon the provisions of sections 1263 and 1265 of the Penal Code, which are quoted in that decision, and upon the decision of the Supreme Court in *Beggs v. Superior Court*, 179 Cal. 130, 175 P. 642, 644, which decision rested upon the court's construction of said sections of the Penal Code. The Supreme Court said: "It is clear, from the reading of these provisions,

that after a judgment of conviction in a criminal case has been affirmed by an appellate tribunal judicial power to alter or suspend it has ceased." In his concurring opinion in that case, Mr. Justice Wilbur pointed out that the procedure where probation is granted may result in cancellation of the judgment and dismissal of the charge, in which event the judgment would never be enforced. But section 1263 of the Penal Code requires that in the event of an affirmance "the original judgment must be enforced." It is worthy of note that, in its order granting probation, respondent court has again attempted, not only to suspend the imposing of sentence but to reimpose a fine of \$500, which is the very thing which, on the appeal of the people, it was held that the court had no authority to do. Notwithstanding that section 1203 of the Penal Code authorizes a trial court, in granting probation, to require the payment of a fine as a condition of probation, we are of the opinion that such authority does not exist under the circumstances presented by the record in this case. This is so because the right to admit to probation after affirmance of the judgment does not exist at all.

In accordance with the views hereinabove expressed, it is clear that the peremptory writ of mandate should issue; and it is so ordered.

We concur: HOUSER, J.; YORK, J.

**PEOPLE v. SUPERIOR COURT IN AND
FOR IMPERIAL COUNTY et al.***
(Civ. 6569.)

District Court of Appeal, Second District, Division 1, California. Aug. 16, 1929.

Rehearing Denied Aug. 28, 1929. Hearing Granted by Supreme Court Oct. 14, 1929.

Criminal law $\Rightarrow$ 1001—Court, knowing that prior to judgment and order of probation defendant had been convicted of felony, could not admit defendant to probation (Pen. Code, § 1203, as amended by St. 1927, p. 1493).

Where defendant, prior to time when judgment convicting him of manslaughter was pronounced and order of probation made, had been convicted of felony, and that fact was presented to and considered by court in connection with application for probation, trial court was without authority to admit defendant to probation, under Pen. Code, § 1203, as amended by St. 1927, p. 1493, providing that probation shall not be granted to defendant, unless court be satisfied he has not been previously convicted of felony.

Application by the People of the State of California for a writ of mandate, prayed to be directed to the Superior Court of the State of California, in and for the County of

Imperial, and another, to require the respondent court to enforce a judgment. Writ granted.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., Elmer W. Heald, Dist. Atty., and Edward W. Patterson, Deputy Dist. Atty., both of El Centro, for the People.

Hickcox, Trude & Johnson, of El Centro, and Edgar B. Hervey, of San Diego, for respondents.

R. B. Whitelaw and Utley & Nuffer, all of El Centro, for defendant Maggio.

CONREY, P. J. By information filed in respondent court (case No. 1959) one Salvatore Maggio was charged with the crime of manslaughter, committed on the 12th day of November, 1927. His plea of guilty was entered on the 21st day of May, 1928, and he applied for probation. On the 1st day of June, 1928, the matter of sentence and application for probation came on for hearing. The court pronounced sentence of imprisonment in the state prison, but granted the application for probation and suspended the execution of the sentence. Thereafter the people moved said superior court for an order vacating the order granting probation, and for an order directing the issuance of the commitment, and for such other proceedings as are required by law to put into effect the judgment. This motion was denied on the 15th day of March, 1929. The people then filed their petition in this court, pursuant to which the alternative writ of mandate has been issued.

Prior to the time when judgment was pronounced and the order of probation made in said action No. 1959, the defendant had been convicted of a felony, and that fact was presented to and considered by the court in connection with the application for probation in case No. 1959. The history of said former action and conviction, and the status of the same as it was on the 1st day of June, 1928, are set forth in *People v. Superior Court* (Civil No. 6570) 88 Cal. App. —, 280 P. 202, in which the decision of this court has been this day filed.

Section 1203 of the Penal Code contains the provisions of law under which admission to probation in criminal cases is authorized. That section, as amended in 1927 (St. 1927, p. 1493), was in force at the time of the proceedings to which we have referred. It is therein provided that, after the conviction by plea or verdict of guilty of a public offense, in cases where discretion is conferred on the court, the court may, under the circumstances indicated in the section, place the defendant on probation; but the authority so given is qualified as follows: "Further provided, however, that probation shall not be granted to any defendant * * * unless the court shall be satisfied that he has never in any

place been previously convicted of a felony. * * * In view of the facts to which we have referred, showing that it was then and there well known to the court that the defendant had been convicted of a felony, it seems to us that the conclusion is imperative that in said action No. 1959, as well as in the other action, the court was without authority to admit the defendant to probation.

Let the peremptory writ issue.

We concur: HOUSER, J.; YORK, J.

PEOPLE v. GUZMAN. (Cr. 1801.)†

District Court of Appeal, Second District, Division 2, California. Aug. 27, 1929.

Aliens ⇨17—Statute requiring defendant to prove citizenship held not to require defendant prosecuted for possessing firearms as alien to prove nativity (Code Civ. Proc. § 1983, as added by St. 1927, p. 434; St. 1923, p. 696).

Under Code Civ. Proc. § 1983, as added by St. 1927, p. 434, providing that in any proceeding by state to enforce laws denying certain privileges or licenses to aliens, alleged alien shall have burden of establishing that he was, at the time of exercising right or privilege, a citizen or eligible to become such, provided state has proved that he actually exercised right or privilege, defendant in prosecution for possessing firearms as naturalized foreign-born alien under St. 1923, p. 696, could not be forced to prove his nativity or suffer a conviction because of his silence, since place of one's nativity is not a matter peculiarly within his knowledge so as to be within ab inconvenienti rule.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

On motion for rehearing. Rehearing denied.

For former opinion, see 279 P. 844.

Trujillo & Eriksson, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

PER CURIAM. It was remarked in *People v. Bruno* (Cal. App.) 279 P. 175, that the place of one's nativity is not a matter peculiarly within his knowledge. In that case and in the main opinion in this case, by quotation from the earlier one, we contented ourselves with this statement, believing it to carry an obvious truth. The Attorney General still insists, however, that under section 1983 of the Code of Civil Procedure (as added by St. 1927, p. 434), the defendant in such a case as this may be forced to prove his nativity or suffer a conviction because of his silence. There is a vast difference between

appellant here and a defendant in an action in which is in controversy the question whether a certain license has been issued to him. In a case of the latter nature the defendant is bound to know whether he has had the license. In a case like the present it may easily occur that the defendant has no knowledge whatever of the place of his nativity. The world is full of individuals whose parents have deceased, or who have deserted them, in their early infancy, leaving no one to communicate to them those circumstances relating to date and place of birth, which, if communicated by the proper persons, would be admissible in evidence under the exception to the hearsay rule in matters of pedigree. Appellant may be one of these individuals. Certainly, we cannot assume that he is not, and the same remark applies to every defendant who refuses to take the witness stand in such an action as the present one. It seems plain, therefore, that the matters which were here left to the defendant to prove were not peculiarly within his knowledge. Proof of them has no relation whatever to the ab inconvenienti rule. To require defendant to make such proof, under section 1983, is to convict the Legislature of the wrong of having required a defendant to prove that which he cannot prove, merely because it may be difficult for the People to prove it.

Rehearing denied.

100 Cal. App. 357

In re CLARK'S ESTATE.★

DOBDEL v. REARDON.

(Civ. 6939.)

District Court of Appeal, First District, Division 2, California. Aug. 20, 1929.

Rehearing Denied Sept. 19, 1929. Hearing Denied by Supreme Court Oct. 17, 1929.

1. Wills ⇨55(3)—Evidence showed testator was not of unsound mind or suffering from insane delusion when executing will.

Evidence in application for the probate of will held insufficient to support jury's finding that testator was not of sound mind or was suffering from an insane delusion at time he executed will.

2. Wills ⇨50—Testator has sound and disposing mind and memory if, when making will, he understands nature of act, and property, and relations to persons having claims upon bounty whose interests will affect.

Testator is of sound and disposing mind and memory if at time of making his will he has sufficient mental capacity to be able to understand nature of act he is doing, to understand and recollect nature and situation of his property, and to remember and understand his relations to persons who have claims upon his bounty and whose interests are affected by provisions of will.

†Hearing granted. 286 P. 1037.

★Rehearing denied. Hearing denied by Supreme Court.

3. Wills ☞21—Mental condition of testator when executing will is question in determining capacity.

Actual mental condition of testator at time of execution of will is question in determination of whether testator was of sound mind with capacity to make will.

4. Wills ☞53(2)—Evidence of mental condition before and after execution of will is admissible only as showing mental condition at execution.

Evidence as to mental condition before and after execution of will may be relevant and admissible in determining whether testator was of sound mind, but it is important only in so far as it tends to show mental condition at time of executing testamentary document.

5. Wills ☞38(1)—Testator's mistaken belief that disinherited sister needed no financial help was not insane delusion sufficient to overcome presumption of soundness of mind to execute will.

Though testator who disinherited sister was mistaken as to belief in sister's financial condition, where there was some basis for belief and testator's judgment that sister needed no financial help, it did not amount to insane delusion sufficient in itself to overcome presumption of soundness of mind to execute will.

6. Appeal and error ☞1048(3)—Error in permitting expert witnesses to base conclusions as to testator's capacity to execute will upon incorrect premises required reversal of judgment denying probate.

Error in permitting expert witnesses of contestant to probate of will to base their answers to questions upon statement of facts which was contrary to facts proved and omitted essential elements in history of testator's life which were before jury and conceded to be true concerning soundness of testator's mind, *held* to require reversal of judgment denying probate of will.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Application by F. W. Dobbelt for the probate of the will of Alfred C. Clark, also known as Alfred Churchill Clark, deceased. From a decree in favor of the contestant, Oliver L. Reardon, as administrator with the will annexed of the estate of Elizabeth Clark Wiley, deceased, denying the probate, the proponent appeals. Reversed.

A. R. Grinstead, of Sonoma, and Clarendon W. Anderson, of Santa Rosa, for appellant.

Barrett & McConnell, of Santa Rosa, for respondent.

NOURSE, J. This is an appeal from the judgment of the superior court rendered upon a verdict of the jury denying probate of the will of Alfred C. Clark. The appeal is presented on typewritten transcripts.

Alfred C. Clark died on March 11, 1926, at the age of 70 years. He left surviving him as his only heir at law his sister, Elizabeth Clark Wiley, who was the contestant in the

trial court. Subsequent to the trial, this contestant died, and her administrator has been substituted as party respondent herein.

The decedent's family moved to Sonoma county in the year 1875, and settled upon a ranch near Glen Ellen. From 1875 to 1898, when the decedent's father died, the decedent worked with his father on the ranch, and in 1898 the decedent married and continued to reside with his wife upon the ranch and to farm the same. In 1913 the decedent obtained a divorce from his wife upon the ground of her desertion. He married again in 1916, and his second wife died in 1924. The contestant lived in the same household with decedent until their father's death, when the contestant moved to another house near by, where she continued to live until her marriage in 1909, when she moved to Ventura county. For many years prior to his death the decedent and contestant were estranged because of controversies arising out of the settlement of the estate of their father and of a brother named George Clark, who died in 1920. The original ranch property had been divided and other properties acquired, so that, about the time of the father's death, and until the death of the brother, George, the decedent, in addition to taking care of his own property and of the interest of the contestant, managed and farmed the property belonging to the brother, George. George's property went to the decedent and the contestant, and this was subsequently sold by the decedent and the proceeds divided. Prior to the sale of this property, the decedent wrote to contestant stating that he could obtain fifteen or sixteen thousand dollars for it, and the contestant agreed to accept \$8,000 as her share, and sent a deed conveying her interest. The property, however, was sold for \$25,000, and the decedent insisted upon holding the contestant to her bargain, sending her \$8,000 from the proceeds and investing the rest on his own behalf. This occurred in the latter part of 1920, and from that time until decedent's death the parties drifted apart, and during the last three years of decedent's life they did not see each other at all. The will was executed on March 10, 1926, while the decedent was sick in the hospital suffering from hypostatic pneumonia, from which he passed away on the day following. This controversy is referred to as explaining in a measure the decedent's act in omitting to provide for his sister in his will. The testimony regarding this controversy no doubt bore an important part of the jury's verdict in favor of the sister, and, though it has little bearing upon the real issues tried, it should be noted that the jury heard the contestant's side of the controversy only.

[1] The attack upon the will was based upon the grounds that it was not executed in the manner and form required by law, that

the decedent was not of sound or disposing mind or memory, and that he was suffering from insane delusions, in that he stated that the contestant was possessed of sufficient property and means for her own support and that she was a religious fanatic and that he feared that any property he might leave her would be contributed by her to religious purposes. At the close of contestant's case, the trial judge granted a nonsuit on the issue of the improper execution of the will, and the other two issues were submitted to the jury. On these the jury answered that the decedent was not of sound and disposing mind at the time the will was executed, and that he was at the time suffering from insane delusions. On this appeal the attack upon the judgment is based upon the grounds that the evidence is not sufficient to support the verdict in either particular. The evidence on the part of the contestant rested upon her testimony and that of four elderly women, who related numerous idiosyncrasies and peculiarities of the decedent generally, running over a period of ten to twenty years prior to the date of the execution of the will. In addition to this, three medical experts were called, and, in answer to a hypothetical question which had been prepared in advance for them by the contestant, they answered that in their opinion the deceased was of unsound mind at the time of the execution of the will. Another witness called by the contestant, the cashier of the bank where the decedent transacted his business, testified as to matters relating to the decedent's account in the bank, but, when asked upon cross-examination his opinion as to the mental capacity of the decedent the contestant objected, and he was prevented from answering. On the part of the proponent, testimony was given by the two subscribing witnesses to the will, by the physician and the nurse who was in constant attendance upon him in his last illness, by his family physician, and by many friends and neighbors, who testified unqualifiedly that the decedent was of sound mind. Having reviewed all this testimony, we are satisfied that the evidence does not support the jury's finding of unsoundness of mind or that the decedent was suffering from an insane delusion, and for these reasons the judgment must be reversed, but in conformity to the practice in cases of this kind, we will include a résumé of this testimony in order that those who wish may read.

[2-4] Before discussing the testimony, it is well to refer to the rules of law governing a case of this character. For this purpose we cannot improve upon the statement of the Supreme Court in *Estate of Sexton*, 199 Cal. 759, 764, 251 P. 778, 780, as follows:

"A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing,

to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument. *Estate of Motz* [136 Cal. 558, 69 P. 294], *supra*; *Estate of Dole*, 147 Cal. 188, 81 P. 534; *Estate of Huston*, 163 Cal. 166, 124 P. 852; *Estate of De Laveaga*, 165 Cal. 607, 133 P. 307; *Estate of Casarotti*, 184 Cal. 73, 192 P. 1085. The actual mental condition of the testator at the time of the execution of the will is the question to be determined. *Estate of Perkins*, 195 Cal. 699, 235 P. 45; 26 Cal. Jur. 635. Evidence as to mental condition before and after the execution of the will may be relevant and admissible, but it is important only in so far as it tends to show mental condition at the time of executing the testamentary document."

In emphasizing the degree of mental unsoundness sufficient to destroy testamentary capacity, we quote from page 765 of 199 Cal. (251 P. 780), of the same case, as follows:

"'Insanity' is a broad, comprehensive, and generic term of ambiguous import. In a medical sense, it is used to denote any unsound and deranged conditions of the mind, and every degree of mental unsoundness, whatever may be its source or cause. 32 C. J. 594. But mere proof of mental derangement, or of insanity in a medical sense, is not sufficient to invalidate a will. Not every degree of mental unsoundness or mental weakness will suffice to destroy testamentary capacity. The contestant is required to go further than that. He must either show such a complete mental derangement as denotes utter incapacity to know and to understand those things which a testator must be able to know and to understand in order to possess testamentary capacity, or he must show the existence of a specific insane delusion which affected the making of the will in question. *Estate of Shay*, 196 Cal. 355, 237 P. 1079. In other words, mental derangement sufficient to invalidate a will must be an unsoundness of mind in one of two forms: (1) mental unsoundness of such broad character as to establish incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. And, even in the latter class of cases, it is not sufficient merely to establish that the testator was the victim of some hallucination or delusion; it must be shown that the will was the offspring of the hallucination or delusion. *Estate of Perkins*, *supra*.

"Testamentary capacity is always presumed to exist until the contrary is established. That is to say, the presumption is always that a person is sane, and the burden is always upon the contestant to show affirmatively and by a preponderance of evidence that the testator, at the time of ex-

ecuting the will, was of unsound mind. In re Wilson, 117 Cal. 262, 49 P. 172, 711; Estate of Perkins, supra; 26 Cal. Jur. 756."

Applying these principles of law to the facts of the case here, it is evident that the testimony is insufficient to support the attack upon the will. The only direct evidence of facts existing when the instrument was executed is that which was given by witnesses for the proponent, and this testimony was clear, direct, and positive evidence that the testator was of sound and disposing mind at the time the will was executed. During the winter preceding his death, the decedent lived with Mr. and Mrs. Johnson who were neighbors, until March 2, 1926, when he returned to his own farm, where he immediately contracted a severe cold, and on March 5th was removed to a hospital.

Mrs. Berger, a witness called by the contestant, testified that she had known the decedent since 1907, and that she had visited in his home frequently since his marriage to his second wife in 1918; that, when she learned that decedent was ill on March 2, 1926, she went to his home and nursed and cared for him for three days and until he was removed to the hospital. Through all this acquaintance she was unable to testify to any act indicating unsoundness of mind, but, when asked this question, she insisted that the decedent was of sound mind; that, when he left his home for the hospital, his mind was perfectly clear "up to that time."

Mrs. Burns, one of the subscribing witnesses to the will, and the proprietor of the hospital in which he died, testified that he did not have delirium at any time during the time which he spent in the hospital; that prior to the execution of the will he had talked with her of his desire to make a will and had told her that he was not going to leave anything to his sister because she was well provided for and also because she was a religious fanatic; that, after the will was signed by the decedent, he declared it to be his last will and personally requested Mr. Grinstead and herself to sign as subscribing witnesses; that, after this was done, he said, "This is my will now and I feel relieved"; that thereafter the decedent asked the witness if she did not desire some money for his expenses in the hospital, saying: "I had better draw you up a check. I might pass out. Life is not certain." Soon thereafter Mr. Dobbel, the proponent, came in, and the decedent asked him to write out a check for the hospital, which was done, and the decedent signed the check. This witness further testified that after the will had been executed the decedent appeared to be very much better and very much encouraged, felt that he would recover.

Mr. Grinstead, an attorney at law practicing in the town of Sonoma, was the other subscribing witness to the will. He testified, as did Mrs. Burns, that at the time the will was executed the testator was of sound and

disposing memory. This witness testified that he had not known the testator until called to the hospital on the day previous to the execution of the will; that all the information relating to the property, the beneficiaries under the will and the amounts to be given each was furnished to him by the testator at the time the will was prepared. The will was written by this witness at the bedside as dictated to him by the testator. The evidence is unmistakable that none of those witnessing the execution of the will and none of those in attendance upon the decedent during his last illness had used any influence of any character as to the disposition of the property, but, on the other hand, all the names of the beneficiaries and addresses and the descriptions of the property, both real and personal, were given to Mr. Grinstead by the testator from memory and without reference to notes or other suggestion.

Dr. McGrath, who attended the deceased in his last illness, testified that his death was caused by hypostatic pneumonia, which he explained is not the disease usually called pneumonia by laymen, but is a cardiac condition diagnosed as heart trouble, that during this illness the patient does not suffer from delirium, and that, during all the time he was treating the deceased, from March 5th to March 10th he was entirely rational and of sound mind. This witness further testified that during this period the testator frequently mentioned his desire to make a will and asked the witness to summon an attorney for that purpose.

Miss Munzenmier, who was one of the testator's nurses in the hospital testified that he frequently spoke to her about his desire to make a will; that during his entire sickness he talked rationally and was in his right mind; that he was never delirious at any time while she was attending him; and that he talked with others who visited him about his plan to make a will.

Dr. Meneary, who had been the personal physician of the decedent for many years, testified that he had frequently visited at the home of the decedent, and that the latter had frequently called at his office. From this professional observation of the personal conduct and life of the deceased, this doctor testified that he was of sound mind, and that any question of his being of unsound mind had never occurred to him.

None of these witnesses, except Miss Munzenmier, the nurse, to whom a small gift was made, was a beneficiary under the will, and the attorney who drew the will had not known the testator before he was called in for that purpose, and knew none of the beneficiaries. Other witnesses whom we do not need to give by name, friends and neighbors of the testator, men who had been engaged in business with him and who had traveled with him, testified as to his mental soundness with one accord.

And in this connection it may be well to

point out that, with the exception of the three medical experts, all the witnesses called by the contestant were elderly women who professed warm friendship for the contestant and a desire to see her successful in the contest, and who for some reason had been offended by the deceased during his lifetime. One of these witnesses was his former wife, whom he divorced thirteen years prior to the date of the execution of the will. Her entire testimony related to instances occurring during their married life. Another of these witnesses had not seen the decedent since 1917, and all her testimony related to instances occurring prior to that time. Another witness had known the deceased since 1907 and called upon him just prior to his death. This witness, while expressing dislike for some of the legatees under the will and frankly admitting that she would like to see the contestant have the property, emphatically declared that he was of sound mind up until the time he went to the hospital on March 5, 1926. Another witness had known the deceased prior to the year 1916, and related some instances that occurred during their life as neighbors. She saw the decedent once after that time in October, 1925, when she met him in San Francisco. What impressed upon her at that time that he was of unsound mind was the fact that he had forgotten a little fire which had occurred in one of the rooms of the house in the year 1915. These witnesses stressed the fact that they reached the conclusion that the decedent was of unsound mind because he did not engage with them in discussion of politics or current affairs and did not read the books and magazines that they were interested in, but preferred the reading of the Youth's Companion. These witnesses, particularly his former wife, related instances of the decedent's physical habits and custom of telling vulgar stories and using vulgar language, a practice which he seems to have discontinued after his marriage to his second wife in 1916. It is significant that none of the men acquaintances or neighbors of decedent were called by the contestant, and that all the male associates of the decedent who were called by the proponent testified to his soundness of mind.

To our minds the evidence which is the most convincing on the general question of mental soundness is found in the testimony of Mrs. Weaver, a sister of the deceased's second wife, during which there was received in evidence a number of letters written by the decedent to Mrs. Weaver at her home in Seabright, Santa Cruz county, from a time subsequent to the death of his second wife in 1924 down to a few months prior to the date of the execution of the will. In view of the fact that the contestant emphasized the lack of education of the testator, that he had been compelled to drop out of school at the age of twelve years because of inability to learn, that his entire source of reading was

the Youth's Companion, and that he would never discuss or take any interest in politics or current affairs, these letters, written as they were a short time prior to the date of the execution of the will, are potent evidence of the keenness of the testator's mind and of his interest in current events during the latter term of his years. The testator and his sister-in-law, Mrs. Weaver, had each purchased shares of stock in a mining corporation operating in Nevada, and, as favorable reports came to them from time to time covering the operations of the mine, they were led to look hopefully to the success of their investment. These investments are referred to throughout this correspondence, and the anticipations of the testator for a financial gain are all expressed with a desire that he may have funds to give to others. This attitude on the part of the testator is explained by the testimony of the contestant that throughout his life he was in the habit of giving money and property to those whom he believed to be in poorer circumstances than himself, and that he frequently expressed the wish that he could help others who were in financial straits, and that a large proportion of the property and moneys which he had acquired had been given away to others rather than dissipated by himself. The first letter in the record is dated January 18, 1925, which we quote in full:

"My dear sister Dell: Yours with Saw's Letter received. Many thanks for sending it. It surely looks good. I sincerely pray it may prove as good as it looks. Please thank them for the extra shares for me. There are so many who I want to help in their struggle to meet the obligations of this life that the money can't come amiss. And when it comes, it will be put where it will do the most good. Please send my shares to me here, and I will put them in my box at Santa Rosa. You surely won't send anymore than you already have. When they begin paying dividends people will be speaking of you as that *rich lady*. Then look out for the *men*.

"You will have enough for yourself and Roscoe too. I shall have *others* to look after. God knows there are many who need lifting along in their struggle for existence. The more I can help the happier I will be. I pray that as they go deeper the lead will turn to silver and then to pure gold. You had better send certificate by express, or the same way they were sent to you to me, to me, to Glen Ellen. Of course, if they should be stolen, they would not be worth anything to anyone else except me.

"Now sit up and be happy and pray for the best.

"Yours with best wishes always,

"Love to all, Dell, Roscoe & Ann, Fred."

Eleven similar letters are found written at intervals of about four weeks, the last appearing in the record being dated January 31, 1926, which was less than two months prior

to the execution of the will. This letter reads in part as follows:

"Leva's passing surely was sudden, although I was not surprised to hear that she had gone, as her condition for several years has been that of a consumptive. I have never heard one word from her since seeing her at Susie's funeral. I think she expected Susie (testator's second wife) to leave her something, but why she should expect anything I can't understand. * * *

"I am here with the Johnsons & shall stay until March or April, then go back to Rose Cottage & stay until I can rent or sell the place. I don't feel that I can ever make my home there again. The Sullivans are living on their place & fixing up the house & think they are improving the place, but the more they do the worse it looks. *No taste for the beautiful.* The Johnsons are just about on the standstill as far as making a living goes. I don't know how they could have held on, if I had not come here and stayed this winter. I not only pay my board, but help them with their work also. (The Johnsons were both remembered in the will.) We are having heavy rains now, which were very much needed. How did things look at the mines when you were there. Have they started building the smelter yet? Give them all my love when you write again. Also remember me to the kids & write soon. Am so sorry about the Sweet Shop friends.

"Give my regards to all my acquaintances down there. Maybe I will drive down next summer on my way to Fallon.

"Well, I must close,

"Yours with love,

Fred."

We have read all this correspondence. It appears without material error in spelling, punctuation, grammar, or composition. If this is the character of education that a man obtains from reading the Youth's Companion, that magazine might well be placed in every American home. If this correspondence had been included in the hypothetical questions propounded to the medical experts and in the face of this evidence they had expressed the opinion that the testator was of unsound mind, then we would say that the practice of employing experts of this character is a useless and frivolous thing. If this evidence does not demonstrate the soundness of mind of the testator for a period of one year at least preceding the execution of the will, it does at least demonstrate that he had lucid and normal periods, and that at a time less than two months before the execution of the will he was enjoying one of those normal states of mind. There was not a particle of testimony offered or received on the part of contestant even remotely tending to prove an irrational or abnormal condition of mind between this period and the date of the execution of the will. In fact, all the competent testimony of facts covered mat-

ters which occurred over a period of from ten to twenty years prior to that date. Aside from the testimony of the experts and the testimony covering the issue of insane delusions, both of which we will treat later, there is no evidence in the record which is sufficient as a matter of law to overcome the direct and positive evidence of mental competency existing at the time of the execution of the will or to rebut the presumption of sanity which runs to every man, even though he make a will which omits to provide for an heir at law.

The rules of law covering cases of this kind are well settled. Some of the later cases are Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Shay, 196 Cal. 355, 237 P. 1079; Estate of Relph, 192 Cal. 451, 221 P. 361; Estate of Gunther, 199 Cal. 119, 248 P. 514; Estate of McDonough, 200 Cal. 57, 251 P. 916; Estate of Haupt, 200 Cal. 147, 252 P. 597; Estate of Smith, 200 Cal. 152, 252 P. 325; Estate of Johnson, 200 Cal. 290, 252 P. 1049; Estate of Phillips, 202 Cal. 490, 261 P. 709. Almost every fact upon which contestant relies to establish incompetency in this case has been considered by the Supreme Court in the cases cited, and its evidentiary weakness has been judicially pointed out. The insufficiency of the evidence such as we have here coming from the contestant herself, showing that in his early life the testator was peculiar at times and did unreasonable things, but that throughout her acquaintance with him her brother had many normal and rational periods, and that, since his second marriage in 1916, the influence of his second wife was such that the testator's condition was markedly improved, and that she (the contestant) was always satisfied to let her brother manage her property and account to her for the income and proceeds thereof, renders appropriate the following language from Estate of Smith, 200 Cal. at page 159, 252 P. 328: "Disregarding any conflicting evidence and resolving whatever conflicts there may be in the evidence in favor of and granting to the contestant every possible inference to be drawn from the evidence, there still remains a hiatus in the chain of proof that, at the time of the execution of the will, the testator was mentally incompetent, or that he was at the time subject to delusions which in any manner, affected his testamentary act." Bearing in mind the issue to be determined is not what might have been the mental condition of the testator, but what in fact was his mental condition at the time he made the will (Estate of Perkins, supra; Estate of Relph, supra; Estate of Wilson, 117 Cal. 262, 49 P. 172, 711), we are satisfied that the opinion expressed by contestant's witnesses, founded upon facts and conditions existing long prior to the date of the execution of the will, "are not sufficient to overturn the uncontradicted evidence of the witnesses who testified to testator's sound mental condition at the very

time the will was executed or at times very near thereto" (Estate of McDonough, 200 Cal. 57, 62, 251 P. 916, 918). But, as said later on in the same case (page 69 of 200 Cal. [251 P. 921]): " * * * The issue does not rest upon the contestant's evidence alone. The testimony of proponent's witnesses must be taken into account in weighing the sufficiency of contestant's case. Evidence which standing by itself might be sufficient to sustain a verdict may in the light of all the facts be wholly inadequate, and that without invading the province of the jury as the judges of the weight and sufficiency of the evidence." Estate of Casarotti, 184 Cal. 73, 192 P. 1085."

[5] The argument is made that the testator was possessed of insane delusions in the belief that his sister was well provided for, that she had as much property as he had, and that she was a religious fanatic, and that, if any of his property were left to her, she would devote it to religious purposes. The proved facts are that the sister owned two houses in the town of Fillmore, that her husband owned six houses in the same town, and that their combined income at the time of the trial was about \$145 per month. At the time of the execution of the will, the contestant was about 75 years of age and her husband was of about the same age. They had no one dependent upon them for support, and the only near relative was a grown son of the husband's by a former marriage. The income from the combined properties of the contestant and her husband was low at the time due to poor business conditions in the town, but at that it was greater than that received by the testator from his property. He naturally viewed the possession of eight houses as property of some value, and therefore had justification in the belief that his sister was provided for and that her property, because of the income she was able to receive from it, was as valuable as his. He had frequently expressed the wish that his sister, who was five years his senior, would pass away before he did, so that he could direct the disposition of his own property. He had also expressed the fear that, if he should die before his sister and leave his property to her she would dispose of it in a way other than desired by him, and that, because of her advanced age, any property which he left her would be of little or no benefit to her. The testator's fear that his sister would not long outlive him was borne out by the fact that subsequent to the trial on October 14, 1926, she passed away. The asserted insane delusion that the sister was a religious fanatic is a matter which cannot be determined upon any basis of fact or reason, because the belief of religious fanaticism depends entirely upon the attitude of the believer as to what form of religious enthusiasm is reasonable and what is fanatical. Here the contestant testified that she had always been greatly interested in the Methodist Church

and in Sunday school work and was "enthusiastic" over religious affairs and church affairs; "that is my principal work in life and I had no other interest in Glen Ellen except that." On the other hand, the testator had given expression of his enthusiasm along these lines in the work of the Masonic order, and had often expressed the desire that the home place should be turned over to the local Masonic lodge upon his death, and had expressed the fear that, if he left it to his sister, she would turn it over to one of her church activities.

Mistaken though he may have been as to his belief in his sister's financial condition, there was nevertheless some basis for the belief, and his judgment as to what his sister needed in a financial way is not to be supplanted by the judgment of the jury or of the court upon that matter. And it is of no moment that the court or jury may take a different view as to the reasonableness of his prejudice or dislike of his sister's religious activities or that in the opinion of the court or jury the testator's property would have gone to a better purpose if the contestant had been allowed to devote it to the aid of the church contrary to the wishes of the testator. That beliefs of this character, unreasonable though they be, but founded upon some fact or information which may or may not be true, do not amount to insane delusions sufficient in themselves to overcome the presumption of soundness of mind, seems abundantly clear from all the cases on the subject. What is necessary in a case of this kind is stated in Estate of Gunther, 199 Cal. 119, 125, 248 P. 514, 516, from which we quote: "An insane delusion is not only one which is error, but one in favor of the truth of which there is not only no evidence, but regarding which there is the clearest evidence to the contrary. It is a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of his belief or knowledge of any fact which would in reason or in probability furnish evidence in its support. The law upon this subject has been very fully and ably set forth in Estate of Scott, 128 Cal. 57, 60 P. 527; Estate of Allen, 177 Cal. 668, 171 P. 686; Estate of Russell, 189 Cal. 759, 210 P. 249; Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Shay, 196 Cal. 355, 237 P. 1079, and cases cited."

[6] A word should be said concerning the testimony of the three expert witnesses called by the contestant. These witnesses, in answer to a hypothetical question prepared by the contestant and submitted to them before their examination, all agreed to give their opinion, based upon the facts covered by this question, that the testator was of unsound mind at the time of making his will. The appellant attacks this testimony upon several grounds, but mainly because the question does not conform to the facts proved. This objection is unanswerable. These witnesses based

their answer upon a statement of facts which, besides being directly contrary to the facts proved, omitted many essential elements in the history of the testator's life which were then before the jury and conceded to be true. For the purpose of this opinion it is necessary to refer to but a few of these discrepancies. The hypothetical question included the statement that the testator took no interest in current affairs and read only boys' stories found in the Youth's Companion. These statements were both untrue. It included a statement that the testator died from pneumonia with the implication that his last illness was accompanied by the usual delirium. This also was untrue. It included a statement of the making of the last will without including any of the circumstances surrounding this transaction, circumstances which were of the most vital importance to enable any one, a medical expert or a layman, to reach a conclusion as to the mental capacity of the testator at the very time the will was executed. Thus the question omitted the conceded fact that during the entire time of his last illness the testator suffered no delirium, but was fully conscious of all the facts surrounding him; that he frequently stated to the nurse and others about him that he desired to make a will; that all the items of the will, including the descriptions of his properties, names and addresses of the beneficiaries, some of whom lived out of the state, were given voluntarily by the testator, without reference to any note or memorandum; that none of those present when the will was drafted used any influence upon the testator; and that, after the will was executed, he expressed great satisfaction that that act had been performed and that he felt better because of it. There was also omitted from the question any mention of the numerous letters which the testator addressed to his sister-in-law, covering a period of more than one year preceding the date of the execution of the will, and all of which displayed a keen interest in current events and an unmistakable ability on the part of the writer to comprehend the daily affairs of life. It is unnecessary to further detail discrepancies in this hypothetical question. Manifestly the answers of the three experts must have had some effect on the minds of the jury, and, because of the error in this respect, if for no other reason, the judgment must be reversed. *Estate of Gould*, 188 Cal. 353, 205 P. 457; *Snow v. Harris*, 41 Cal. App. 34, 37, 181 P. 676; *Treadwell v. Nickel*, 194 Cal. 243, 264, 228 P. 25; *Johnson v. Clarke* (Cal. App.) 276 P. 1052.

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

100 Cal. App. 424

THATCHER v. G. & M. CONCRETE CO., Inc.★
(Civ. 6490.)

District Court of Appeal, First District,
Division 1, California, Aug. 23, 1929.

Rehearing Denied Sept. 21, 1929.

1. Appeal and error ⇨1040(10)—Overruling demurrer to complaint because uncertain as to whether promise sued on was part of written contract, if error, held harmless.

Where plaintiff had conveyed purchase contract of gravel-producing plant to defendant in consideration for defendant reconveying to plaintiff one-fourth interest in plant, and defendant sold entire plant, in action by plaintiff for his portion of sale price paid, overruling demurrer to complaint based on uncertainty of whether promise to reconvey one-fourth interest was oral or written, if error, held harmless, as defendant was familiar with written contract.

2. Evidence ⇨419(13)—Where \$1 and other valuable consideration was recited as consideration for transfer, plaintiff was not precluded from showing true consideration (Code Civ. Proc. § 1856).

Where transfer of gravel-producing plant recited as consideration sum of \$1 and other valuable consideration, plaintiff was not precluded, under Code Civ. Proc. § 1856, from showing true consideration for transfer, as it did not destroy the legal operation of the contract.

3. Appeal and error ⇨1011(1)—Court's finding that defendant agreed to reconvey to plaintiff interest in gravel-producing plant could not be disturbed as evidence conflicted.

When evidence on issue is conflicting, finding of court that defendant agreed to reconvey to plaintiff an interest in gravel-producing plant free and clear of incumbrance could not be disturbed.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by G. M. Thatcher against the G. & M. Concrete Company, Incorporated. From a judgment for the plaintiff, defendant appeals. Affirmed.

A. A. Montague, for appellant.

S. G. Tompkins, of San Jose, for respondent.

PER CURIAM. An appeal from the judgment entered in an action for declaratory relief and for an accounting.

The court found that on and prior to November 17, 1926, the plaintiff was the owner of a contract for the purchase from S. T. Carlisle of a gravel-producing plant situated on the land of Joseph and Caroline Doetsch in Santa Clara county, the consideration being \$5,000, payable in installments, and the delivery to Carlisle of 2,000 cubic yards of gravel; that plaintiff also held a written lease of

a gravel deposit upon the land mentioned; that on the above date the plaintiff agreed to assign and transfer to the defendant the Carlisle contract and the lease in consideration of the transfer by the corporation to the plaintiff of a one-fourth interest in the plant fully paid and free of incumbrances; that the plant consisted of the leasehold interest mentioned and the appliances used in producing, crushing, and washing the gravel; that these assignments were on the same day made to the defendant, which thereupon executed to the plaintiff the following bill of sale:

"Oakland, Cal., Nov. 18, 1926.

"Bill of Sale.

"For one dollar and other valued consideration the G. & M. Concrete Company, Inc., herewith grant and convey back to G. M. Thatcher one fourth (25%) interest in their gravel plant located near Campbell, known as the Central Gravel Co., at this time, situated on the Los Gatos Creek bed on property owned by Joseph Doetsch and Caroline Doetsch.

"G. & M. Concrete Company, Inc.,

"By R. Martin Greathouse, President.

"Accepted 11/18/26 by G. M. Thatcher."

(Corporate seal.)

The assignment of the Carlisle contract, which was indorsed thereon, was in words and figures as follows:

"November 17, 1926.

"For one dollar and other valued consideration I hereby assign, convey and sell all my interest in and upon this contract to G. & M. Concrete Co.

"G. M. Thatcher."

It was further found that defendant went into possession and operated the plant for the account and benefit of both parties according to their respective interests, namely, a one-fourth in the plaintiff and a three-fourths interest in the defendant, until the month of May, 1927, when the defendant notified the plaintiff that he had no further interest therein, and that thereafter until the execution by the defendant of an agreement for the sale of the plant to one William Watson the plant was operated for the account and benefit of the defendant alone; and that on August 30, 1927, the defendant, acting in the transaction as the agent for the plaintiff, executed an agreement to sell the plant for the sum of \$11,800 to Watson, who paid thereon the sum of \$1,500.

The plaintiff prayed that he be adjudged the owner of a one-fourth interest in the plant, and that the defendant be required to account for that proportion of the amount paid by Watson.

Judgment was entered accordingly and an appeal was taken therefrom by the defendant.

As grounds for the appeal it is claimed that

the court erred in overruling the demurrer to the complaint and in admitting oral testimony as to the consideration for the transfers mentioned; and also that the finding that the defendant agreed to assign or assigned a one-fourth interest in the gravel plant "fully paid and free of incumbrances" is unsupported.

[1] The objection to the complaint was based upon the alleged uncertainty appearing from its averments as to whether the alleged promise to reconvey to plaintiff "a one-fourth interest in said gravel plant fully paid for" was oral or written. While the allegations in this regard might have been more specific, the defendant was necessarily familiar with the written portion of the transaction, and any error in overruling the demurrer was not prejudicial to his substantial rights and is not ground for reversal. *Grossetti v. Sweasey*, 176 Cal. 793, 169 P. 687; *Arena v. Bank of Italy*, 194 Cal. 195, 228 P. 441; 2 Cal. Jur., Appeal and Error, § 603, p. 1014.

The evidence shows that the plaintiff agreed to pay Carlisle the sum of \$5,000 in five installments of \$1,000 each between February 1, 1927, and February 1, 1928, and to deliver the gravel mentioned above. It also shows that no part of the contract in these respects had been performed when the same was assigned to defendant. It also appears that the defendant paid certain installments, following which it demanded as a contribution from the plaintiff one-fourth of the amount so paid, and upon his refusal to pay said proportion declared that he had no further interest in the plant.

[2] The assignment by the plaintiff, as well as the transfer from the defendant to him, recited as the consideration the sum of "one dollar and other valued considerations." The defendant contends that the parol evidence rule precluded evidence that the true consideration for plaintiff's assignment was an agreement that as between the parties the plaintiff's interest in the plant should be considered as having been fully paid for. As provided by section 1856 of the Code of Civil Procedure, it is the rule that "when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, * * *" nevertheless, as an exception thereto, it has been held that when the effect is not to destroy the legal operation of the writing it may be shown by parol that the true consideration is other or different from that expressed in the instrument. *Arnold v. Arnold*, 137 Cal. 291, 70 P. 23; *Winchester v. Winchester*, 175 Cal. 391, 165 P. 965; 10 Cal. Jur., Evidence, § 199, p. 932. Thus, the consideration of the assignment of a personal chattel or chose in action may be proven by parol, and a different

one established than that expressed in the instrument (Bennett v. Solomon, 6 Cal. 134), or the true consideration for a written release reciting a consideration of one dollar may be shown (Stufflebeem v. Arnold, 57 Cal. 11). The seller of a business may, notwithstanding the recitals in the bill of sale with respect to its consideration, show by parol that the consideration in part was the agreement by the purchaser to pay an outstanding note of the seller (Wurdeman v. Waller, 88 Cal. App. 393, 263 P. 558); and it may be likewise shown that as a part of the consideration of the purchase of mortgaged property the grantee assumed the payment of the mortgage (White v. Schader, 185 Cal. 606, 198 P. 19, 21 A. L. R. 499; Robson v. O'Toole, 60 Cal. App. 710, 214 P. 278).

[3] In view of the foregoing, testimony was properly admitted in the present case to show that the true consideration for the assignments by the plaintiff was defendant's agreement to reconvey to him an interest in the plant, fully paid for and free of incumbrances; and the evidence on the issues being conflicting, the findings of the court, which were fully supported, cannot be disturbed. 2 Cal. Jur., Appeal and Error, § 543, p. 921.

We find no merit in the appeal, and the judgment is accordingly affirmed.

100 Cal. App. 384

SEVERNS v. CALIFORNIA HIGHWAY INDEMNITY EXCHANGE. (Civ. 6953.)★

District Court of Appeal, First District, Division 2, California. Aug. 20, 1929.

Rehearing Denied Sept. 19, 1929.

1. Abatement and revival ⇨54—Cause of action for personal injuries, in absence of statute to contrary, abates on death of either person injured or tort-feasor.

In absence of statute expressly providing to contrary, cause of action for personal injury abates on the death of either person injured or tort-feasor.

2. Municipal corporations ⇨703(1)—Municipality may within reasonable limits prescribe nature of security required by those operating vehicles for hire on public streets.

Municipality has right within reasonable limits to prescribe security to be given by those operating vehicles for hire on its public streets.

3. Municipal corporations ⇨703(1)—Ordinance requiring operator of vehicle for hire on public streets to protect public by bond or insurance policy is not unreasonable.

There is nothing unreasonable in provision of ordinance requiring operator of vehicle for hire on public streets to protect public by bond or insurance policy required therein and in manner provided.

4. Abatement and revival ⇨54—Passenger injured while riding in jitney bus, whose owner was insured as required by ordinance, held not entitled to maintain action against insurer after insured's death.

Where owner of jitney bus, operating vehicle for hire on public streets of city, complied with ordinance by taking out policy of insurance, which insured owner against loss or damage from operation of vehicle, and guaranteed payment within policy limits of any final judgment rendered against owner, passenger, injured in collision with jitney bus and another automobile, held not entitled to bring action against insurer, where owner of jitney bus had died before action was commenced, since insurance policy was only an undertaking to pay any final judgment which injured person may obtain against insured, and obtaining of such judgment constituted condition precedent to any action which injured person might have against insurer.

5. Automobiles ⇨95—Passenger in jitney bus after insured's death could not maintain action directly against insurer under statute prescribing liability of indemnitor (Civ. Code § 2777).

Where owner of jitney bus in which passenger was riding at time of collision was injured, and died before action was brought by passenger, passenger could not maintain action against insurer, under Civ. Code, § 2777, providing that one who indemnifies another against act to be done by latter is liable jointly with person indemnified and separately to every person injured by such act, since statute applies only to a joint tort-feasor, or where liability of indemnitor and indemnitee is joint and concurrent.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Margery Severns against the California Highway Indemnity Exchange. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Raymond D. Williamson and Raymond T. Donohue, both of San Francisco, for appellant.

B. P. Gibbs, of Los Angeles, and Barry J. Colding and Theodore Hale, both of San Francisco (Carroll B. Crawford, of San Francisco, of counsel), for respondent.

LAMBERSON, Justice pro tem. Appeal by plaintiff, Margery Severns, from a judgment in favor of defendant, after the trial court had granted a motion for nonsuit.

The action is one to recover damages for personal injuries, medical expenses, and loss of wearing apparel sustained by plaintiff on May 31, 1925, in a collision between an automobile, operated as a so-called jitney bus, in which plaintiff and a woman friend were passengers for hire, and another automobile, at the intersection of Fell and Franklin streets,

in the city of San Francisco. The operator of the jitney bus was Sam Euphrat, who was injured in the accident and died as a result of his injuries, on June 3, 1925. It was alleged, and the evidence tended to show, that the accident was the result of negligence on the part of Euphrat.

The complaint, which was filed December 7, 1925, alleges that Euphrat was a duly licensed driver, and had complied with the provisions of Ordinance No. 3212, New Series, of the city and county of San Francisco, approved April 29, 1915, section 4 of which reads, in part, as follows:

"In order to insure the safety of the public, it shall be unlawful for any person to drive or operate such 'jitney bus' or to obtain a permit therefor unless he shall have given and there is in full force and effect at all times while such person is driving and operating such 'jitney bus' on file with the police commission, either (a) a bond of the owner or lessee of said 'jitney bus' with a responsible surety company or association authorized to do business under the laws of the state of California, in the sum of ten thousand (10,000) dollars, conditioned that the owner or lessee of said 'jitney bus' for which a permit has been applied (giving its manufacturer's name and number and state license number) will pay all loss or damage that may result to any person or property from the negligent operation of or defective construction of said 'jitney bus,' or which may arise or result from any violation of any of the provisions of this ordinance or the laws of the state of California. The recovery upon said bond shall be limited to five thousand (5,000) dollars for the injury or death of one (1) person and to the extent of ten thousand (10,000) dollars for the death or injury of two (2) or more persons in the same accident and to the extent of one thousand (1,000) dollars for the injury or destruction of property. Such bond shall be given to the city and county of San Francisco and shall inure to the benefit of any and all persons suffering loss or damage either to person or property as herein provided, and suit may be brought in any court of competent jurisdiction upon said bond by any person or persons or corporation suffering any loss or damage as herein provided. Such bond shall be approved by the police commission, and the permission granted by said police commission as herein provided shall recite that the permit is issued upon condition and in consideration of the filing of said bond. Said bond shall be a continuing liability notwithstanding any recovery thereon, and if at any time, in the judgment of the police commission, said bond is not sufficient for any cause, the commission may require the party to whom permit is issued as herein provided to replace said bond with another bond satisfactory to the commission, and in default thereof said permit may be revoked; or (b) a policy of insurance in a

company authorized to do business in the state of California, insuring said owner or lessee of said 'jitney bus' against loss by reason of damage that may result to any person or persons or property from the operation of said 'jitney bus' said policy of insurance to be in limits of five thousand (5,000) dollars for any one (1) person injured or killed; and, subject to such limit for each person, a total liability of ten thousand (10,000) dollars in case any one (1) accident resulting in bodily injury or death to more than one (1) person. Said policy of insurance must also provide insurance to the extent of one thousand (1,000) dollars for the injury to or destruction of any property of third parties.

"Said policy shall guarantee payment of any final judgment rendered against the said owner or lessee of said 'jitney bus' within the limits herein provided, irrespective of the financial responsibility or any act of omission of said 'jitney bus' owner or lessee."

Euphrat had deposited with the police commission of San Francisco, and there was in effect on the day of the accident, an instrument purporting to be a policy of insurance, executed by the defendant, California Highway Indemnity Exchange. Those portions which are important and material in the consideration of the case read as follows:

"Subscribers at California Highway Indemnity Exchange (herein called Exchange) do hereby agree to indemnify the subscriber named herein: In consideration of the stipulations enumerated in the schedule of warranties attached hereto subscribers at California Highway Indemnity Exchange do hereby severally agree to indemnify the subscriber named herein against the hazards covered by the special agreements:

"Filed—Police Commission S. F. Jit—
Rent End Att. San Francisco
"Special Agreements

"Injuries to persons:

"(a) Against loss from common-law or statutory liability for damage on account of bodily injuries, fatal or nonfatal, accidentally suffered (or alleged to have been suffered) while this contract is in force, by any person or persons not in the employ of the subscriber resulting directly from the ownership, use or maintenance of any automobile described in the schedule herein contained. This contract shall cover such injuries so sustained wherever any automobile covered hereby may be in the service of the subscriber. The Exchange's liability is limited to five thousand dollars (\$5,000.00) for injuries to or death of any person, and, subject to the same limit for each person, the Exchange's total liability for injury to or death of more than one person in any one accident is limited to ten thousand dollars (\$10,000.00). And in addition to said limited sums, the Exchange will pay the expense of litigation, and all costs taxed against the subscriber in any legal proceedings de-

fended by the Exchange, together with any interest accruing after entry of judgment upon such part of said judgment as shall not be in excess of the limits of the Exchange's liability herein expressed.

"(b) The subscriber may provide such immediate surgical relief as is imperative at the time of the accident, and the Exchange will reimburse him the amount expended upon receipt of proper voucher therefor.

"(c) Against loss from common law or statutory liability for damages on account of another (property of the subscriber or in charge of the subscriber or any of his employees, or carried in or upon said automobile, not being covered by this clause) resulting directly from the ownership, use or maintenance of any automobile described in the schedule hereinafter contained. The liability of the Exchange for loss or damage in this clause is limited to not more than one thousand dollars (\$1,000.00) for any one accident.

"(g) The foregoing special agreements are made subject to the general agreements, which shall be construed as conditions. * * *

"It is hereby understood and agreed that in the event a final judgment covering any loss or claim under this policy is rendered against the subscriber, the Exchange guarantees the payment of said judgment direct to the plaintiff securing such judgment, irrespective of any financial responsibility on the part of the subscriber, provided that any action by the said plaintiff to recover under this clause is commenced within twelve months next after such final judgment shall have been rendered; or where such limitation of time is prohibited by the laws of the state wherein this policy is issued, then and in that event no suit or action shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state. The Exchange does not prejudice by this condition any defense against such loss or claim that it may be entitled to make under this policy in so far as it relates to any action brought against the Exchange by the subscriber."

It is contended by plaintiff that her action lies directly against the defendant insurance exchange, because she is one of the class of persons for whose benefit the policy was issued by reason of the provisions of the ordinance under which it was executed and received by the police commission; in other words, that she has an independent cause of action against the defendant on an instrument issued pursuant to the intent of the so-called jitney bus ordinance.

[1] A cause of action for personal injuries, in the absence of a statute expressly providing to the contrary, abates upon the death of either the person injured or the tort-feasor. *De La Torre v. Johnson*, 200 Cal. 754, 254 P. 1105; *Clark v. Goodwin*, 170 Cal. 527, 150 P. 357, L. R. A. 1916A, 1142. The right, if any, of the plaintiff to have a direct action against

the defendant is dependent, therefore, not upon any statutory provision, but upon the intent disclosed by the ordinance and the terms of the policy or the contract which the defendant executed.

A number of cases have been before the appellate courts of California in which the San Francisco jitney bus ordinance, or ordinances of similar nature in other cities, have been under consideration. The San Francisco ordinance was first reviewed in the case of *In re Cardinal*, 170 Cal. 519, 150 P. 348, L. R. A. 1915F, 850, in which case the Supreme Court specifically mentioned the fact that the ordinance provides, first, for a bond conditioned that the surety company will pay all loss or damage resulting from the negligent operation of a jitney bus; or, second, for a policy of insurance, insuring the owner of the bus against loss, which policy shall guarantee payment within the limits prescribed of any judgment rendered against the owner.

In the case of *Milliron v. Dittman*, 180 Cal. 443, 181 P. 779, 780, the court had under consideration an ordinance of the city of Los Angeles which provided that a bond to be given by a jitney bus driver should be conditioned that said bond should inure to and be for the benefit and protection of any one who should sustain any damage or injury, which is the substance of the provisions of subdivision (a) of section 4 of the San Francisco ordinance. The court said:

"It is true, as the appellants contend that the general rule is to the effect that the liability of sureties cannot be extended beyond the fair import of the express undertaking in the bond. There is, however, an exception to this general rule in the case of bonds given in pursuance of a governmental law for a public purpose. The exception is clearly and concisely stated in the case of *State v. Nutter*, 44 W. Va. 385, 30 S. E. 67, where it is said: 'The law in force at the date of a public bond, fixing a certain condition for it, and saying what its obligations shall be, is a part of it as effectually as if such obligations were in words inserted in it. * * * By signing the parties adopt the law as a part of the bond. If we do not so hold we frustrate the plain purpose of the statute.' * * *

"Of course, this exception to the general rule would have no application where its undoubted effect would be to impose a liability necessarily and absolutely inconsistent with the unequivocal intent of the parties as disclosed by the express terms of the bond itself. *Graeter v. De Wolf*, 112 Ind. 1, 13 N. E. 111. There is no provision, however, in the bond in question which expressly excludes a direct right of recourse by the injured party against the bonding company. Moreover, the bond as it read at the date of the accident was a contract made not only for the protection of the operator of the motor bus, but also directly for the benefit of injured passengers in so far

as it expressly promised to pay directly to an injured party any amount for which the operator of the bus might be adjudged liable.

"To read the statutory requirement into the bond, while it accords to the plaintiff the privilege of joining the Casualty Company in a suit against the operator of the bus, introduces no necessary inconsistency into the contract and leaves the substantial rights of the parties unimpaired."

In other cases, such as *Malachowski v. Varro*, 76 Cal. App. 207, 244 P. 936 (in which the Los Angeles ordinance was under consideration), *Gugliemetti v. Graham*, 50 Cal. App. 268, 195 P. 64 (a bond providing that it should inure to the benefit of anyone injured by reason of the negligence of the assured), and *Fraher v. Eisenmann* (Cal. App.) 270 P. 704 (interpretation of the San Francisco ordinance), it was held that the defendant insurance carrier was properly joined in an action against the assured, if the policy or the ordinance provided that it should inure to the benefit of the public; but we find no case in California in which the question whether the insurance carrier can be held responsible after the death of the assured, and before any action has been begun or any judgment has been secured against him, has been decided.

It should be noted that the San Francisco ordinance provides specifically for two distinct forms of protection: First, under subdivision (a) of section 4 for a bond conditioned as stated in the ordinance which has been heretofore quoted; and, second, for a policy of insurance containing the conditions set forth in said ordinance. There is no provision in section (b) that the policy issued thereunder shall inure to the benefit of the public, such as appears in subdivision (a), and the policy itself contains no provision of that kind.

In the case of *Kruger v. California Highway Indemnity Exchange*, 201 Cal. 672, 258 P. 602, 604, the Supreme Court, interpreting the same ordinance and a similar policy, said: "The undertaking is to pay the judgment to the party injured and not the damages sustained nor the loss incurred as a result of the injury."

In the *Kruger* Case, as well as in the case of *Milliron v. Dittman*, *supra*, the court made the comment that the defendant must be presumed to have taken into consideration the extent of the liability incurred by it in issuing the policy, and in fixing the cost of the premium, which should be charged therefor.

Considerable stress has been laid upon the use in section 4 of the San Francisco ordinance of the introductory words "in order to insure the safety of the public." The expression is not apt, as the real purpose of the ordinance is to compel the giving of a better or more substantial security to the public that claims for damages against more or less irresponsible operators of motor vehicles for hire will be paid.

[2, 3] It is plain that a municipality has the right within reasonable limits to prescribe the nature of a security to be given by those operating vehicles for hire upon its public streets, and there is nothing unreasonable in the provision of an ordinance requiring the operator of such a vehicle to protect the public by the bond or policy of insurance required therein and in the manner provided. *Kruger v. California Highway Indemnity Exchange*, *supra*.

In the case of *Woodhead Lumber Co. v. E. G. Niemann, etc.* (Cal. App.) 278 P. 913, the court held that the question of whether a contract is intended for the benefit of a third person, is one of construction, and the intent must be gathered from reading the contract as a whole, in the light of circumstances under which it was entered into.

[4] It is clear that the board of supervisors of the city and county of San Francisco intended to permit the execution of one or the other of two instruments, one of which was in the form of a bond expressly inuring to the benefit of all those persons who might be injured by the operation of a motor vehicle covered by the bond, and the other being an insurance policy guaranteeing the payment of any final judgment which should be recovered against the assured.

If the driver of the automobile in which the plaintiff was injured had survived the accident, it could not be contended that the plaintiff could have proceeded directly against the defendant without having first secured a final judgment against the assured, although it has been suggested that the assured and the defendant might have been proceeded against in the same action. *Kruger v. California Highway Indemnity Exchange*, *supra*. We do not think it can be conceded that the plaintiff would now have any greater rights against the defendant than she possessed prior to the death of the assured.

Reading section No. 4 of the ordinance, we do not think that the legislative intent was to create a primary liability against the insurance carrier. The use of the words "final judgment" in subdivision (b) of section 4, appear in themselves to negative such intention, and the language of the insurance policy does not indicate an intention on the part of the insurance company to extend its obligations beyond the terms of the ordinance, but expresses, on the other hand, an intention that the liability of the carrier should not attach until the final judgment had been obtained.

[5] It is contended by plaintiff that section 2777 of the Civil Code gives her the right to maintain her action directly against the defendant. That section provides that one who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately, to every person injured by such act.

The case of *Moore v. L. A. Iron & Steel Co.* (C. C.) 89 F. 73, is cited in support of such con-

tention, but that case, so far as its interpretation of section 2777 is concerned, has been superseded by *Northam v. Fed. Casualty Co. of America* (C. C.) 177 F. 981, in which it was held that said section is to be regarded as a declaration of the common law, and that it announces a rule of no greater import; that it applies, in other words, to joint tort-feasors, or where the liability of the indemnitor and indemnitee is joint and concurrent.

In the case of *Treloar v. Kell & Hannon*, 36 Cal. App. 159, at pages 168 and 169, 171 P. 823, 826, the court referred to the case of *Northam v. Federal Casualty Co. of America*, supra, and section 2777 of the Civil Code, and said as to that section:

"We may say that it would not be competent for the Legislature to modify, defeat, or nullify a contract of the parties by creating a liability that was not contemplated or provided in their contract, and in the second place it is entirely obvious by the provisions of the succeeding section 2778 that the Legislature did not intend to change the liability of the indemnitor in such policy as the one herein involved.

"For therein it is provided: '2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.' It may be stated finally that the encyclopedias and text-books approve the doctrine which we have herein announced.

"Applying the familiar rules of interpretation we can reach no other conclusion than that the surety company is not liable for this claim. To hold that the surety company bound itself to defend successfully any suit that might be brought against the indemnitee and to assume any liability of the latter, and therefore satisfy any judgment that might be obtained against the employer in such case and under the circumstances herein appearing, would be doing violence to the language of the contract adopted by the parties themselves and supplying an additional covenant not to be found in the policy."

While other jurisdictions do not, in most instances, recognize the right of a third person to join the assured and the insurance carrier as defendants in the same action, upon the theory that actions *ex contractu* cannot be joined with actions *ex delicto*, cases in such jurisdictions are persuasive as supporting the principle which we think should control in this case.

In the case of *Criss v. United States Fidelity & Guaranty Co.*, 105 W. Va. 380, 142 S. E. 849, 850, the Supreme Court of Appeals of West Virginia held that under a liability insurance contract, issued in compliance with a certain statute which forbade the road commission of the state to issue a permit to a taxi driver until he should file a bond or "liability insurance satisfactory to the commission, and

in such sum as the commission may deem necessary to adequately protect the * * * public," and in which case the policy issued provided that its obligations and promises should inure to the benefit and protection of any person sustaining bodily injuries, and that such obligations constitute direct liability to such persons whether an action for damages should be brought against the named assured alone, or jointly with the company, a person claiming to have been injured could not proceed against the insurer alone until such claim had been liquidated. After stating that the Legislature had created a new right, but did not provide a new remedy, the court said:

"The phrase upon which she relies is a promise upon a promise. It is a promise, to any person who might be injured by the automobile of the assured, that the insurer's promise to the assured in such contingency shall inure to the benefit of the injured person. The promise to the assured is to indemnify him for his actual loss in such case. *Ann. Cas.* 1913D, note, p. 1152. That promise requires performance only when such loss is determined. That determination depends upon the recovery of a final judgment against the assured, or upon an agreement to which the insurer is a party. The policy so states. The fulfillment of that promise cannot be exacted upon the mere occurrence of an injury; the mere institution of an action against either the assured or the assured and the insurer jointly does not make either one directly liable to the injured person. Such person himself might be at fault. The direct liability of the insurer commences only when established. It is established only by the final judgment or by the agreement above referred to. Consequently, in plain language, the rider simply obligates the insurer to pay directly to the injured person the amount he is entitled to recover from the assured, either by judgment or by agreement, instead of indemnifying the insured in that amount. The 'inurement to the benefit and protection' and the 'direct liability' requirements of the rider are fully met by such payment.

"The plaintiff here has obtained neither judgment against the assured nor an agreement of liability from the assured and the insurer. Therefore a direct liability to her from the insurer has not been established, and she cannot predicate her right of action against the insurer on that ground. See *Smith Stage Co. v. Eckert*, 21 Ariz. 28, 184 P. 1001, 1003, 7 A. L. R. 995, a leading case."

In the case just cited the assured died about nine months after the date of the injury, and the court commented upon the fact that under the common law plaintiff's right of action against the assured perished at his death.

In the case of *Smith Stage Co. v. Eckert*, supra, the court had under consideration an action by a passenger against a stage company and its insurance carrier upon an indemnity

policy covering loss by reason of judgments against the stage company for injuries to passengers, and which policy contained a clause inserted by order of the corporation commission providing that the policy was to inure to the benefit of any and all persons suffering loss or damage, and that suit might be brought thereon in any court having jurisdiction. The policy provided further, as follows: "If final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the company shall pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment."

The court held that such provisions did not make it unnecessary for the person injured to first obtain judgment against the stage company before he could recover against the indemnity company on the policy, and the court said: "After much thought and investigation, we have concluded that the indemnity company's contract is not one of insurance, but one of conditional liability; the condition being that the injured person must first obtain a judgment against the assured stage company before he has any remedy against the indemnity company on the policy."

In the case of *New York Indemnity Co. v. Ewen*, 221 Ky. 114, 298 S. W. 182, it was held that a passenger, injured by the negligent driving of an automobile by the holder of a policy indemnifying against loss from liability imposed by law on account of the maintenance of the automobile, may not join in his action the assured and insurer, notwithstanding the provision in the policy that the assured's insolvency should entitle the claimant to maintain an action against the insurer, and notwithstanding the allegations and proof of the assured's insolvency, it being the opinion of the court that the indemnity provided for in the insurance policy was against loss from liability, meaning a real loss and one which must be put into a judgment against the assured before recovery could be had against the insurance carrier.

From the foregoing we conclude that the insurance policy in question in this case was simply an undertaking to pay any final judgment which the injured person might obtain in a court of competent jurisdiction against the assured, and not the damages sustained nor the loss incurred as a result of the injuries, and that the obtaining of such judgment constituted a condition precedent to any action which the injured person might have against the insurance carrier.

We are of the opinion that the motion for nonsuit was properly granted, and the judgment should be affirmed. It is so ordered.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

COLLEGE NAT. BANK OF BERKELEY v. MORRISON et al. (Civ. 5941.)★

District Court of Appeal, First District, Division 1, California. Aug. 21, 1929.

Rehearing Denied Sept. 20, 1929. Hearing Denied by Supreme Court Oct. 17, 1929.

1. Sales ⇨475—Seller's delivery of sales contract to bank as security constituted valid assignment.

Seller's delivery to bank of title-retaining contract for sale of motortruck as security for payment of seller's note to bank and other demands constituted sufficient and valid assignment.

2. Guaranty ⇨66—Failure to act in regard to matter in which one owes guarantor no duty will not release guarantor.

Guarantor is not released by failure of one to do something in regard to which he owes guarantor no duty.

3. Guaranty ⇨56—One guaranteeing buyer's performance of sales contract, on delivery thereof to bank as security for loan to seller, held not discharged by bank's extension to seller without notice to guarantor (Civ. Code, § 2819).

One guaranteeing performance on part of buyer of contract for buyer's purchase of truck, at time contract was delivered by seller to bank as collateral security for payment of seller's obligation at bank, held not discharged by bank's extension of time for payment of loan to seller, without notice to guarantor, since guarantor's liability to pay amounts due on sales contract and his rights against his coguarantor and the buyer were not altered, under Civ. Code, § 2819.

4. Pledges ⇨44—Seller's execution of renewal notes for unpaid balance on loan secured by pledge of sales contract did not extinguish obligation.

Contract for sale of motortruck and obligation thereunder were not extinguished by seller's execution of renewal notes for unpaid balance on loan to bank, to which he had transferred contract as collateral security, in absence of agreement to that effect, though original notes were surrendered, and under such circumstances security might be applied by pledgee to balance remaining unpaid.

5. Evidence ⇨44(7) — Evidence of parol agreement that one guaranteeing buyer's performance under title-retaining sales contract, at time of pledge thereof, should not be liable until truck sold had been repossessed by pledgee, held incompetent (Civ. Code, § 1625; Code Civ. Proc. § 1856).

In action by pledgee of title-retaining sales contract against one guaranteeing buyer's performance thereunder at time of pledgee's loan to seller, testimony offered by guarantor as to agreement, made at time of execution of guaranty, that he would not be liable until truck sold had been repossessed by bank and sold to satisfy seller's note, was incompetent under parol evidence rule, and was properly rejected under Civ. Code, § 1625, and Code Civ. Proc.

§ 1856, irrespective of tendency of evidence to show failure of consideration for guaranty.

6. Pleading ⚡236(2)—Late application to amend pleading is addressed to trial court's discretion.

After expiration of time within which amendments of pleadings may be made as matter of course, an application to amend is addressed to sound discretion of trial court.

7. Appeal and error ⚡959(1)—Trial court's grant or refusal of delayed application to amend pleadings is reviewable only when discretion is abused.

Trial court's exercise of its discretion to grant or deny amendment to pleadings, sought after time within which amendments may be made as matter of course, is subject to review only when abuse of discretion is apparent.

8. Pleading ⚡258(4)—Refusal to permit guarantor to amend answer at close of trial by setting forth new defense, where delay was not excused, held not abuse of discretion.

In action by pledgee of sales contract against one guaranteeing buyer's performance thereunder at time of pledge, it was not an abuse of discretion for trial court to refuse defendant permission to amend answer at close of trial by alleging agreement that guaranty contract would not be effective until truck should be sold, since amendment set forth new defense, and no reason for delay was shown.

9. Guaranty ⚡36(5)—One guaranteeing performance of sales contract was liable for attorney's fees incurred in enforcing performance thereof.

One guaranteeing performance of contract covering sale of motortruck was liable for attorney's fees incurred by pledgee of seller in enforcing performance.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the College National Bank of Berkeley against Arch Morrison and others. Judgment for plaintiff, and last defendant F. H. Dam appeals. Affirmed.

Eugene W. Roland, of Oakland, and F. H. Dam, of San Francisco, for appellant.

Oscar T. Barber, of San Francisco, for respondent.

PER CURIAM. An appeal from a judgment entered against defendants Morrison and Dam. Defendant Wetherbee was not served with summons, and Morrison defaulted. Defendant Dam answered the complaint and is the sole appellant.

On February 29, 1922, Morrison, by an instrument in writing designated a lease, agreed to sell, and Wetherbee, who is therein called the lessee, agreed to buy, a motortruck for the sum of \$2,600, payable \$875 in cash and the balance in monthly installments of \$172.50, with interest. Title to the truck was reserved by the seller, and the buyer agreed to pay the sum of \$100 as attorney's fees in

the event of suit to recover any part of the amount payable under the contract. Thereafter, on March 7, 1922, Morrison and his wife borrowed \$1,500 from plaintiff bank, for which they executed their note, payable 90 days after date, with interest. With the note there was delivered to the bank the above lease contract, the note reciting that the lease contract was deposited as security for the payment of the note, and also for "all other present or future demands of any and all kinds of the holder hereof against the undersigned." There was indorsed upon the contract at the time of its delivery to plaintiff the following, signed by defendants Morrison and Dam: "I hereby guarantee the performance of the within lease on the part of the lessee to the College National Bank of Berkeley. Arch. Morrison, F. H. Dam."

The complaint alleged, and the court found, that there was due and unpaid on the lease contract a total of \$1,295.25, and of the principal and interest of the Morrison obligation to the bank the sum of \$788.54, for which, with the further sum of \$100 as attorney's fees, the judgment was entered. The evidence showed that \$306.01 was paid on the note mentioned; that on June 7, 1922, Morrison and his wife executed to the bank a new note for \$1,153.99, on which the sum of \$334.74 was paid; and that on October 7, 1922, Morrison executed to the bank a third note for \$819.25, on which \$200 was paid. Each note contained the same recitals as to the security. The two notes first mentioned were surrendered either before or at the time the third note was executed, and Mrs. Morrison was not made a party to the action.

[1-3] Appellant contends that the acceptance of the two notes last executed, and the surrender of the first and second upon the execution of the third, exonerated him from liability under the guaranty indorsed upon the lease contract, and that the court erred in excluding certain oral testimony offered by him and in refusing to allow an amendment to his answer.

The delivery of the lease contract with the intent to assign the same constituted a sufficient and valid assignment thereof to the bank. *Bibend v. Liverpool, etc., Ins. Co.*, 30 Cal. 78. As stated, appellant guaranteed the performance of the obligation of his principal, Wetherbee, and not that of Morrison or his wife; and he was not released by the failure of the bank to do something in regard to which it owed him no duty. *Friend v. Smith Gin Co.*, 59 Ark. 86, 26 S. W. 374; *Welch v. Walsh*, 177 Mass. 555, 59 N. E. 440, 52 L. R. A. 782, 83 Am. St. Rep. 302; *Westchester, etc., Co. v. McIntire*, 174 App. Div. 525, 161 N. Y. S. 384; 28 Corp. Jur. Guaranty, § 150, p. 992.

The bank was under no duty to proceed against Wetherbee (*Carver v. Steele*, 116 Cal.

116, 47 P. 1007, 58 Am. St. Rep. 156), nor was appellant exonerated by the extension of time for payment of the Morrison loan, as his liability to pay the amounts due on the lease contract was not thereby affected, nor his rights or remedies either against his coguarantor or Wetherbee impaired, or the obligation of the latter altered. Civ. Code, § 2819; Fitts v. A. F. Messick, etc., Co., 144 N. C. 463, 57 S. E. 164.

[4] Moreover, the execution of the renewal notes for the unpaid balance of the Morrison loan, and the surrender of the note or notes previously given, did not, in the absence of an agreement to that effect (which the court found was not the case), extinguish the original obligation (*Bonestell v. Bowie*, 128 Cal. 511, 61 P. 78; *White v. Stevenson*, 144 Cal. 104, 77 P. 828; *Gnarini v. Swiss, etc., Bank*, 162 Cal. 181, 121 P. 726; *Angelo-Cal., etc., Co. v. Wallace*, 58 Cal. App. 625, 628, 209 P. 78), and the security might properly be applied to the balance unpaid (*Sather Banking Co. v. Briggs Co.*, 138 Cal. 724, 72 P. 352).

[5] Appellant pleaded as a defense, and sought to prove, an agreement with the bank, made at the time of the execution of the guarantee contract, that he was not to be liable thereunder until the truck described in the lease contract had been repossessed by the bank and sold to satisfy to that extent the Morrison note. The offered testimony under the parol evidence rule was incompetent, and its rejection was not error. Civ. Code, § 1625; Code Civ. Proc. § 1856; *Leonard v. Miner*, 120 Cal. 403, 52 P. 655; *Lindemann v. Coryell*, 59 Cal. App. 788, 212 P. 47.

Appellant in the same connection claims that the offered evidence also tended to show a failure of consideration for his promise. However this may be, its effect being to vary the terms of the contract, the evidence was incompetent. Moreover, the evidence in the record clearly shows that the consideration for the guaranty was the making of the loan to the Morrisons, which was sufficient to support appellant's promise.

[6-8] At the close of the trial appellant sought to amend, by alleging that it was agreed that the guaranty contract should not be in effect until the truck should be sold by the bank and the proceeds applied on the Morrison note. Permission to amend was denied. The amendment set forth a new defense, and no reason for the delay was shown. After the expiration of the time within which amendments may be made as a matter of course, an application to amend is addressed to the sound discretion of the court. While the court should exercise its power in that respect liberally, in order that the substantial merits of the cause may be determined, yet when the court has exercised its power, either by granting or denying an amendment, the ruling is subject to review only when it

is apparent that an abuse of discretion has occurred. *Wixon v. Devine*, 91 Cal. 477, 27 P. 777; *Miner v. Rickey*, 5 Cal. App. 451, 90 P. 718; *Cullinan v. McColgan*, 87 Cal. App. 684, 263 P. 353. Under the circumstances appearing from the record the denial of the motion was not an abuse of discretion. *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 P. 17; *Manha v. Union Fertilizer Co.*, 151 Cal. 581, 91 P. 393.

[9] Lastly, it is claimed that the allowance of an attorney's fee was improper. Appellant, having guaranteed the performance of the lease contract, was also liable for attorney's fees incurred in enforcing performance. *Henne v. Summers*, 23 Cal. App. 763, 139 P. 907; *Grace v. Croninger*, 56 Cal. App. 659, 206 P. 130; *Murphy v. Luthy Battery Co.*, 74 Cal. App. 68, 239 P. 341.

We find no merit in the appeal, and the judgment is accordingly affirmed.

208 Cal. 64

PEOPLE v. NEGRA. (Cr. 3198.)★

Supreme Court of California. Aug. 30, 1929.

Rehearing Denied Sept. 26, 1929.

1. Criminal law §742(2)—Whether witness corroborating accomplice was also accomplice held for jury.

Whether witness in prosecution for murder, whose testimony corroborated that of accomplice, was also accomplice, was fact to be determined by jury under instructions of the court.

2. Homicide §234(3)—Evidence independent of that of accomplice held to connect defendant with commission of murder (Pen. Code, § 1111).

In prosecution for murder, evidence independent of that of accomplice held sufficient to connect defendant with commission of murder, so as to comply with provisions of Pen. Code, § 1111.

3. Criminal law §512—Jury may consider that witness is accomplice in passing on credibility, but testimony cannot be rejected therefor, and, if other evidence tends to connect defendant with crime, accomplice's testimony is considered as other testimony (Pen. Code, § 1111).

While jury may consider circumstances that witness is an accomplice, in passing on his credibility as witness, his testimony is not to be rejected merely because he is an accomplice, and, if there is other evidence which measures up to requirement of Pen. Code, § 1111, tending to connect defendant with commission of crime charged, then testimony of accomplice is to be considered by jury as is any other testimony, and must be given weight to which jurors may conclude that it is entitled.

4. Criminal law §511(1)—Evidence necessary to corroborate testimony of accomplice need not tend to establish precise facts testified to by accomplice.

The law does not require that evidence necessary to corroborate testimony of an accomplice shall tend to establish precise facts testified to by accomplice.

5. Criminal law §511(2)—Strong corroborative testimony is not necessary to support conviction founded on accomplice's testimony, and evidence is sufficient if tending to connect accused with crime.

Strong corroborative testimony is not necessary to support judgment of conviction founded on testimony of an accomplice, and, even though circumstantial and slight, evidence is nevertheless sufficient if it tends to connect accused with commission of offense.

6. Criminal law §511(7)—Defendant's statements and admissions in connection with other testimony may afford corroboratory proof sufficient to sustain conviction.

Defendant's own statements and admissions, made in connection with other testimony, may

afford corroboratory proof sufficient to sustain verdict of conviction.

7. Criminal law ⇨511(1)—It is unnecessary that corroborating evidence establish, without aid of testimony of accomplice, that defendant committed offense.

It is not necessary that corroborating evidence should go so far as to establish by itself and without aid of testimony of an accomplice that defendant committed offense charged.

8. Criminal law ⇨511(4)—Evidence in criminal prosecution must be considered in light of rules relating to corroborating testimony of accomplice applied to particular facts, and determination reached accordingly.

Evidence in each criminal prosecution must be considered in light of rules relating to testimony corroborating that of accomplice applied to particular facts, and determination reached accordingly.

9. Witnesses ⇨278—Defendant held not unduly limited in cross-examination of accomplice witness.

In prosecution for murder, evidence held not to show that defendant was unduly limited as to cross-examination of an accomplice, by refusing to allow testimony by accomplice as to conversation with district attorney previous to prosecution, where court and prosecution accorded defendant very wide latitude in cross-examination, which went into minutest details of accomplice's testimony.

10. Criminal law ⇨823(16)—Instruction that, if defendant aided or abetted murder, jury should return verdict of guilty, held not erroneous for using word "or." Instead of "and," where following instructions used aid and abet; "accomplice" (Pen. Code, § 31).

In prosecution for murder, instruction that if defendant instituted homicide, and aided or abetted its commission, though not present at actual killing, verdict of guilty should be returned, held not erroneous for using word "or," instead of "and," as used in definition of an "accomplice" in Pen. Code, § 31, where court not only read part of section 31, defining who are principals, but immediately followed criticized instruction with two others, stating principal must aid and abet crime, and defined "accomplice" as one who with criminal intent aids and abets another in crime.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Accomplice.]

Langdon, J., dissenting.

In Bank.

Appeal from Superior Court, Merced County; J. J. Trabucco, Judge.

Antone Negra was convicted of murder, and he appeals. Affirmed.

Rehearing denied; LANGDON, J., dissenting.

Andrew R. Schottky and Edward Bickmore, both of Merced, and H. A. Gabriel, of San Jose, for appellant.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and F. M. Ostrander, Dist. Atty., of Merced, for the People.

WASTE, C. J. Antone Negra and Robert, known as "Buck," Deluchi were indicted jointly by the grand jury of the county of Merced for the crime of murder. They were tried separately. Negra was found guilty of murder in the first degree. The jury failed to fix the punishment, and Negra was sentenced to pay the extreme penalty. The conviction rested mainly on the testimony given by Deluchi, and Negra has appealed, urging the insufficient corroboration of an accomplice to sustain the judgment, and alleged errors of the lower court occurring during the trial.

Deluchi was present at the killing of the decedent, and testified in detail as to the manner in which the deceased was lured to a lonely ranch, some distance from Los Banos, and there shot by Negra. Therefore our consideration of the evidence is to be directed to determining whether or not Deluchi's testimony, that of an accomplice, is corroborated by such other evidence as tends to connect the appellant, Negra, with the commission of the offense. Pen. Code, § 1111.

The evidence discloses that Negra and Ralph Amabile, the deceased, were copartners in the sheep business. They were first cousins and brothers-in-law. The partnership was indebted to a bank at Los Banos in the sum of approximately \$46,800, partly secured by a mortgage upon sheep, cattle, and other personal property. As further security for the indebtedness, an insurance policy on the life of Amabile had been obtained in the sum of \$10,000, with a double indemnity clause (\$20,000) for accidental or violent death. The appellant, Negra, was shown to be a very intimate friend of the wife of the deceased. Their relations were objectionable to Amabile and were such as to "cause talk" in the community.

Amabile left his home on the evening of July 24, 1928, at about half past 7 o'clock, saying he was going to a distant ranch to meet a man on business. Three days later his dead body was found. He had been shot, the bullet entering his back and piercing his heart. The truck, in which he left his home on July 24, was found several days after the murder, abandoned on a street in Tracy. It is the theory of the prosecution that in killing Amabile the appellant was actuated by two motives: First, to secure money to place the business in a better financial condition through collecting the insurance on the life of his partner; and, second, to remove the obstacle of Amabile's objections to appellant's intimacy with Amabile's wife. Ten thousand dollars of the insurance was collected and

paid to the bank immediately after Amabile was killed.

The witness Deluchi testified that for several weeks prior to the actual killing the appellant had endeavored to get him, Deluchi, to "pull a job" for him for which he would give Deluchi \$500. Appellant said to Deluchi: "This Ralph Amabile, he is going, or me. We have been fighting all the time." Appellant give Deluchi money on several occasions, once for the purpose of buying a gun. Through Deluchi, the appellant endeavored to get two other men, living in Stockton, to do the "job," which he told each was to kill Amabile. Neither of the men approached consenting to kill Amabile, according to Deluchi's testimony, Negra said he would "get him," and that he "had an alibi all fixed." Amabile was then induced by Negra and Deluchi to go to the deserted Santa Nella ranch. There is some evidence from which it may be inferred that he was requested by them to go there for the purpose of getting some stolen calves. Negra and Deluchi reached the ranch before Amabile. Negra went into the barn. Amabile soon arrived, backed his truck up to the barn, and got out. There was a shot, Amabile fell, and, when Deluchi came up, Negra said to him, "I guess the son of a bitch won't bother me now." He told Deluchi to take Amabile's truck out to the highway. Later in the evening, appellant and his wife went to a moving picture show in Los Banos, and Negra apparently made an effort to be seen there, and that his automobile should be seen near the theater. The prosecution's theory is that appellant was thereby laying the basis for an attempt to establish an alibi. Deluchi drove the truck to Stockton, and then to Tracy, where he abandoned it.

[1, 2] Immediately after the discovery of the body, the appellant was interviewed by deputy sheriffs concerning the death of Amabile, and the movements and whereabouts of himself and Deluchi prior to and on the 24th of July. He made many statements, which were subsequently shown to be untrue, and later, when confronted with the falsity of his statements, he made further denials, and became angry. After three or four days, however, he went to the office of the sheriff, and was taken to the office of the district attorney, where he admitted, as subsequently proved by several witnesses, that on July 24 he had been with Deluchi near the place where the crime was committed, and about the time of the killing of Amabile, as described by Deluchi. While the search for Amabile's body was being conducted, and during the time the authorities were seeking to reconstruct the incidents leading to and surrounding the murder, appellant was, according to the testimony of several witnesses, nervous, and expressed himself as fearing trouble if the body should be found. In the presence of a number of persons who testified

In the case, he stated that Morse, a deputy sheriff investigating the killing, was trying to connect him with the crime, and if "he did not look out [he] would blow his head off, too." He uttered the same threat, in substance, against persons who told the officers they saw Deluchi and him near the scene of the crime.

Appellant's reasons, given when on the stand, for not admitting that he was with Deluchi on the day of Amabile's death, and his explanation and his counsel's theory as to why he did not tell the authorities that he was with Deluchi near the scene of the murder and about the time it was committed, failed to impress the jury. It was plausible, but did not satisfy. According to his testimony, Amabile was engaged in stealing cattle, against his (appellant's) remonstrance, and Deluchi was apparently in on the deal; he had, at Amabile's request, taken Deluchi to meet Amabile; and he was "scared they would run [him] into this thing." The fact that appellant and Deluchi were much together and had frequent telephone conversations during the weeks preceding Amabile's death, as testified to by Deluchi, appears to be abundantly established by the testimony of a number of witnesses. The witness Eddie Smith corroborated the testimony of Deluchi that appellant bought a gun in Stockton and endeavored to induce Smith and another man, "Shillalah Buck," to "do the job," as "Buck Deluchi ran out on him."

It is argued that Smith was also an accomplice. Whether he was or not was a fact to be determined by the jury under the instructions of the court (*People v. Compton*, 123 Cal. 403, 56 P. 44); but, without Smith's testimony, there is sufficient evidence in the record, independent of that of Deluchi, tending to connect the appellant with the commission of the offense to comply with the provisions of section 1111 of the Penal Code.

[3-8] While the jury may consider the circumstance that a witness is an accomplice, in passing upon his credibility as a witness (*People v. Clough*, 73 Cal. 348, 354, 15 P. 5), his testimony is not to be rejected merely because he is an accomplice, and if there is other evidence which measures up to the requirement of the Code (*supra*), tending to connect the defendant with the commission of the crime charged, then such testimony of the accomplice is to be considered by the jury, as is any other testimony, and must be given the weight to which the jurors may conclude that it is entitled. *People v. Hoosier*, 24 Cal. App. 746, 142 P. 514.

The evidence tending to connect a defendant with the commission of the crime may be slight and, when standing by itself, entitled to but little consideration. *People v. McLean*, 84 Cal. 480, 24 P. 32. The law does not require that the evidence necessary to corroborate the testimony of an accomplice

shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense. *People v. Martin*, 19 Cal. App. 295, 125 P. 919. The defendant's own statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a verdict. *People v. Armstrong*, 114 Cal. 570, 46 P. 611; *People v. Sullivan*, 144 Cal. 471, 473, 77 P. 1000. It is not necessary that the corroborating evidence should go so far as to establish by itself, and without the aid of the testimony of an accomplice, that the defendant committed the offense charged. *People v. Solomon*, 6 Cal. Unrep. Cas. 305, 58 P. 55.

It is not necessary to cite the great number of authorities which sustain these fundamental principles of law relating to the testimony of an accomplice. An examination of the decisions will show that the evidence in each case must be considered in the light of these rules, applied to its particular facts, and a determination reached accordingly.

We are of the view that there is evidence in this case, other than the testimony of Deluchi, which, when considered as a whole, tends quite convincingly to connect the defendant with the commission of the offense for which he was indicted. The jurors accepted it, and, under correct instructions, passed upon its weight and the credibility of the witnesses who gave it. Its weight and the credibility of the witnesses were again passed upon by the trial court on a motion for a new trial, which was denied. We find no legal ground for disagreeing with the conclusion of the court and jury.

[9] Because of the importance the jury must have attached to the testimony of Deluchi, appellant complains that the trial court unduly limited the cross-examination of that witness, and prevented appellant from following an inquiry vital to his case. The record does not bear out the contention. After the homicide, Deluchi went first to Stockton, where, he testified, appellant met him and gave him \$50. He then fled to Mexico, where he was apprehended and returned to Los Angeles. He refused to discuss the killing of Amabile with the arresting officers, but talked freely with Mr. Ostrander, the district attorney of Merced, who interviewed him in the office of the district attorney of Los Angeles county. The details of that conversation, and what was there said, were not offered in this case, for Deluchi was not on trial, and his extrajudicial statements to Mr. Ostrander in Los Angeles were no part of the case against appellant. Near the close of appellant's cross-examination of Deluchi, the witness was

asked who was the first person to whom he told the story of the killing of Amabile after his arrest. He replied that it was Mr. Ostrander. The record continues as follows:

"Q. Who spoke to you first? A. Mr. Ostrander.

"Q. What did he say to you? A. He said, 'How do you do,' or 'Hello,' or 'How are you.'

"Q. And then what? A. He asked me then—he started to ask me in regard to this case.

"Q. And did you immediately tell him all about it, or did you deny it first.

"Mr. Ostrander: If the court please, we object as incompetent, irrelevant, and immaterial, and not proper cross-examination.

"The Court: The objection is sustained. If you want to make him your own witness, you may do so at the proper time.

"Mr. Gabriel: Q. Was there any promises made to you? A. Nothing whatever.

"Q. Has there been any since then, any promises made to you in reference to this case? A. Nothing, no promises whatever; only my attorney had wrote me a letter, while I was in Madera, to come and make a clean breast of everything, and to tell the truth, and also my relatives in San Francisco."

A number of questions about the letter followed, and the witness was questioned as to his attitude toward appellant, and if he was not trying to convict appellant. He answered that he was not. The cross-examination of Deluchi was long and searching, before and after the incident noted. In view of the serious nature of the charge against appellant, and the alleged association of Deluchi in the commission of the crime, the ruling complained of might well have been otherwise; but, when we review the record of the entire cross-examination, we find no justification for the plea that appellant was unduly limited. He cites no other ruling in support of his contention. The court and prosecution accorded appellant a very wide latitude in the cross-examination, which went into the minutest details of Deluchi's testimony.

[10] Complaint is made of certain of the trial court's instructions. In one part of the charge to the jury, it told the jurors that if they "believed from the evidence beyond all reasonable doubt that defendant, Antone Negra, instituted the homicide, *and aided or abetted its commission*," even though not present at the actual killing, the jury should return a verdict of guilty. Complaint is made of the use of the disjunctive word "or," in the italicized portion of the instruction, instead of the conjunctive word "and," as used in the definition of an accomplice found in section 31 of the Penal Code. Support for the contention that the instruction is erroneous is found in two old decisions of this court, in which the instructions then under consideration were held to be improper. *People v. Dole*, 122 Cal. 486, 55 P. 581, 68 Am. St. Rep. 50; *People v. Compton*, 123 Cal. 403, 56 P. 44. We are

not now so impressed with the soundness of those decisions on the point now made as to accept their application, unless that be found absolutely necessary. In fact, in the Dole Case the court held that a correct specific instruction on the precise point affected by the improper use of the word "or" in the erroneous instruction cured the error, and that has ever since been the rule. *People v. Arnold*, 199 Cal. 471, 499, 250 P. 168; *People v. Morine* 138 Cal. 626, 629, 72 P. 166; *People v. Anderson*, 59 Cal. App. 408, 431, 211 P. 254; *People v. Fisher*, 30 Cal. App. 135, 138, 157 P. 7; *People v. Fredoni*, 12 Cal. App. 685, 108 P. 663.

While in this case the instruction complained of is the one specifically referring to the defendant Negra, the trial court, not only correctly read the part of section 31 of the Penal Code defining who are principals, but immediately followed the criticized instruction with two others, in one of which it told the jury that a principal must aid *and* abet in the commission of the crime, and in the other extended the definition of an accomplice to be one who "with criminal intent aids, abets, and assists another in the commission of such crime." We are therefore satisfied in this case, as we were in *People v. Arnold*, supra, that, in view of all the instructions given on the subject of who are principals in the commission of criminal offenses, and the general circumstances of the case, the jury could not have taken the charge as to "aiding and abetting" in the narrow and literal sense which might attach if the objectionable instruction was the only one on the subject.

Complaint is also made that the lower court erroneously instructed the jury on the doctrine of the defense of alibi, but fails to point out wherein the alleged error lies. As we read it, the instruction, in substance, correctly states the law (*People v. Winters*, 125 Cal. 325, 327, 57 P. 1067), and was favorable to the defendant.

In support of his motion for a new trial, appellant presented the affidavits of a number of persons. These were met by counter affidavits offered by the prosecution, and the motion was denied. On reading these affidavits, we are convinced that the trial court did not abuse the wise discretion vested in it in ruling on the motion. What has been before said by this court on that subject covers the case so exactly that we refer to the decision in *People v. Weber*, 149 Cal. 325, 86 P. 671, and especially to the language of the court and the decisions cited on page 350 of the report.

The evidence in this case fairly supports the verdict of the jury. The rulings and instructions of the court complained of did not constitute error.

The judgment of conviction and the order

denying the motion for a new trial are, and each is, affirmed.

We concur: CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.

LANGDON, J. I dissent. The chief witness for the prosecution was an admitted accomplice, Buck Deluchi. I think the court erred in curtailing the cross-examination of the accomplice, Deluchi, without whose testimony no conviction could be had in the case. It is evident that the testimony of Deluchi is full of contradictions, and his reputation for truth, honesty, and integrity was shown by the testimony of a number of reputable witnesses to be bad. It is evident, also, that he was testifying to save his own life, and, therefore, the widest latitude should have been extended on the cross-examination of this witness.

I am satisfied, also, that the corroboration of the accomplice falls far short of the standard required as set forth in *People v. Kempley* (Cal. Sup.) 271 P. 478.

208 Cal. 102

In re YALE'S ESTATE.

YALE et al. v. BRIGGS et al.

(L. A. 11409.)

Supreme Court of California. Sept. 10, 1929.

Appeal and error ⇨ 123—Appeals from minute orders in will contest, intended merely to afford data from which proper final judgment might be drafted, held dismissible.

Where minute orders in will contest, granting nonsuit as against certain contestants, were intended and must have been understood to be and to serve merely as memoranda affording data from which proper final judgment might thereafter be drafted, disposing of entire cause, appeals from such orders were dismissed, since in such case appeal would lie only from formal judgment.

In Bank.

Appeals from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding by Harold L. Yale and others against William E. Briggs and others to contest and revoke probate of the will of Charles Yale, deceased. From orders granting nonsuit as to certain contestants, and portion of judgment thereon, such contestants appeal. On motions to dismiss appeals. Motion to dismiss appeals from orders granted, and motion to dismiss appeal from portion of judgment denied.

Woodruff, Musick, Pinney & Hartke, of Los Angeles, for appellants.

Harry A. Chamberlin and Farrand & Slosson, all of Los Angeles, for respondents.

WASTE, C. J. Motions to dismiss appeals. The last will and testament of Charles Yale, deceased, and a codicil thereto, were duly admitted to probate, and letters testamentary issued. A contest and petition to revoke the probate was filed by the appellants, and the proceeding came regularly on for hearing. During the hearing, and as the introduction of evidence progressed, the proponents and respondents moved for a nonsuit as to each of the four grounds of contest. An order granting the motion as to the third and fourth grounds of contest was entered in the minutes on November 23, 1928, and an order granting the motion as to the second ground was entered on December 6, 1928. On the following day a nonsuit was granted as to the first ground of contest, but only as to two of the contestants. The issue presented by the first ground of contest was submitted to a jury, which found for the remaining contestants. Judgment was entered in accordance with the verdict on December 31, 1928.

The judgment provided, in part: "That said motions of said respondents * * * for a nonsuit and dismissal of the second, third amended, and fourth separate grounds of contest having heretofore been ordered granted, same are and each of them is hereby granted, and said separate grounds of contest to revoke said will and codicil and the probate thereof, on the ground of undue influence, fraud, and conspiracy, and lack of proper execution, are hereby dismissed, and said contestants shall have and recover nothing, and be granted no relief, under and by reason of said second, third amended, and fourth separate grounds of contest; and it appearing that contestants, Jennie Ethelyn Grisier * * * and Richard Miller, are not interested in said estate as contemplated by law, and are not proper parties to said contest, said action and contest is dismissed as to said contestants Jennie Ethelyn Grisier and Richard Miller only." On February 14, 1929, the contestants filed a notice of appeal to this court from each of the several minute orders above referred to, and from that portion of the judgment just above quoted. The notice of appeal was filed more than 60 days after the entry of the respective minute orders, but within 60 days of the entry of the judgment.

In moving for a dismissal of the several appeals, the respondents rely on section 581 of the Code of Civil Procedure, which reads, in part, as follows: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * * 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. * * * The dismissals mentioned in subdivisions 3, 4, and 5 of this section must be made by orders of the court entered upon the minutes thereof, and

are effective for all purposes when so entered. * * *

The respondents take the position that, under the provisions of this section, each of the several minute orders became, when entered, a final determination or judgment upon the particular ground of contest to which it related, requiring any appeal therefrom to be taken within 60 days after the entry. It is contended that the appeals from these orders, not having been taken within that time, were taken too late. The dismissal of the appeal from the quoted portion of the judgment is moved on the ground that the reference therein to the orders of nonsuit theretofore made was "superfluous and of no effect." It is respondents' contention that, as an appeal from a nonsuit, to be effective, must be taken within 60 days from the entry of the order of nonsuit in the minutes, no appeal will lie from a formal judgment of dismissal thereafter entered.

Without in any manner attempting to minimize the force of the authorities cited and relied on by the respondents in support of their motion, it is our conclusion, founded on a reading of the several minute orders and of that portion of the formal judgment hereinabove quoted, that the minute orders were intended by the trial court, and must have been understood by the parties, to be and to serve merely as memoranda affording data from which a proper final judgment might thereafter be drafted disposing of the entire cause. In such a case an appeal is held to lie from the formal judgment. *Ferris v. Baker*, 127 Cal. 520, 523, 524, 59 P. 937; *Larson v. Larson*, 15 Cal. App. 531, 536, 115 P. 340.

The motion to dismiss the appeals from the several minute orders hereinabove referred to is granted. The motion to dismiss the appeal from a portion of the judgment is denied.

We concur: PRESTON, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LANGDON, J.

208 Cal. 99

UNITED STATES v. ACKERMAN et al.
(S. F. 13412.)

Supreme Court of California. Sept. 10, 1929.

Appeal and error §795(1)—Motion to dismiss appeal, because appellants were not "parties aggrieved," which did not challenge appellate jurisdiction, or allege appellant's failure to comply with rules, was denied (Code Civ. Proc. § 938).

Motion to dismiss appeal on ground that appellants, being only lodgers in hotel closed as a common nuisance by order of court, were not "parties aggrieved," and had no interest in subject-matter of action, within meaning of Code Civ. Proc. § 938, was denied, where there was no challenge in such motion to jurisdiction of

appellate court for alleged failure of appellants to comply with rules or statute as to appeals.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Aggrieved Party.]

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the United States against Rosa Ackerman and others. Judgment against defendants. On motion to dismiss appeal of Paul Bahr and others. Denied.

William H. Johnson, of San Jose, for appellants.

Fred L. Thomas and Frank J. Waterhouse, both of San Jose, for respondent.

WASTE, C. J. This action, instituted under and pursuant to the provisions of sections 21 and 22 of title 2 of the National Prohibition Act (41 Stat. 305 [27 USCA pp. 99, 111, §§ 33, 34]), terminated in the court below with the entry of a decree adjudging the Alviso Hotel, situate in the county of Santa Clara, to be a common nuisance, and ordering the entire building closed for a period of one year. No appeal was taken by the owner of the building. However, certain occupants of the hotel, none of whom had been made parties to the action, duly moved the court below to vacate or modify its judgment, on the ground, among others, that "each of said moving parties are aggrieved by the effect of said judgment, and are materially injured as to their substantial rights."

An affidavit, filed in support of this motion, set out that the several moving parties had been occupying rooms in the Alviso Hotel "as their private place of dwelling"; that at none of the times mentioned in the complaint had intoxicating liquors been kept or dispensed in any of their said rooms; and that, by reason of the judgment and decree of abatement, they had been ousted and ejected "from their several rooms and places of dwelling." From the order denying their motion to vacate or modify the judgment, the moving parties prosecuted this appeal.

The plaintiff and respondent moves to dismiss the appeal, principally on the ground that the appellants "at no time had any interest in the subject-matter of the action, for the reason that they were mere lodgers in said hotel," and were not, therefore, "parties aggrieved," within the meaning of section 938 of the Code of Civil Procedure. Inspection of the transcript and of the appellants' opening brief discloses that both the motion to vacate the judgment and the appeal from the order denying the same are grounded on the claim that the appellants, although merely roomers or lodgers in the Alviso Hotel, have such an interest in that portion of the building occupied by them as "places of dwelling" as to

make them "parties aggrieved," within the meaning of section 938, supra. It is readily apparent, therefore, that a determination of the motion to dismiss the appeal involves the necessity of an investigation and consideration of the merits of the appeal.

A motion to dismiss an appeal "is, in the usual acceptation of the term, a challenge to the jurisdiction of the appellate court, or based upon some alleged failure of the appellant to comply with the statutes or the rules of court in taking and perfecting his appeal. * * *" Estate of Sharp, 10 Cal. App. 1, 2, 100 P. 1071. Here there is no challenge to the jurisdiction of the court, or alleged failure to comply with the rules or statutes as to appeals.

That being so, the motion to dismiss is denied, with leave to the respondent to renew the motion upon the final submission of the appeal, if so advised.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

207 Cal. 697

CITY OF INGLEWOOD v. LOS ANGELES COUNTY. (L. A. 10903.)

Supreme Court of California. July 31, 1929.

1. Municipal corporations ⇨434(1)—Exemption of municipality's property from taxation does not apply to special assessments (Const. art. 13, § 1; Pol. Code, § 3607).

Const. art. 13, § 1, and Pol. Code, § 3607, exempting property of a municipality from taxation, does not apply to special assessments.

2. Municipal corporations ⇨406(1)—Power to levy special assessment is analogous to that exerted in levy of ordinary tax.

Power to levy special assessment is exercise of same power as that exerted in levy of an ordinary tax for governmental purposes, and both have their source in the fundamental power inherent in all governments.

3. Municipal corporations ⇨426—Special assessment for local improvement cannot be made on municipality's property without positive legislative authority.

Special assessment for local improvement cannot be imposed on property owned by municipal corporation unless there is positive legislative authority.

4. Drains ⇨70—Health ⇨4—Levees and flood control ⇨23—Municipal corporation was not bound by general words relating to taxation of real property in statutes creating flood control, sanitation, and drainage districts (Los Angeles County Flood Control Act; St. 1923, p. 498, as amended; St. 1919, p. 731, as amended).

Municipal corporation held not bound by general words to effect that all real property in

district should be and remain liable for taxes contained in Los Angeles County Flood Control Act (St. 1915, p. 1502); St. 1923, p. 498, as amended, creating Los Angeles County Sanitation District No. 5; and St. 1919, p. 731, as amended, creating drainage improvement district.

5. Drains ⚡70—**Health** ⚡4—**Levees and flood control** ⚡23—City held not liable for special assessments on property privately owned when flood control, sanitation, and drainage districts were created but acquired by city and used for public purposes before assessments were made (St. 1915, p. 1502; St. 1923, p. 498, as amended; St. 1919, p. 731, as amended; Acquisition and Improvement Act 1925, § 5).

City held not liable for special assessments on property privately owned at time of creation of flood control, sanitation, and drainage districts under St. 1915, p. 1502, St. 1923, p. 498, as amended, and St. 1919, p. 731, as amended, but which city subsequently acquired and used for public purposes before assessments were made, since, there being nothing in any of such acts or in any other statute which expressly or impliedly provides for imposition of such liability upon municipally owned property, it must be conclusively presumed that no intention existed in minds of Legislatures to authorize assessment upon such class of property in view of Acquisition and Improvement Act 1925, § 5 (St. 1925, p. 849), in which assessments were authorized for local improvements on lands of municipalities.

6. Evidence ⚡65—Property owners in flood control and other districts were conclusively presumed to know legal effect of acts creating assessment districts (St. 1915, p. 1502; St. 1923, p. 498, as amended; St. 1919, p. 731, as amended).

Property owners in flood control, sanitation, and drainage districts created by St. 1915, p. 1502; St. 1923, p. 498, as amended; and St. 1919, p. 731, as amended, were conclusively presumed to have known that legal effect of such acts was that property of municipality could not be taxed and to have acted in light of such knowledge at time of hearing when their lands were included in such districts and made liable for improvement assessments.

7. Constitutional law ⚡290(1)—Withdrawal for assessment purposes of property acquired by city after formation of flood control, sanitation, and drainage districts did not deprive taxpayers of property without due process (St. 1915, p. 1502; St. 1923, p. 498, as amended; St. 1919, p. 731, as amended).

Withdrawal for assessment purposes of property acquired by city subsequent to formation of flood control, sanitation, and drainage districts under St. 1915, p. 1502; St. 1923, p. 498, as amended; and St. 1919, p. 731, as amended, did not deprive taxpayers of their property without due process of law, since this was legal consequence of operation of statutes under which districts were organized and of which property owners were fully informed by provisions of such acts.

8. Constitutional law ⚡290(1)—Withdrawal for assessment purposes of property acquired by city after formation of flood control, sanitation, and drainage districts did not deprive bondholders of property without due process (St. 1915, p. 1502; St. 1923, p. 498, as amended; St. 1919, p. 731, as amended).

Withdrawal for assessment purposes of property acquired by city after formation of flood control, sanitation, and drainage districts under St. 1915, p. 1502; St. 1923, p. 498, as amended; and St. 1919, p. 731, as amended, did not deprive bondholders of their property without due process of law, since they purchased bonds of districts with full knowledge that enabling acts under which bonds were issued contained no provision authorizing assessment of municipal property for purpose of paying bonds or for any other purpose.

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by the City of Inglewood against the County of Los Angeles for the refund of special assessments and penalties paid under protest. From the judgment, plaintiff appeals. Reversed.

Clyde Woodworth, City Atty., of Inglewood, for appellant.

Everett W. Mattoon, Co. Counsel, W. Sumner Holbrook, Jr., and Gordon Boller, Deputy Co. Counsels, all of Los Angeles, for respondent.

R. C. McAllaster, City Atty., of Pasadena, for intervener City of Pasadena.

CURTIS, J. This action was brought under the provisions of section 3819 of the Political Code of this state for the refund of certain special assessments and penalties paid under written protest upon publicly owned and used property of the city of Inglewood, situated in the county of Los Angeles. The action comes before us upon an appeal from a judgment of the superior court of said county, sustaining a general demurrer of the county of Los Angeles to the complaint of said city of Inglewood. These special assessments were levied by the county officials of said county of Los Angeles, acting for and on behalf of the Los Angeles flood control district, the Los Angeles county sanitation district No. 5, and the Los Angeles county drainage district No. 8. The complaint states the following facts regarding said districts and the several assessments which are the subject of this action:

1. Los Angeles county flood control district was created by an act of the Legislature of the State of California, entitled "Los Angeles County Flood Control Act," approved June 12, 1915, Statutes 1915, p. 1502. Said district was duly and regularly established under the provisions of said act on August 11, 1915, and at all times since has duly and

regularly performed the governmental purposes set forth in said act. Further facts regarding said district may be found in the decision rendered by this court in the action entitled *Los Angeles County Flood Control District v. Hamilton*, reported in 177 Cal. 119, 169 P. 1028. Under and by virtue of the provisions of said act, there was levied upon the property included within said district for the fiscal year beginning July 1, 1927, and ending June 30, 1928, a special assessment on land and improvements only of 11 cents per hundred dollars of assessed valuation.

2. Los Angeles county sanitation district No. 5. Under and by virtue of an act of the Legislature of the State of California, entitled "An act authorizing the creation, government and maintenance of county sanitation districts, issuance of bonds by such districts and the powers thereof," approved May 29, 1923, Statutes 1923, p. 498, as amended, there was validly and legally established prior to said first Monday in March, 1927, a certain assessment district known as Los Angeles county sanitation district No. 5. Jurisdiction of the said district over the land and improvements included therein for the purposes of said district including the levy of special assessments thereon attached on the 31st day of March, 1924. Under and by virtue of the provisions of said act there was levied on land and improvements located in said Los Angeles county sanitation district No. 5, a special assessment for the fiscal year beginning July 1, 1927, and ending June 30, 1928, of 26 cents per hundred dollars of assessed valuation.

3. Los Angeles county drainage district No. 8. Under and by virtue of the provisions of an act of the Legislature of the State of California, entitled "An act to promote the drainage of wet, swamp and overflow lands, and to promote the public health in the communities in which they lie; providing for the issuance of bonds and levying of assessments on lands benefited, to pay the cost and expenses thereof," Statutes 1919, p. 731, as amended, there was prior to the first Monday in March, 1927, created in the county of Los Angeles a certain special assessment district known as "Drainage Improvement District No. 8 of Los Angeles County." Jurisdiction of the said district over the land and improvements included therein for the purposes of said district including the levy of special assessments thereon attached on the 17th day of March, 1924.

There was validly levied under and by virtue of the provisions of said act in zone H of said drainage improvement district No. 8 of Los Angeles county, for the purpose of creating a fund for the payment of interest and sinking fund on the bonds of said district, a special assessment of 8 cents per hundred dollars of assessed valuation of land only located in said district.

Under the provisions of all of said acts,

the special assessments of said districts are levied and collected at the same time and in the same manner as the general tax levy for county purposes in the county of Los Angeles.

Subsequent to the first Monday in March, 1927, the tax collector of the county of Los Angeles, acting as tax collector of the Los Angeles county flood control district, and on behalf of said Los Angeles county sanitation district No. 5 and drainage improvement district No. 8 of Los Angeles county, presented certain tax bills to the city of Inglewood; said tax bills showing assessments against the property described in the complaint under each of said districts. Said assessments were not paid and on the 8th day of June, 1928, the properties were duly and regularly advertised for sale, and on the 30th day of June, 1928, were sold to the state in the usual manner. On or about the 9th day of July, 1928, said property was redeemed from the sale, payment being made under protest, and thereupon this action was brought to recover the sum so paid under the provisions of section 3819 of the Political Code, as aforesaid.

All of the property described in said assessments is situated in the city of Inglewood and within the various named districts and zones heretofore mentioned and was, at the respective dates on which said districts were created or organized, privately owned property, but since the creation and organization of said districts said property has been acquired by said city of Inglewood, and at 12 o'clock noon on the first Monday of March, 1927, the city of Inglewood was and ever since said date has been the owner of the whole of said property, and all of said property on said last-named date was and at all times thereafter has been exclusively devoted to and actually used by said city of Inglewood for public purposes.

The sole question presented on this appeal is whether or not property which was privately owned at the time of the creation of an assessment district under any one of the above mentioned acts, but which subsequently became public property, used for a public purpose, is subject to assessment for the improvement or other work for which the district is created.

The language of the three acts with reference to the assessments, the issuance of bonds, and the property within the respective districts liable for the payment of the assessments levied for the purpose of paying the bonded indebtedness and other charges against the district, while not in the same phraseology, is not materially different and need not be set out in full. It is sufficient to say that there is a provision in each of the three acts which provides for the raising of funds by means of a bonded indebtedness to meet the expense of improvements made by the several districts, and to levy an annual ad valorem tax for the purpose of paying the

amount due on the bonds of the district and for the maintenance thereof. In the flood control district this tax is levied "upon the taxable real property in said district" and "all real property in the district shall be and remain liable to be taxed for such payments as hereinafter provided." In the sanitation district this tax or assessment is levied and collected "upon all the taxable real property within the district," and the bonds issued under the provisions of the act governing the organization of said district "shall be a lien upon the real property of the district * * * and all the real property in the district shall be and remain liable to be taxed for such payments as hereinafter provided." In the drainage district the act providing for its organization directs that "the board of supervisors shall annually at the time of making the general tax levy for general county purposes levy special assessment taxes on the land (exclusive of improvements, but inclusive of the land of public utilities) within the several zones theretofore established. The board shall determine the total sum that will be needed to meet the payments of principal and interest on the bonds of the district that will fall due before the proceeds of the next annual levy are available and shall determine the amount to be raised for each zone according to the percentage fixed for each zone. The special assessment tax to be levied in each zone shall be at the rate based on the value of the land in the zone as assessed for the purpose of general county taxation clearly sufficient to raise the amount determined by the board to be raised from such zone."

[1] It will be noted that in the flood control and sanitation districts all "taxable real property" is made liable for the payment of the special assessments which would, of course, include improvements upon real property, while in the drainage district land exclusive of improvements is made the sole source from which revenue is to be derived by the levy of special assessments. Whether any distinction is to be made between "taxable real property" as used in the Flood Control and Sanitation Acts, and "land" as used in the Drainage Act, is not necessary for us to decide in this action.

There is a broad and well-recognized distinction between a tax levied for general governmental or public purposes, and a special assessment levied for improvements made under special laws of a local character. *San Diego v. Linda Vista Irrigation Dist.*, 108 Cal. 189, 41 P. 291, 35 L. R. A. 33; *City Street Improvement Co. v. Regents, etc.*, 153 Cal. 776, 96 P. 801, 18 L. R. A. (N. S.) 451. As to the former, that is, a tax for governmental purposes, property of a municipality is exempt therefrom by express provision of the Constitution of this state and of the Political Code. Constitution of California, art. 13, § 1; Pol.

Code, § 3607. These provisions of the Constitution and Code, however, do not apply to special assessments, and property of a municipality or other property publicly owned may, under certain circumstances, be made liable for special assessments. *City of San Diego v. Linda Vista Irrigation Dist.*, *supra*, and *City Street Improvement Co. v. Regents, etc.*, *supra*; *Los Angeles County F. C. Dist. v. Hamilton*, 177 Cal. 119, 130, 169 P. 1028; *City of Pasadena v. McAllaster* (Cal. Sup.) 267 P. 873. The rule is aptly stated by Judge Cooley in the following language: "While these local assessments are taxed under a taxing power, they are not taxes in the ordinary understanding of that term, and that, consequently, the usual exemptions from taxation will not preclude the property exempt being subject to them." Cooley on Taxation (2d Ed.) p. 650.

[2] Nevertheless, the power to levy a special assessment is the exercise of the same power as that exerted in the levy of an ordinary tax for governmental purposes. Both have their source in the fundamental power inherent in all governments. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369; *Santa Clara County v. Southern Pac. R. R. Co.* (C. C.) 18 F. 385. In this latter case the court said (page 411): "Taxation for local improvements, or for city, county, or town purposes, involves the exercise of the same power which is exerted in taxation for state or general purposes. It is the sovereign power of the state in both cases which authorizes the tax, whether that power be exerted directly by an act of the legislature, or by a municipal body as an instrumentality of the state. 'That these assessments,' says Cooley, speaking of such as are special, 'are an exercise of the taxing power, has over and over again been affirmed, until the controversy may be regarded as closed.'"

[3] While publicly owned and used property is not exempt from special assessments under the Constitution or statutory law of this state, there is an implied exemption of such property from burdens of that nature. This rule is stated by Dillon as follows: "The principle which makes property of the state or any of its political or municipal subdivisions nontaxable under general statutory provisions and in the absence of a positive direction therefor, according to the great weight of authority, also precludes the imposition of a special assessment for a street or other local improvement upon such property, unless there is positive legislative authority therefor." 4 Dillon on Municipal Corporations, p. 2577, § 1446. This rule has been uniformly approved and followed in this state. *San Diego v. Linda Vista Irrigation Dist.*, *supra*; *Witter v. Mission School Dist.*, 121 Cal. 350, 53 P. 905, 66 Am. St. Rep. 33; *City Street Improvement Co. v. Regents, etc.*, *supra*; *Raisch v. Regents, etc.*, 37 Cal. App. 697, 174 P. 943;

City of Fresno v. Fresno Irrigation Dist., 72 Cal. App. 503, 237 P. 772; *Reclamation District No. 684 v. East Bay Municipal Utility District* (Cal. App.) 266 P. 969.

The respondent admits that all property owned by said city of Inglewood and by it devoted to public use at the date of the creation of said several districts was exempt from assessments. At the time of the trial it was stipulated by the parties to this action "that so far as the complaint was based upon payments of special assessments and penalties thereon upon property which was in public ownership and use upon the date of the establishment of the particular assessment district, under and by virtue of which said special assessments were levied, that judgment might be entered therefor for the plaintiff." Respondent, however, insists that a distinction should be made as to property which was in private ownership when such particular district was organized and thereafter was acquired by the city of Inglewood and by it devoted to one or more of the public uses of said city. Respondent contends that to release such property from its proportion of the cost of maintaining said district and of making improvements therein would be to cast upon the balance of the property owners in said district an additional burden without giving them any notice thereof or any opportunity to be heard, and would accordingly amount to the taking of the property of the other landowners in said district without due process of law. Respondent further contends that unless all property in private ownership at the time the particular district was organized continues to be liable for special assessments, even if it thereafter becomes the property of a municipal corporation, devoted to public use, the contract of said district with its bondholders will become unconstitutionally impaired. No direct authority is cited by respondent in support of either of these propositions. Respondent, however, relies upon certain decisions of this and other jurisdictions as declaring principles which if applied to the facts in the present proceeding would compel this court to hold in favor of its contentions. We will discuss some of the more important of these authorities and attempt to show their applicability or nonapplicability to the facts of this case. The first of these in the case of *City of Santa Monica v. Los Angeles County*, 15 Cal. App. 710, 115 P. 945. That was an action brought to recover taxes paid under protest. The property assessed was privately owned property on March 1, 1903. Thereafter, but before such assessment was levied, the city of Santa Monica acquired said property. The court held with the defendant in said action that the lien of said taxes attached on the first Monday in March of said year and that, "The plaintiff, when it acquired this land, took it subject to the lien for county purposes to the

same extent as would a private purchaser." We can see but slight analogy between that case and the one now before us. In the case of the city of Santa Monica, it purchased the property after the taxes for the current year had become a lien thereon and said lien was not affected or destroyed by the property thereafter being devoted to public use. The property of the city of Inglewood, against which said special assessments were attempted to be levied, was purchased by said city and devoted by it to a public use prior to the 1st of March of the year in which said special assessment was levied and therefore before any lien for any assessment had attached thereto.

The next case relied upon by the respondent is *Nevada National Bank v. Poso Irr. Dist.*, 140 Cal. 344, 73 P. 1056. In that case it was held that land which was government land at the time of the organization of an irrigation district was no part of said district, and that a subsequent purchaser of said land from the government took said land free from any liability contracted or incurred by the district, including bonds of the district issued for the purpose of making improvements therein. Respondent insists that by the ruling in this case the status of an assessment district is determined at the date of its creation, and subsequent conveyances cannot alter it. We cannot agree with this contention. The grounds of said decision are, as set forth therein, that: "If the grantee of the United States must take the land burdened with the liability of an irrigation district made to include it without the assent of the government or the purchaser, it attaches a condition to the disposal of the property of the government without its sanction or consent, and which must, in such cases, interfere with its disposal." According to the construction placed upon that decision by respondent, if, after the formation of said district the government would decide to locate and build a post office therein, and should purchase for that purpose and construct a post office building upon a lot or parcel of land which was in private ownership at the time of the organization of said district, that said land and premises, even though belonging to the United States government and used by it as a post office, would be liable for all taxes and assessments that might thereafter be levied by said district. There is nothing in said decision to justify any such claim or contention. The case of *Lee v. Osceola Imp. Dist.*, 268 U. S. 643, 45 S. Ct. 620, 69 L. Ed. 1133, cited by respondent, contains nothing so far as we can perceive which is in any way helpful to respondent. That case cites, with approval, *Nevada National Bank v. Poso Irr. Dist.*, supra, and deals with the same question that was involved in that case, as will appear from the following brief statement from the opinion: "It was settled many years ago that the property of the United States is

exempt by the Constitution from taxation under the authority of a state so long as title remains in the United States. *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 180, 6 S. Ct. 670, 29 L. Ed. 845. This is conceded. It is urged, however, that this rule has no application after the title has passed from the United States, and that it may then be taxed for any legitimate purposes. While this is true in reference to general taxes assessed after the United States has parted with its title, we think it clear that it is not the case where the tax is sought to be imposed for benefits accruing to the property from improvements made while it was still owned by the United States." These are the principal authorities cited by the respondent in behalf of its contention that property in private ownership at the time of the creation of a district like one of the three districts mentioned herein remains liable for the payment of all assessments thereafter levied by said district, notwithstanding the fact that said property was on the first Monday in March of the year in which said assessments were levied public property and exclusively devoted to public use. In our opinion there is nothing in any of these authorities which would justify us in holding that in considering the property within said districts liable for said special assessments, any distinction should be made between property which was public property at the time of the creation or organization of any of said districts and property which thereafter was acquired by a municipality and devoted by it to public use.

[4-7] As we have already shown, public property of a municipality, that is, property owned by such municipality and by it devoted to public use, is liable for special assessments for public improvements only in case there is a positive legislative authority therefor. In none of the acts under which the three districts involved herein were created or organized is there to be found any such authority. It is true that in two of said acts it is provided that "all real property in the district shall be and remain liable to be taxed for such purposes," and in the other language equally effective is used in reference to the property in the district liable for such assessments. These are requirements which apply generally to property within the districts. But it is well settled that the state and its subordinate agencies, including municipal corporations, are not bound by general words used in a statute. This doctrine was expressly approved by this court in a recent decision, wherein the question, and the authorities applicable thereto, were exhaustively discussed and considered. *C. J. Kubach Co. v. McGuire*, 199 Cal. 215, 248 P. 676. The intention of the Legislature in respect to making municipal property subject to the assessments levied for the purpose of maintaining said districts and of paying for the public improvements made

therein is best determined by an inspection of the acts themselves providing for the creation and organization of said districts. When there is nothing in any of said acts, or in any other statute, which expressly or impliedly provides for the imposition of such liability upon municipally-owned property, then it must be conclusively presumed that no intention existed in the minds of the legislators at the time of the passage of said acts to authorize any tax or assessment upon such class of property. That such omission was intentional, we think, is further made apparent by reference to other acts of the Legislature, the purpose of which was to provide for local improvements and the payment of the same by special assessments. We refer particularly to the Acquisition and Improvement Act of 1925 (Stats. 1925, p. 849), where the legislative body conducting proceedings under said act is expressly authorized to levy assessments for local improvements upon lands of a municipality. This authority is given under section 5 of said act, which provides that, "The lands upon which said special assessment taxes shall be levied * * * shall include all lands belonging to any county, municipality," etc., provided said legislative body might omit any of such lands from the levy and collection of such assessment. The fact that authority to levy assessments against municipal property was expressly given in the Acquisition and Improvement Act of 1925, and was omitted from each of the three acts involved herein, is an additional circumstance going to show that the Legislature never intended to authorize the levy of assessments against the public property of municipalities under any of said acts. This being so, the property owners in said several districts are conclusively presumed to have known the legal effect of said acts of the Legislature and to have acted in the light of such knowledge at the time of the hearing when their lands were included in said districts and made liable for improvement assessments. Conceding that the assessments of the individual property owners in said districts have been increased by the withdrawal for assessment purposes of the property acquired by the city of Inglewood subsequent to the formation of said districts, yet this was but the legal consequence of the operation of the acts of the Legislature under which said districts were organized, and of which the property owners were fully informed by the provisions of said acts. Their property is not, therefore, taken from them without a hearing and consequently they are not deprived of their property without due process of law.

[8] The bondholders are in a similar position to that of the landowners, as shown above. They purchased the bonds of the several districts with full knowledge that the enabling acts under which the bonds were is-

sued contained no provision authorizing the assessment of municipal property for the purpose of paying said bonds, or for any other purpose. In their behalf we will say that no complaint has come from any of said bondholders as far as the record in this case shows. The bondholders appear to be perfectly content with the situation as it is. Neither are the landholders in any of said districts making complaint regarding the exclusion of said public lands from assessments to pay for the improvements carried on in the several districts. The point is raised by the county of Los Angeles only, the respondent herein. But, conceding that respondent may properly raise the question, we are convinced that its position regarding the validity of the assessments involved herein is untenable and finds no support in the law of this state.

The judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; RICHARDS, J.

207 Cal. 709

LOS ANGELES COUNTY FLOOD CONTROL DIST. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (CITY OF PASADENA, Intervener). (L. A. 11136.)

Supreme Court of California. July 31, 1929.

1. Drains ☞70—Health ☞4—Levees and flood control ☞23—City held not liable for assessments on property privately owned when improvement districts were created but subsequently acquired by city.

City held not liable for assessments on property privately owned at time flood control, sanitation, and drainage districts were created but thereafter acquired by city and used for public purposes before levy of assessments.

2. Municipal corporations ☞513(1)—Superior court had jurisdiction to determine validity of asserted liens for assessments against city's property in suit in which city asked injunction against collector.

Superior court of Los Angeles county had jurisdiction to hear and determine validity of county's asserted liens against real property of city for assessments for improvement districts, in suit by city against tax collector in which city asked for injunction restraining tax collector from selling property for delinquent assessments and sought to have title quieted.

In Bank.

Application for writ of prohibition by the Los Angeles County Flood Control District against the Superior Court of the State of California in and for the County of Los Angeles, and Walter S. Gates, judge thereof, and Edwin F. Hahn, presiding judge thereof, to require respondent to dissolve a restrain-

ing order, in which the City of Pasadena intervened. Writ denied.

Superseding opinions in 271 P. 518, and 272 P. 359.

Everett W. Mattoon, Co. Counsel, Roy W. Dowds, Flood Control Counsel, and W. Sumner Holbrook, Jr., Deputy Co. Counsel, all of Los Angeles, for petitioner.

R. C. McAllaster, City Atty., and Harold P. Huls, Deputy City Atty., both of Pasadena, for respondents and intervener.

Jess E. Stephens, City Atty., of Los Angeles, Alan Patten, Deputy City Atty., of Los Angeles, W. Turney Fox, City Atty., of Glendale, Aubrey N. Irwin, Deputy City Atty., of Glendale, Chester S. Coffin, City Atty., of Santa Monica, Nowland M. Reid, City Atty., of Long Beach, Beach Vasey, Deputy City Atty., of Long Beach, amici curiæ in support of respondents and intervener.

CURTIS, J. This case was argued and submitted for decision with the case of City of Inglewood v. County of Los Angeles, L. A. No. 10903, 280 P. 360, this day decided. That action involved the validity of certain assessments levied by the board of supervisors of the county of Los Angeles, acting for the Los Angeles county flood control district, the Los Angeles county sanitation district No. 5, and the Los Angeles county drainage improvement district No. 8, upon property which was held in private ownership at the time of the creation and organization of said districts, but which had thereafter been acquired by the city of Inglewood and by it devoted to public use, and which was so held and used by said city at the time of the levy of said assessments. In our decision in said action we held that there was no authority for the levy of any of said assessments and that the same were invalid and void. A similar assessment was levied by said board of supervisors of the county of Los Angeles, acting for and on behalf of the Los Angeles county flood control district, against public property of the city of Pasadena which, at the time of the creation of said flood control district, was held in private ownership, but which subsequently thereto had been acquired by said city of Pasadena and by it devoted to public use. The city of Pasadena refused to pay said assessment, and W. O. Welch, the county tax collector (who was also tax collector of said district), advertised said property of the city of Pasadena for sale for said delinquent assessments. Prior to the date of holding said sale, however, the city of Pasadena brought an action in the superior court of the county of Los Angeles, in which it asked, among other things, for an injunction restraining W. O. Welch, the said tax collector, from selling said property. A temporary restraining order was issued as prayed for by said superior court, and the defendant in said action, the

said W. O. Welch, as such tax collector, appeared in said action and filed a demurrer to the complaint therein and also a motion to dissolve said restraining order. Said demurrer was overruled and said motion was denied. Thereupon the Los Angeles county flood control district instituted this proceeding in the District Court, Second District, Second Division, against said superior court and two of the judges thereof, to prohibit said superior court from "taking any further proceedings against or making any other orders affecting the petitioner herein in said action, other than to dissolve the restraining order previously issued therein." The city of Pasadena asked leave to file a petition in intervention in this proceeding on the ground that it was the real party in interest in opposing the petition for prohibition. Leave to intervene was granted to said city by said District Court of Appeal. The matter came on for hearing before said court, and after argument of counsel both oral and by written briefs, said court rendered its decision denying said writ of prohibition. Upon the petition of the Los Angeles county flood control district, said cause was transferred for decision to this court.

[1] It is the contention of the city of Pasadena that property owned by it and devoted to and actually used by it for public purposes is exempt from all and every kind of assessments levied under the provisions of the Los Angeles County Flood Control Act (St. 1915, p. 1502). The position of the Los Angeles county flood control district is that only such municipally owned and used property which was such at the date of the formation of said district is exempt from said assessments. This question, as we have already noted, was decided by this court in the opinion in the case of *City of Inglewood v. County of Los Angeles*. Said decision was adverse to the contention now made by the Los Angeles county flood control district. The decision of that question in said action is controlling in this proceeding.

[2] The Los Angeles flood control district makes the further contention that the superior court of the county of Los Angeles had no jurisdiction to entertain the proceeding brought by the city of Pasadena against the county tax collector to restrain the latter from selling said property of the city of Pasadena for said delinquent assessments.

While the city of Pasadena in the action instituted by it against W. O. Welch, tax collector, asked for an injunction restraining said tax collector from selling its said real property for said delinquent assessments, it also sought by said action to quiet its title to said real property against said invalid assessment liens. That action was similar in this respect to the action of *Las Animas, etc., Land Co. v. Preciado*, 167 Cal. 580, 140 P. 239. In the action instituted by the *Las Animas*

Company the prayer of the complaint was as follows: "Wherefore plaintiff prays that the said taxes, and both thereof, be declared not to be a lien or charge upon the said property, or upon any part thereof; that said defendants be enjoined, and restrained from * * * advertising the said property for sale, or selling the same for nonpayment of said tax," etc. In the action instituted by the city of Pasadena against the said W. O. Welch, tax collector, the prayer of the complaint is in part as follows: "Wherefore, plaintiff prays judgment that said purported taxes and/or assessments be declared null and void and not a lien upon said property and that defendant be permanently enjoined and restrained from selling said property to said state of California for nonpayment of said taxes and/or assessments." In *Las Animas, etc., Land Co. v. Preciado*, supra, this court said, at page 241: "There is thus left for consideration the single proposition as to the availability to respondent of the remedy which it has sought, and herein it is argued that, under the authority of such cases as *Savings & Loan Society v. Austin*, 46 Cal. 415; *Houghton v. Austin*, 47 Cal. 647; and, especially the case of *Crocker v. Scott*, 149 Cal. 575, 87 P. 102, the remedy by injunction is not available to respondent. It might be a sufficient answer to this to say that, irrespective of the injunctive relief sought and awarded, plaintiff had the unquestioned right under section 738 of the Code of Civil Procedure to have determined these conflicting lien claims asserted to affect its property, and that, this being done, the fact that an injunction was also asked would be immaterial to the cause of action specifically pleaded." The court then went on to show that the plaintiff in that action was entitled not only to quiet its title against the asserted liens for said taxes, but was also entitled to the injunctive relief prayed for. It is not material in the present proceeding to decide whether or not the city of Pasadena was entitled to an injunction in the action instituted by it against the tax collector of said flood control district. The present proceeding against the superior court of the county of Los Angeles can only be maintained by showing that said court had no jurisdiction of the subject-matter of said action instituted therein by said city of Pasadena. That it had jurisdiction to hear and determine the validity of the asserted liens against the real property of the city of Pasadena for said assessments, we think, is not questioned. If it is questioned, the case of *Las Animas, etc., Land Co. v. Preciado*, supra, is decisive of the matter. This, we think, disposes of the jurisdictional question presented herein.

The writ is denied.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; RICHARDS, J.

208 Cal. 82

PROCTOR v. ARAKELIAN et al. ★
(S. F. 12748.)

Supreme Court of California. Sept. 3, 1929.

Rehearing Denied Oct. 3, 1929.

1. Brokers ⇨106—Evidence relating to broker's representations while agent for defendant held admissible in action to set aside note and trust deed for fraudulent representations.

In action to set aside note and trust deed on ground of fraudulent representations inducing agreement to exchange real estate, where broker before defendant presented proposed exchange agreement, which was rejected, was defendant's agent to secure exchange of property, testimony bearing on representations made during period of agency prior to presentation of rejected agreement were admissible.

2. Exchange of property ⇨8(4)—False representations made in beginning of negotiations though propositions originally proposed failed, could be considered in determining whether fraudulent representations induced agreement.

Where ultimate object of all negotiations looking to exchange of real estate was finally consummated, false representations intentionally made in beginning of negotiations, even though propositions originally proposed failed, were proper matters to be considered in determining question of fraudulent representations to plaintiff suing to set aside note and trust deed, since where person resorts to false and fraudulent representations of a material fact to gain undue advantage over another, and thereby induces him to believe that representations are true, in absence of showing that false representations were removed, it will be presumed they operated upon mind of person whom it was intended to deceive to his prejudice thereby.

3. Brokers ⇨102—Permitting broker to act as dual agent held not to authorize broker to repeat previous fraudulent representations while acting as agent of party to exchange agreement.

Where, prior to dual agency, broker as agent for one of parties to exchange agreement during negotiations made false representations regarding value of property to be exchanged, subsequent acting in dual capacity did not permit agent to repeat false representations and render principal immune from liability, if it be shown that principal and broker were acting in concert to defraud other party, since agent may become unfaithful to his trust, and, where he does, both agent and third person with whom conspiracy has been formed to defraud another may be called to account in damages.

4. Brokers ⇨102—Gross discrepancy between property values held to charge owner of farm land exchanged for business property with notice that broker in negotiating exchange imposed on other party.

Where there was gross inequality between value of business property and unproductive, unimproved, and unmarketable farm land exchanged, owner of farm land was put upon inquiry and was charged with notice of imposition

on owner of business property by broker acting as his agent and trying to negotiate exchange as he would have obtained had he made inquiry.

5. Exchange of property ⇨3(1)—Party to exchange agreement relying on representations of dual agent held not required to make independent investigation of farm property exchanged.

Where party to exchange agreement, operating on large scale in buying and selling city property, but having no personal knowledge of farm property exchanged, relied on representations of other party, a large dealer in agricultural lands, and of dual agent, who had prior thereto acted for him in negotiating several deals and had always been found to be reliable, recovery could be had, in suit to set aside note and trust deed as part of transaction, for fraudulent representations regarding value of farm property, although no independent investigation to determine value was made.

6. Bills and notes ⇨520—Mortgages ⇨86(3)—Evidence in action to set aside note and trust deed for fraud supported finding that loan of \$25,000 could not be procured on defendant's property as represented.

In action to set aside note and trust deed given at time of agreement exchanging real estate for fraudulent representations, evidence held to support finding that no bank or disinterested individual would loan \$25,000 on defendant's farm property exchanged for plaintiff's business property as represented.

7. Jury ⇨14(4)—Complaint, asking that amount of note and trust deed sought to be set aside be deemed lien, held for foreclosure of vendor's lien precluding jury trial (Civ. Code, § 3046).

Complaint to set aside note and trust deed given in consummating transaction for exchange of real estate on ground of fraudulent representations, and praying that amount of note and trust deed be deemed a valid and subsisting lien upon property exchanged, held to present case for foreclosure of vendor's lien as recognized by Civ. Code, § 3046, precluding jury trial as a matter of right, since enforcement of such liens is a well-recognized function of courts of equity.

8. Jury ⇨14(4)—In matter of jury trial, no distinction is made between vendor's lien for unpaid purchase price and other liens.

No distinction in matter of jury trial is to be made between vendor's lien for unpaid purchase price and other liens.

9. Jury ⇨13(7)—Plaintiff in equitable proceeding is not entitled to jury trial on legal issues of fraud.

Although action for relief which can be afforded only by court of equity may involve questions of fraud and deceit, such as are cognizable in court of law, plaintiff is not entitled to jury trial on such issues when they arise in equitable proceeding.

10. Jury ⇨14(6)—Action for cancellation of note for fraud is equitable as respects jury trial.

Action for cancellation of a promissory note or other instrument on ground of fraud in its

procurement is equitable, precluding jury trial as matter of right.

In Bank.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by Frank H. Proctor against K. Arakelian and others. Judgment for defendants, and plaintiff appeals. Reversed.

J. W. Bingham, of Stanford University (Ralph W. Arnot, of Oakland, of counsel), for appellant.

Lindsay & Gearhart, of Fresno, and McKee, Tasheira & Wahrhaftig, of Oakland, for respondents.

SEAWELL, J. Plaintiff appeals from a judgment entered in defendants' favor in an action arising from a transaction wherein plaintiff exchanged valuable real property owned by him and situate in the business district of the city of Oakland, at the northwest corner of Clay and Sixteenth streets, 50x75 feet, upon which was located a substantial five-story brick building, with basement, for 1,000 acres of unproductive, unimproved, and unmarketable land, belonging to respondent K. Arakelian, and of the quality known as magnesia alkaline clay, situate in the county of Fresno, and United States Liberty bonds of the par value of \$55,000. Said bonds were found by the trial judge to be of the actual market value, including accrued interest, of but \$49,614.01. Plaintiff in turn executed in favor of defendant Rosa Arakelian, wife of K. Arakelian, his promissory note for the sum of \$30,000 secured by a trust deed upon said Fresno county real property, in which deed respondents K. Arakelian and D. Arakelian, the son of defendants K. and Rosa K. Arakelian, were named as trustees. The complaint alleged that plaintiff was damaged in the amount of \$79,535.99 by certain false and fraudulent representations as to the quality, adaptability, and value of the Fresno county lands made to him by said K. Arakelian acting for himself and on behalf of his wife, Rosa K. Arakelian, and that "by reason of said damages as aforesaid the sum of \$79,535.99 of the purchase price of said Oakland property has not been paid and the whole thereof, to-wit, \$79,535.99, is now unpaid, and that the plaintiff claims to have and has a vendor's lien upon said Oakland property for said sum of \$79,535.99, and that the plaintiff is entitled to have said deed of trust and note cancelled and the amount thereof credited upon said sum of \$79,535.99."

The prayer of plaintiff was that by reason of the fraudulent representations which induced him to enter into the transaction with K. Arakelian, the note and deed of trust executed by him to Rosa K. Arakelian be canceled, and that said sum of \$79,535.99 be deemed to be a valid and subsisting lien upon said Oakland property, and that the usual de-

cree of sale be made, and that the proceeds thereof be applied in payment of the amount found to be due plaintiff, and that defendants be barred and foreclosed of all right, claim, or equity of redemption in said premises, and that plaintiff have judgment against K. Arakelian and Rosa K. Arakelian for any deficiency that might remain after applying all of the proceeds of the sale to the satisfaction of said judgment. The trial court's refusal to grant appellant a trial by jury is also made an assignment of prejudicial error.

An expert chemist familiar with the district in which said Fresno county lands are situate caused borings to be made in various parts of said tract and analyzed the soil taken therefrom and pronounced it unfit for any purpose. Others well acquainted with said lands and the district in which they are situate testified that said lands were low and flat, subject to heavy overflows from adjacent sloughs and streams, and by reason of the impervious clay strata which lies at varying depths below the surface, overflow waters are held in vast quantities upon the surface until late in the summer season; that the soil is so strongly impregnated with alkali and magnesia as to make it impossible to grow any kind of fruit trees or vegetables or cereals known to produce crops in that section of the state. The cost of reclamation and the elimination of superabundant hostile elements would be greatly in excess of the revenue which could be derived from it for any known farm or agricultural uses.

Upon the record before us there is absolutely no other conclusion deducible from the evidence but the one that said lands have but a nominal value. The owner, Mr. K. Arakelian, testified that in placing said real property in the hands of his agent, the Laymance Real Estate Company of Oakland, for exchange purposes, he declined to place a value upon the same when requested to do so by Mr. William J. Laymance, a member of said company who personally conducted the transaction. At the trial neither K. Arakelian nor his son, D. Arakelian, aged 28 years and familiar with said lands, nor his wife, Rosa K. Arakelian, who claims to be the exchange owner of the Oakland real property, gave any evidence as to value. William J. Laymance was deceased at the time of trial. The claim made by K. Arakelian that he placed no value upon said lands to his agent is disputed by the appellant. The inherent improbability that K. Arakelian declined to value said property in the circumstances of the situation and the directions he is reported to have given to his agent, Laymance, on this subject pending negotiations, will be considered later.

The Oakland property at the time of the execution of said agreement to exchange property was leased to L. H. Spotts by lease dated November 1, 1919, for a term of five years,

The rentals reserved for the ground floor and basement were, for the first six months, \$500 per month; for the second six months, \$550 per month; for the third six months, \$600 per month; for the fourth six months, \$650 per month; for the third year, \$750 per month; for the fourth year, \$850 per month; for the fifth year, \$950 per month, subject to the owner's right of cancellation. The upper floors were on a straight monthly rental basis of \$500 per month. Payment of rentals was secured by a cash interest bearing bond in the sum of \$2,000. Said real property was held subject to a mortgage of \$100,000 in favor of the Oakland Bank of Savings.

Negotiations were first opened and a proposal of exchange was first made by K. Arakelian in writing on June 4, 1921. At that time said building was earning as rentals \$1,150 per month—\$650 for the ground floor and basement and \$500 per month for the other four stories. The rentals under the transferred lease dated November 1, 1919, were to be increased at the rate of \$100 per month for the third, fourth, and fifth years, respectively. The last year's rental, as provided in said lease, aggregated \$17,400 gross per annum—\$1,450 per month—which was better than interest at $8\frac{1}{2}$ per cent. per annum computed on \$200,000. Rentals derived from real property are an aid in determining value. *Bonnarjee v. Pike*, 43 Cal. App. 502, 185 P. 479; *Sullivan v. Hefling*, 66 Cal. App. 478, 226 P. 803; *Atlas Development Co. v. National Surety Co.*, 190 Cal. 329, 212 P. 196; *Nichols Applied Evidence*, vol. 5, p. 4595; 10 Cal. Jur. 847.

Appellant Proctor had operated in the purchase and sale of business property in the city of Oakland, but was never engaged in the occupation of real estate broker, and it was his rule not to invest in country properties. Mr. Laymance had been in his office many times in an effort to interest him in the purchase of real properties which he had listed for sale and had acted as his broker in the purchase of other properties. Appellant first learned of the Fresno county property early in the year 1921.

William J. Laymance was the active intermediary in putting the deal through. He first brought said Fresno county property to the attention of Mr. Proctor early in 1921 in what seemed to be a casual conversation, in which Laymance stated that he had a definite offer from Arakelian to exchange said Fresno property for the Mrs. A. A. Moore home, which was located on the opposite side of the street to appellant Proctor's residence in Piedmont. Laymance stated to Proctor that the Moore residence was appraised by its owners at \$175,000; that in addition to the Fresno county tract, consisting of 1,000 acres, \$75,000 was to be paid in cash or secured by a first mortgage on the Moore property. This deal fell through, as did several others in which the

Fresno county property was the main factor in the proposition of exchange. Laymance assured Proctor in subsequent conversations in which he was endeavoring to bring about a deal between him and Arakelian, that K. Arakelian was a man of high standing in Fresno county, a successful agriculturist, and director of banks, and was possessed of much property and means and desired to exchange a portion of his Fresno county property for east bay district real property, as he contemplated removing to the city of Oakland or one of its adjacent districts.

K. Arakelian was, in fact, a man of reputed wealth, being a director of the Fidelity Bank of the City of Fresno, and engaged in carrying on an extensive fruit and melon business in Fresno. As stated in his own words, he owned ranches located "all over the county," naming specifically Fresno, Madera, and San Joaquin counties.

That Laymance, prior to bringing the subject to Proctor's attention, had been actively co-operating with K. Arakelian in an effort to exchange said Fresno property for Oakland property, there is no room for doubt. As early as May, 1921, and upon several subsequent occasions, respondent K. Arakelian visited Oakland, and inspected, examined, and informed himself as to the value of Proctor's Oakland property. Proctor was not familiar with Fresno county property and had not and did not see it until some time after the exchange of deeds had passed. Neither had met the other, nor did they have immediate personal contact during the entire transaction. The evidence as to the false and fraudulent representations alleged to have been made by K. Arakelian through his agent Laymance mainly appears in the testimony given by Proctor, which was afterwards stricken from the record upon motion of the respondents. No evidence was accordingly given by any of the Arakelians in refutation of the main charges made against K. Arakelian and Rosa K. Arakelian by the complaint. The latter was not called to the witness chair for any purpose.

K. Arakelian, we doubt not, was eager to dispose of said Fresno county property for east bay property, and, knowing that Laymance was acquainted with and had had some business transactions with Proctor, he relied upon Laymance to deal personally with him and make replies, rather than to do so himself, to the many inquiries as to soil, productivity, location, improvements, and adaptability to present and future uses that are invariably made by prospective purchasers, none of which could have been frankly answered without blighting the prospects of a trade so far as the Fresno county lands were to be considered as a substantial part of the consideration.

On June 4, 1921, said K. Arakelian, without any personal conference with Proctor, caused

to be prepared and placed in the latter's hands a proposed agreement for the exchange of said properties. The proposed agreement contained the provision that the Laymance Real Estate Company was authorized to act as Arakelian's agent in negotiating said exchange, and the further provision that the Laymance Real Estate Company might also act as the agent of Proctor, from whom it might also receive a commission. As a part of the consideration of said proposal, Arakelian agreed to give to said Proctor "fifty-five thousand dollars worth of United States Government Liberty Bonds at par value, divided approximately in first, second, third, fourth and fifth issues," and also secure a loan of \$25,000 for said Proctor on said Fresno property on or before August 1, 1921, to be secured by Proctor's note and a first lien deed of trust payable two years after date, with interest at the rate of 7 per cent. per annum, payable semiannually. The assignment of the lease on the Oakland property was also a condition of the proposed agreement. The subsisting mortgage of \$100,000 on said Oakland property, held by the Oakland Bank of Savings, was expressly recognized. Said agreement also made said Oakland property subject to a second lien deed of trust in the sum of \$25,000 to F. A. Marshall, bearing interest at the rate of 6 per cent. per annum, due and payable on or before November 1, 1921, which said \$25,000 loan said Arakelian assumed and agreed to pay. What purpose this last-mentioned provision was meant to serve is not clear, inasmuch as no such loan was ever made and no trust was created thereunder. It seems to have dropped out of the case, and its purpose was not disclosed. Said proposed agreement in its final clause provided that 10 days were allowed Proctor for "seeing land and acceptance" of said contract. Proctor, upon receipt of the above proposed agreement, offered to accept the same provided the following proposed modifications be made: First, that it be understood that the water rights of the Fresno lands had not been conveyed and were still appurtenant to the said lands; second, that said Arakelian, in addition to the proposition therein made, pay to said Proctor the sum of \$25,000 in cash at the time of the transfer of deeds. The above offer and counter offer on the part of the parties thereto did not eventuate in the parties agreeing on all the terms as proposed by the respective parties. Negotiations were then resumed between Proctor and K. Arakelian through said Laymance in accordance with the proposition of K. Arakelian that the real estate firm of which Laymance was the active participant should conduct said negotiations, there being no direct communication as found by the court either by writing or otherwise on the subject between K. Arakelian and Proctor. Said agreement as originally proposed, or as sought to

be modified, did not receive the signatures of said parties. Negotiations seemed to have terminated for a time. Laymance made several trips to Fresno county in promoting the trade and put forth his best efforts to put Proctor in a frame of mind favorable to the ownership of the Fresno county property. He telephoned several times to Proctor from Fresno and called on him upon numerous occasions in an effort to stimulate his interest in the Fresno property.

On July 21, 1921, Proctor signed a proposed agreement for exchange of properties, doubtless procured by the efforts of Laymance, which in all material respects corresponded with the first proposal except that it omits any reference to the Marshall loan matter. By this contract Proctor proposed to give Arakelian his note for \$30,000 payable substantially at the time, in the manner and at the rate of interest provided in the first proposed written agreement. Parts of said contract not material to a decision of the case such as an adjustment of taxes, insurance, furnishing of certificates of title, etc., are omitted. On July 26, 1921, Arakelian proposed the following modification of said last proposal, which was accepted by Proctor: "And it is understood that said Laymance R. E. Co. may also act as agent for the owner of the first piece of property herein described, from whom they may also receive a commission. It being understood that I, said Arakelian am not to pay any commission."

Deeds to the properties proposed to be exchanged and escrow papers were subsequently executed and deposited with escrow holders and delivered in due course to the respective parties entitled to receive the same. The Oakland property was, upon the request of K. Arakelian, conveyed directly by Proctor to Rosa K. Arakelian, wife of K. Arakelian.

The learned trial judge found that it was true that William J. Laymance was the agent of K. Arakelian for the limited period of seven days beginning with the day he presented his proposed agreement of exchange, to wit, June 4, and ending on June 11, the day on which the court held that negotiations terminated. The court further found it to be true that said Arakelian by his proposed offer of exchange dated June 4, 1921, falsely represented that he could secure a loan of \$25,000 upon the real property then belonging to him, and that he then and there knew that no disinterested money lender, whether an individual or corporation, would loan in excess of \$5,000 on said real property. It found, on the other hand, that no other false representation was made *on said June 4, 1921*, or on any occasion *thereafter during any negotiations* for the exchange of said property by the said K. Arakelian either with the intent to induce Proctor to make said exchange of properties or that he did knowingly, wilfully, and designedly or at all make any representation

whatever to Proctor as to the value, character, or condition or capabilities or loan value of said property then belonging to him. The concluding finding on the issue of agency was that the second written agreement was initiated by said Proctor and that from July 21, 1921, to July 26, 1921, the date of its acceptance by K. Arakelian, said Laymance acted as the agent of Proctor, and from the last-named day to the final consummation of the transaction Laymance acted as the agent of both of said parties.

[1, 2] The inference that Laymance was Arakelian's agent to dispose of his property by sale or exchange for other property prior to June 4, 1921, independent of Proctor's testimony to the effect that Laymance had over a period of several weeks attempted to induce him to exchange his Oakland property for said Fresno county real property, is materially aided by the evidence of both K. and D. Arakelian and is the only reasonable and logical inference that may be deduced from a consideration of the transaction itself. D. Arakelian, the son of the elder Arakelian, admitted that he had talked over the Mrs. A. A. Moore deal with Laymance. This testimony was in corroboration of Proctor's reference to the negotiations by Laymance of a trade for the Moore property heretofore adverted to, which incident occurred some time prior to Proctor's knowledge of or connection with the Arakelian property exchange. Again, the elder Arakelian, upon examination to determine what interest, if any, his wife had in the property in suit, made it reasonably certain that Arakelian had authorized Laymance to negotiate an exchange of the Fresno lands at a time before Proctor was brought into the transaction. His evidence as to his conversation with his wife as to the terms of the proposed trade cannot be reconciled upon any other reasonable theory. The finding that Laymance was not the agent in the sale or exchange of the Fresno property for Oakland property prior to June 4, 1921, is contrary to the fact as disclosed by the record. While the trial court held that Laymance was not the agent of Arakelian until June 4, 1921, and that he falsely and fraudulently represented the loan value of his property in his written offer, it further held that inasmuch as the offer was not accepted in the precise terms in which it was made and was not executed as presented, any representations affecting the value of said property, however fraudulently made with a view of inducing Proctor to enter into said proposed agreement, would not be competent evidence for the court's consideration in determining whether the final action of Proctor in entering into the exchange was influenced by said false and fraudulent representations made in an effort to induce him to consent to the terms of the first proposed agreement. We think this position untenable. The ultimate

object of all of the negotiations looked to the exchange of the real properties in suit which was finally consummated.

Even though there were lulls in the negotiations at times, they were, nevertheless, resumed and finally terminated in the exchange of said properties, which was the ultimate object from the first sought to be accomplished. Where a person resorts to false and fraudulent representations of a material fact to gain an undue advantage over another and thereby induces him to believe that said representations are true, in the absence of a showing that the said false representations were removed, it will be presumed that they operated upon the mind of the person whom it was intended should be deceived to his prejudice thereby.

In the instant case, whatever false representations were intentionally made in the beginning of the negotiations, even though the propositions originally proposed failed, were proper matters to be considered by the court in determining whether the fraudulent representations unduly influenced the action of Proctor. He testified that he believed said false representations and would not have made the transfer if he had not believed the representations made by Arakelian and his agent Laymance were true. We, therefore, are of the view that any false representations made by Arakelian's agent prior to June 4, 1921, with a view of influencing Proctor to his prejudice, would be material evidence in the case.

Plaintiff testified upon the trial, and his testimony is uncontradicted, that in agreeing to the exchange he relied upon representations of Laymance to the effect that the Fresno county land was valued at \$75,000 to \$100,000, and could be readily sold for \$60,000; that it would sustain a bank loan of \$25,000, and had been very conservatively appraised as for bank loan purposes by an appraiser for the Bank of Italy, to whom Arakelian had introduced him, at \$45,000. It was further represented, Proctor testified, that the property was unimproved land ready for immediate cultivation and development and was suitable for the raising of alfalfa, rice, and various fruit trees; that Arakelian had not improved it because of his many other holdings, and then wished to dispose of it because he was coming to the bay district to live; that the major portion of the tract was high land, but readily irrigable from the Fresno slough, which passed through the property, and that there was little, if any, alkali in the land; that it was salable as a whole or in subdivision. Laymance exhibited to plaintiff pictures of the land, which he stated had been taken by himself and one of the Arakelians, and explained said pictures as supporting his assertions with regard to the land. D. Arakelian was present when said pictures were taken. They exhibited a likely landscape, but

could not have afforded Proctor any information as to the character of the soil. It is claimed that they are misleading.

The unrestrained authority that was conferred upon Laymance by K. Arakelian, as to the value that he might place upon the lands of which Arakelian was the owner and its capabilities, is best illustrated by the testimony of Mr. Arakelian given in support of his claim that he refused to place a value upon it to Mr. Laymance, in whose hands he had placed it for sale or exchange:

"Q. [Directing his attention to the value of the Arakelian land.] Did you have any conversation with him [Laymance] about that matter? A. We had a conversation.

"Q. What? A. We had a conversation.

"Q. What was it? A. Well, he asked me what I valued the land at, and I told him I didn't value it at nothing, to go and see it for yourself, find out yourself. I didn't want to put any price on it.

"Q. You placed no value on it? A. No."

Interrogated as to whether he had had any conversation with Laymance as to crops that had been produced on said lands, his answer was, "No." He admitted that Laymance inquired of him as to how much a bank would loan on said property, and his answer was, "I told him I didn't know, to go and find out for yourself." It would seem most strange and fall far without the usual that a large landowner and a man of affairs offering a portion of his property for sale would refuse to place any value thereon or to give his agent, who is totally unacquainted with his real property, any information as to its capabilities to produce crops or its adaptability for farming or commercial purposes. It would seem that such replies as above shown to have been made to pertinent questions as to value would by inference at least encourage the agent to go to unwarranted lengths in his representations as to values and productiveness of soil.

The theory of the respondents and the court seemed to be that the misrepresentations testified to by Proctor were made before June 4, 1921, and prior to the establishment of agency. The fact that the first agreement offered by Arakelian expressly acknowledged Laymance as his agent is not evidence that he was not his agent prior to said day. The facts and circumstances impel a contrary inference.

The following testimony of Mr. Arakelian supports what is above stated:

"Q. When was the first conversation that you had with Rosa K. Arakelian regarding this deal with Mr. Proctor? A. I don't remember the date.

"Q. Was it previous to the time of the offer of June 4th? A. I don't remember as to that, probably was. * * *

"Q. Any conversation you had with your wife before this deal with Mr. Proctor? A.

Well, I told her that there was a deal over here to trade the Oakland property for the thousand acres I had."

While the time is not as definitely fixed as it should have been and perhaps could have been fixed, we are of the view that reading the case in its entirety there are substantial grounds supporting appellant's contention to the effect that Laymance had the Arakelian real property listed for sale or exchange some weeks before June 4, 1921, and, this being so, the testimony bearing on representations made during this period of agency was admissible and should not have been stricken out.

[3] The findings of the trial court would indicate an attempt to treat the negotiations which began with Proctor's offer of July 21 as independent of previous dealings. We regard this division as artificial, as the inquiry here is whether the intent to commit a fraud was in the mind of the person charged. This issue may be determined by plans previously laid, if any, and all acts leading to its consummation may be shown in evidence. It is true that following the suggestion made by Arakelian in his first offer of exchange Proctor in his subsequent offer provided that Laymance might act as the agent of Arakelian and said offer was accepted with a few modifications. But even if this be so, that would not wipe from the mind of Proctor the false impressions previously made by Laymance, nor would it extend a privilege to Laymance to repeat them or immune Arakelian from liability for the acts of Laymance if it be shown that he and Arakelian were acting in concert to defraud Proctor. An agent may become unfaithful to his trust, and where he does both the agent and a third party with whom a conspiracy has been formed to defraud another may be called to account in damages. Such cases are made out by the facts and circumstances presented.

[4] The great discrepancy of values was enough to put Arakelian on notice that the transaction was grossly unfair if it could be said that he did not have actual knowledge of the misrepresentations that were being made by Laymance. The large earning ability of the Proctor business building situate in the heart of the Oakland business district has already been noticed. Plaintiff produced apparently conservative real estate dealers who were familiar with land values in Oakland who placed the value as high as \$200,000 or \$201,000. The witnesses called by the defense valued said business building from \$140,000 to \$150,000. No finding was made as to either Arakelian's or Proctor's respective properties. If the lowest appraisal placed upon Proctor's real property by defendants' witnesses be taken as the basis of valuation, his loss in the transaction would exceed \$20,000, and if the values fixed by Proctor's witnesses be the basis of valuation, his loss would ap-

proximate \$80,000. Any conservative view of the situation that may be taken will show that Proctor's loss is startling, considered with reference to the transaction. This gross inequality between the value of the property Arakelian was to transfer in the trade, and the value of the property he was to receive and which he had inspected was so great that it must have suggested to him that the offer would not have been made except for imposition upon plaintiff by Laymance, whom Arakelian knew had been actively engaged in promoting the exchange, and reliance upon the implication in Arakelian's offer of June 4 that the property was of a value to sustain a loan of \$25,000. In such a case Arakelian was put upon inquiry and is charged with such notice of the imposition as he would have obtained had he made inquiry. The action is to be determined as if Arakelian had actual notice of the imposition.

[5] Nor are we of the view that Proctor was precluded from recovery because he accepted as true the positive assertions of Laymance and Arakelian without instituting an independent investigation to determine the value of the Fresno county land. Proctor operated on a large scale in buying and selling city property on his own account and in financing, but he had no personal knowledge of farm lands in Fresno county. Arakelian was represented to him to be and was in fact a bank director and successful agriculturist in Fresno county. He was the owner of large agricultural holdings in Fresno, Madera, and San Joaquin counties. Proctor testified that Laymance had acted as his agent in the purchase of property upon eight or ten occasions, including the purchase of the Oakland property herein involved, and that he had always found him reliable and had confidence in his integrity. He further testified that the press of a large New York business deal he then had under way kept him from making the trip to Fresno county, and but for the representations of Laymance and Arakelian, upon whom he relied, he would have investigated its value and character. Under such circumstances Arakelian cannot avoid liability by asserting that Proctor need not have relied on the representations made. *Dow v. Swain*, 125 Cal. 674, 58 P. 271; *Harris v. Miller*, 196 Cal. 8, 235 P. 981; *Faull v. Johnson* (Cal. App.) 270 P. 993; *French v. Freeman*, 191 Cal. 579, 217 P. 515; *Teague v. Hall*, 171 Cal. 668, 154 P. 851.

[6] It is the claim of appellant that Arakelian knew, as found by the court, that no bank or disinterested individual would loan the sum of \$25,000 on his said property, and before he agreed to secure such a loan he made special investigation as to Proctor's financial standing, and finding it to be sound made the loan, not with the expectation of realizing that amount from a sale of said property, but by compelling its payment by

Proctor. The court's finding that no bank or disinterested individual would loan \$25,000 on said property is supported by the evidence.

The evidence offered to show that the bonds which were passed in the deal were the separate property of the wife does not satisfactorily establish that claim. It does no more than show them to have been purchased by community property and held in the exclusive possession of the husband. His conduct both before and subsequent to the transaction tends to show that the bonds were held under his control and ownership as other common property was handled by him.

Respondents contend that the appellant was guilty of laches and the court found with them on that issue. The action, which was not one for rescission, but for an affirmation of the transaction and the foreclosure of a lien which arose in a transaction involving fraud, was brought within the statutory period provided by law. The appellant did not make written complaint at once, but did protest the transaction in writing in February, 1923, and attempted to bring about a settlement. The installments of interest paid by him, amounting to \$3,150, were paid with a notation that he did not thereby waive any rights in the premises.

[7-10] We are of the view that the appellant was not entitled to a jury trial as a matter of right. The complaint presents a plain case for the foreclosure of a vendor's lien. Section 3046, Civ. Code. The enforcement of such liens is a well-recognized function of courts of equity. *Clark v. Brown*, 141 Cal. 93, 74 P. 548; *Hibernia, etc., Soc. v. London, etc., Ins. Co.*, 138 Cal. 257, 71 P. 334. It follows that a jury may not be demanded of right in actions to foreclose liens. *Curnow v. Happy Valley Blue Gravel, etc., Co.*, 68 Cal. 262, 9 P. 149; *Walker v. Sedgwick*, 5 Cal. 192; *Downing v. Le Du*, 82 Cal. 471, 23 P. 202; *Vance v. Gilbert*, 178 Cal. 574, 174 P. 42; *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 108 P. 42; *Case v. Copren Bros.*, 45 Cal. App. 159, 187 P. 772. No distinction in the matter of a jury trial is to be made between a vendor's lien for the unpaid purchase price and other liens. Not only is the action for the foreclosure of a vendor's lien an equitable proceeding, but the right to the lien is a creature of equity, now recognized by statute. Section 3046, Civ. Code; *Woolley v. Wickerd*, 97 Cal. 70, 31 P. 733; *Selna v. Selna*, 125 Cal. 357, 58 P. 16, 73 Am. St. Rep. 47; *Martin v. Becker*, 169 Cal. 301, 146 P. 665, Ann. Cas. 1916D, 171; *Royal Cons. Mining Co. v. Royal Cons. Mines*, 157 Cal. 737, 110 P. 123, 137 Am. St. Rep. 165. Although an action for relief which can be afforded only by a court of equity may involve questions of fraud and deceit such as are cognizable in a court of law, plaintiff is not entitled to a jury trial on such issues when they arise in an equitable proceeding. *Angus v. Craven*, 132 Cal. 691, 64 P. 1091.

An action for the cancellation of a note or other instrument on the ground of fraud in its procurement is likewise equitable. *Ballou v. Avery*, 175 Cal. 641, 166 P. 1003; *Angus v. Craven*, 132 Cal. 691, 64 P. 1091; *Rocha v. Rocha*, 197 Cal. 396, 240 P. 1010; *Pomeroy v. Collins*, 198 Cal. 46, 243 P. 657; *Montgomery v. McLaury*, 143 Cal. 83, 76 P. 964.

We see no reason on principle why a vendor under facts which are sufficient to establish fraud should not be entitled to a lien in a transaction involving the exchange of real property.

It is not our intention in our discussion of the case as presented to prejudice any defense that respondents may make in case a retrial is had. We have stated the case as presented by the record before us and have drawn the conclusion therefrom which we feel must inevitably follow.

Permission is granted the plaintiff to amend his complaint, if so advised, as to the nature of the relief he may seek.

Judgment reversed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.

208 Cal. 785

In the Matter of the Application of J. W. MARSDEN, on Habeas Corpus. (Cr. 3255.)

Supreme Court of California. Sept. 12, 1929.

In Bank.

Application for writ of habeas corpus, prayed to be directed to the Warden of Folsom State Prison, to secure petitioner's release from custody. Writ denied.

Herman Bachrack, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Lionel B. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM. The application of the petitioner herein for relief upon habeas corpus is denied, upon the authority of *In re Haines*, 195 Cal. 605, 234 P. 883.

The writ of habeas corpus is discharged, and the prisoner remanded.

208 Cal. 785

In the Matter of the Application of Abe RUBIN on Habeas Corpus. (Cr. 3257.)

Supreme Court of California. Sept. 12, 1929.

In Bank.

Application for writ of habeas corpus prayed to be directed to the Warden of Folsom State Prison to secure petitioner's release from custody. Writ denied.

Herman Bachrack, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Lionel B. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM. The application of the petitioner herein for relief upon habeas corpus is denied upon the authority of *In re Haines*, 195 Cal. 605, 234 P. 883.

The writ of habeas corpus is discharged, and the prisoner remanded.

100 Cal. App. 452

KNOX v. SUPERIOR COURT IN AND FOR RIVERSIDE COUNTY et al. (Civ. 6668.)

District Court of Appeal, Second District, Division 1, California. Aug. 27, 1929.

1. Judgment $\Rightarrow$ 153(2)—Trial court, after more than six months from taking of default, is without jurisdiction to vacate default or ensuing judgment.

Where more than six months have elapsed after a default has been regularly taken, trial court is without jurisdiction either to vacate such default or ensuing judgment.

2. Judgment $\Rightarrow$ 176—Plaintiff by amending complaint and setting cause for trial after vacation of default and judgment held not estopped to question trial court's jurisdiction.

Where plaintiff, after obtaining a default and judgment, amended complaint and caused action to be set for trial after order vacating default and judgment, plaintiff was not estopped to raise question of jurisdiction of trial court to proceed thereafter, since plaintiff had right to protect interests in any and every legal matter, and in order that estoppel may operate it is at least essential that person claiming benefits should have been misled to his injury by conduct of opposing party.

3. Prohibition $\Rightarrow$ 3(2)—On application for prohibition where identical question which could be presented on appeal was fully presented and considered, prohibition was granted, notwithstanding remedy by appeal (Code Civ. Proc. § 1103).

Where, on application for writ of prohibition to prevent trial of certain action pending in superior court in which default and judgment were vacated more than six months after default, precluding jurisdiction in superior court to vacate such default or ensuing judgment, and identical question which would be presented on appeal had been fully presented and considered, prohibition was granted notwithstanding Code Civ. Proc. § 1103, providing prohibition may be issued in all cases where there is not plain, speedy, and adequate remedy in ordinary course of law.

Application for writ of prohibition by E. W. Knox, prayed to be directed to the Superior Court of Riverside County, Hon. Oakley K. Morton and another, Judges thereof,

to prevent trial of a certain action pending therein. Writ granted.

William Ellis Lady, of Los Angeles, for petitioner.

Winterer, Combs & Ritchie, and L. S. B. Ritchie, all of Los Angeles, for respondents.

HOUSER, J. So far as this proceeding is concerned, the essential facts are that in an action instituted by petitioner Knox in the superior court of the county of Riverside (No. 17914 of the files of said court) against one Wyman and Title Guarantee & Trust Company, a corporation, each of said defendants failed to answer the complaint therein, and the default of each of them was regularly taken and judgment entered. About five months later, under the provisions of section 473 of the Code of Civil Procedure, Title Guarantee & Trust Company, a corporation, *as trustee*, and one Aamoth, individually (the latter of whom claiming as assignee of the rights of defendant Wyman in the subject-matter of the action), served the plaintiff in said action with a notice that on a specified date, which was more than six months after the default in the action had been taken, they would move the trial court to vacate the default and the judgment entered in the action. On stipulation of the parties, several continuances of the hearing of the motion were ordered by the trial court; but the motion was finally granted. Thereupon, as against Title Guarantee & Trust Company, a corporation, *as trustee*, and Aamoth, individually, the plaintiff filed an amended complaint in the action, wherein, in addition to the original cause of action, he set up a second count. Later, plaintiff moved the trial court to vacate its former order by which the default of the original defendants was vacated, which motion was by the court denied. The substituted defendants then answered the amended complaint and at the same time set up facts from which they demanded affirmative relief. On motion of the plaintiff the cause was then set for trial. Thereafter the plaintiff attempted to file with the clerk of the court a dismissal of the action so far as the amended complaint differed from the original complaint as to parties and subject-matter. The clerk refused to file said dismissal, but, on request of the plaintiff, permitted it to remain in the office of the clerk. In view of such facts, petitioner here seeks a peremptory writ of prohibition in the action pending in the lower court by which said court shall be restrained from proceeding to a trial thereof, or from taking or permitting further or other proceedings therein.

[1] In the case of Title Insurance & Trust Co. v. King L. & I. Co., 162 Cal. 44, 120 P. 1066, it is held that where more than six months have elapsed after a default has been regularly taken the trial court is without ju-

risdiction either to vacate such default or the ensuing judgment. To the same effect are *Wheelock v. Superior Court*, 67 Cal. App. 601, 227 P. 931, and *Colthurst v. Harris* (Cal. App.) 275 P. 868, where other authorities are cited.

[2] Respondents suggest that by the conduct of the plaintiff in the action in the lower court after the order by which default and judgment was vacated, whereby he amended his complaint and caused the action to be set for trial, he is estopped from now raising the question of jurisdiction of the trial court to proceed in the matter. No authorities sustaining such position are cited by respondents; nor has this court been able to discover a principle of equity, or, more particularly, a principle governing the doctrine of estoppel, by which the plaintiff may be deprived of the remedy afforded him by law. It is manifest that whatever may be the legal situation which arose from the order of the trial court in vacating the default and the judgment in the action, plaintiff had the right to protect his interests in any and every legal manner prescribed by the statutes and the practice of the courts. Nor is it apparent in what manner any legal injury has been suffered by the respondents, or the defendants in the action, or either of them, by reason of the aforesaid acts of plaintiff of which complaint is made. In order that the doctrine of estoppel may operate, it is at least essential that the person claiming the benefits must have been misled to his detriment by the conduct of the opposing party.

[3] Respondents also urge that because the plaintiff has the right of appeal from any judgment which may be rendered against him in the action, by the terms of section 1103 of the Code of Civil Procedure he is not entitled to a writ of prohibition in the premises. Although, strictly speaking, such position may be correct, since the identical question which would be presented on appeal has been fully presented to and considered by this court in this proceeding in the interests of efficiency and the saving of expense and inconvenience to the litigants, it may as well be answered in this proceeding as later on appeal. As was said by the Supreme Court in the case of *Davis v. Superior Court*, 184 Cal. 691, 696, 195 P. 390, 393, where a similar situation was present: " * * * While the existence of the right of appeal at that time might have been a sufficient reason for that court to have then refused to entertain the petition (*Glougie v. Superior Court*, 169 Cal. 675, 147 P. 972), yet in view of the fact that the superior court was then and ever since has been without power or jurisdiction to proceed further in the action, as we have shown, but nevertheless proposes to do so, and that further proceedings of any kind, except to again dismiss the action, would be void, we are disposed to grant the writ, rather than put the parties to further vexation and useless ex-

pense by further attempts to prosecute it. The question is largely one of discretion, and we deem it the better policy to terminate the proceedings forthwith." See, also, *Col County v. Superior Court*, 196 Cal. 604, 621, 622, 239 P. 926.

It is ordered that the respondents and each of them be and they are restrained and prohibited from any and all further proceedings in the action to which reference has been had herein.

We concur: CONREY, P. J.; YORK, J.

100 Cal. App. 498

ROCK v. ORLANDO et al. (Civ. 6961.)★

District Court of Appeal, First District, Division 2, California. Sept. 5, 1929.

*Rehearing Denied Oct. 3, 1929. Hearing Denied by Supreme Court Nov. 4, 1929.

1. Appeal and error ⇨1002—Finding, in action of pedestrian hit while crossing highway, based upon conflicting evidence as to party guilty of negligence, was conclusive.

In action for injuries received by pedestrian when hit by truck while crossing highway, where evidence as to who was guilty of negligence conflicted, finding was conclusive.

2. Appeal and error ⇨930(1)—All reasonable inferences are indulged in support of jury's finding on conflicting evidence.

All reasonable inferences are to be indulged in support of finding of jury on conflicting evidence.

3. Automobiles ⇨193(10)—Owner was not liable for negligence of driver using truck without knowledge or consent of owner.

Where, at the time truck driver hit pedestrian crossing highway, driver was engaged in mission wholly his own and his use of truck was without knowledge or consent of owner, owner was not liable for negligence of driver.

4. Automobiles ⇨226(2)—Instruction that negligence of pedestrian struck by automobile in crossing highway would not bar recovery unless it proximately occasioned injuries was proper.

In action for injuries received by pedestrian when hit by truck while crossing highway, instruction that, if pedestrian was guilty of negligence in crossing highway, such negligence would not bar recovery unless it proximately occasioned or contributed to injuries, was correct statement of law applicable to case.

5. Negligence ⇨89(1)—Negligence of truck driver who hit pedestrian crossing highway was imputed to defendant, who signed driver's license (St. 1923, p. 517, § 62, subd. b).

Negligence of truck driver who hit pedestrian crossing highway was imputed to defendant who signed application of truck driver for license, under St. 1923, p. 517, § 62, subd. b.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Edward G. Rock against Peter Orlando and others. Judgment for plaintiff, and defendants appeal. Affirmed in part and reversed in part.

Owen D. Richardson and O. H. Speciale, both of San Jose, for appellants.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

PRESTON, Justice pro tem. This is an appeal by defendants Peter Orlando, Joseph Orlando, and Peter Orlando, Jr., from a judgment entered against them upon a verdict of a jury in the sum of \$3,500.

The facts, as testified to by respondent and his witnesses, are briefly these: On Sunday afternoon, May 15, 1927, at about the hour of 7 p. m., respondent Edward G. Rock and his wife were traveling from Saratoga, in Santa Clara county, to San Francisco, in a Franklin automobile owned and driven by Louis Houle. When they reached a point on the state highway about halfway between the towns of Sunnyvale and Cupertino, the driver stopped on the right-hand side of the highway, and respondent stepped out on the left side of the car, and after looking for approaching cars, proceeded toward the opposite side of the highway, where a fruit stand was located. He continued across the highway until he cleared the paved portion of the road and was about 5 feet off of the paved portion of the highway when he was suddenly struck by a Ford truck coming south on the highway at a high and dangerous rate of speed and off the paved portion of the road, driven by appellant Joseph Orlando. As a result of this collision, respondent suffered a fractured right leg and other injuries and bruises.

The appellants charge respondent with contributory negligence in running suddenly across the highway in front of the Ford truck, making it impossible for the driver to stop the truck in time to avoid the accident.

Appellants' contention is supported by the testimony of Joseph Orlando, the driver of the Ford truck, and Peter Ceflu, who was riding on the truck at the time of the accident, and also by the testimony of one or two other witnesses who were near the scene of the accident.

[1, 2] Therefore, upon the vital question of who was guilty of negligence, the evidence is decidedly conflicting. The jury undoubtedly accepted the testimony of respondent and his witnesses as being a correct statement of the facts and circumstances of the accident, and their evidence amply supports the implied finding of the jury that the accident was caused solely by the negligence of Joseph Orlando, the driver of the Ford truck. The finding of the jury upon conflicting evidence is conclusive, and all reasonable inferences are to be indulged in support thereof. The

authorities supporting this well-established rule are legion and need not be here cited.

[3] It is first contended by appellants: "That there is nothing in the evidence to show that Joseph Orlando, the driver of the Ford truck, was the agent, employee, or in any manner, driving the automobile with the permission, authority or knowledge of the owner, Peter Orlando, Jr."

This contention is ignored entirely by respondent in his brief. We think, however, it must be sustained. The record is entirely barren of any evidence that would warrant the jury in finding that the negligence of Joseph Orlando, the driver of the Ford truck, was imputed to Peter Orlando, Jr., the owner thereof, who was not present at the time. The only evidence that we are able to discover in the record accounting for the fact that Peter Orlando, Jr.'s truck was in the possession of his brother, Joseph Orlando, at the time of the accident, was that given by Joseph Orlando himself. He testified in part as follows:

"Q. At that time (at the time of the accident) where were you going? A. I was going to see a friend of mine in Cupertino.

"Q. Were you on any business of anybody's? A. Not exactly.

"Q. Well, exactly, or particularly or any other way, were you on any other business except going to see a friend? A. I was going to see a friend of mine, used to work for him, thought I would go up and see him was all.

"Q. Did anybody give you permission to use that car that day? A. No.

"Q. Where was the car when you took it? A. It was home.

"Q. Was Peter Orlando, Jr., there? A. No, nobody was home but myself. I had just come in from San Juan baseball game. I took the car with my nephew.

"Q. Did you run the Ford to San Juan that day? A. No, the Ford was home. I had gone up with a neighbor of mine."

Therefore it is clear from the evidence that at the time of the accident Joseph Orlando was engaged in a mission wholly his own, and that his use of the Ford truck was without the knowledge or consent of the owner.

Clearly under such circumstances, Peter Orlando, Jr., the owner of the truck, is not liable for the negligence of the driver, Joseph Orlando. *Brown v. Chevrolet Motor Co.*, 39 Cal. App. 738, 741, 179 P. 697; *Maupin v. Solomon*, 41 Cal. App. 323, 183 P. 198; *Martinelli v. Bond*, 42 Cal. App. 209, 212, 183 P. 461; *Berry on Automobiles* (2d Ed.) §§ 601, 618; *Mullia v. Ye Planry Bldg. Co.*, 32 Cal. App. 6, 161 P. 1008; *Mauchle v. Panama-Pacific International Exposition Co.*, 37 Cal. App. 715, 174 P. 400; *Gousse v. Lowe*, 41 Cal. App. 715, 183 P. 295.

It might be contended by respondent that when Peter Orlando, Jr., admitted in his answer the ownership of the truck, coupled with

proof that it was in the possession of Joseph Orlando at the time of the accident, an inference could be drawn by the jury that the driver was acting as the agent or employee of the owner, and within the scope of his employment, and notwithstanding the clear and positive evidence that Joseph Orlando was not so acting. Still a conflict in the evidence was created and the owner's liability was a question of fact for the jury. Such contention would be entirely untenable.

The reasonable inference that might be drawn from respondent's prima facie case against Peter Orlando, Jr., is wholly dispelled when the uncontradicted evidence of Joseph Orlando was introduced, showing that his possession of the truck at the time of the accident was without the knowledge or consent of the owner.

Or, in other words, after the evidence of Joseph Orlando came before the jury and was not contradicted, then there was no conflict of evidence on this point, and the jury could not lawfully draw the inference that Joseph Orlando was the agent or in the employ of the owner of the truck at the time of the accident. *Maupin v. Solomon*, supra; *Brown v. Chevrolet Motor Co.*, supra; *Martinelli v. Bond*, supra; *Everett v. Standard Acc. Ins. Co.*, 45 Cal. App. 332, 339, 187 P. 996; *Fahey v. Madden*, 56 Cal. App. 593, 598, 206 P. 128; *Musachia v. Jones*, 65 Cal. App. 283, 298, 223 P. 1006; *Dowd v. Atlas Taxicab, etc., Co.*, 187 Cal. 523, 202 P. 870; *Mar Shee v. Maryland Assur. Corp.*, 190 Cal. 1, 210 P. 269; *Osborne v. Baughman*, 85 Cal. App. 224, 227, 259 P. 70.

[4] Appellants also contend that the court erred in giving the jury an instruction on contributory negligence, to the effect that if respondent was guilty of any negligence in crossing the highway, still such negligence on the part of respondent would not bar his recovery against appellants unless such negligence on the part of respondent proximately occasioned or contributed to the injuries he received. This instruction contained a correct statement of the law. *Rush v. Lagomarsino*, 196 Cal. 308, 237 P. 1066. We have carefully examined all the instructions given, and, when taken as a whole, they fully and correctly state the law upon all the issues involved in the case.

[5] Peter Orlando, Sr., is made a defendant for the reason that he signed his son's (Joseph Orlando's) application for a driver's license. Therefore the negligence of Joseph Orlando, the driver of the truck, was imputed to his father. Section 62, subd. b, California Vehicle Act (Stats. 1923, p. 517).

It follows from what has been said that the judgment against Peter Orlando, Sr., and Joseph Orlando should be affirmed, and the judgment against Peter Orlando, Jr., should be reversed; Peter Orlando, Jr., to recover his costs. And it is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 512

BRANDES v. RUCKER FULLER DESK CO.
et al. (Civ. 6864.)

District Court of Appeal, First District, Division 1, California. Sept. 6, 1929.

Appeal and error ⇨659(3)—**Motion on suggestion of diminution of record, to incorporate instructions in reporter's transcript, granted.**

On suggestion of diminution of record, motion to incorporate in reporter's transcript on file in appellate court two instructions duly certified by trial judge and filed, in order that record should show at whose request instructions were given, was granted.

Appeal from Superior Court, Alameda County; El. C. Robinson, Judge.

Action by Lydia Brandes against the Rucker Fuller Desk Company and another. Judgment for plaintiff. On motion for diminution of record, on appeal by defendants. Motion granted.

Donahue, Hynes & Hamlin, of Oakland, for appellants.

Ford & Johnson, of San Francisco, for respondent.

PER CURIAM. Appellants' motion, upon suggestion of diminution of the record, to incorporate in the reporter's transcript now on file in this court the two instructions duly certified by the trial judge and filed herein on August 30, 1929, in order that the record shall show at whose request said instructions were given to the jury, is granted. *McMahon v. Hamilton*, 202 Cal. 319, 260 P. 793.



100 Cal. App. 509

PEOPLE v. HANNA. (Cr. 1539.)

District Court of Appeal, First District, Division 2, California. Sept. 5, 1929.

1. Criminal law ⇨620(1)—**Order consolidating for trial two charges of robbery under two informations held proper (Pen. Code, § 954).**

Where accused was charged in two informations with having committed robbery on two different occasions, charges were properly consolidated for trial under Pen. Code, § 954, authorizing court to order informations consolidated.

2. Criminal law ⇨622(2)—**Order directing separate trials of two defendants jointly charged in one information with robbery held proper (Pen. Code, § 1098).**

Where defendants in one information were jointly charged with having committed robbery, order directing separate trials of two defendants was proper under Pen. Code, § 1098, authorizing separate trials on demand of any defendant or in discretion of court.

3. Indictment and Information ⇨15(1)—**Failure to order a new information filed eliminating name of defendant pleading guilty to information jointly charging defendants with robbery held not error.**

Where defendants were jointly charged in one information with having committed robbery and one defendant pleaded guilty to charge against him, it was not error to try case without ordering a new information filed eliminating name of defendant pleading guilty, especially where other defendant did not request court to make such order.

4. Witnesses ⇨393(6)—**On cross-examination of prosecuting witness in robbery prosecution, ruling requiring portions of transcript of examination in police court to be taken up one at a time held proper.**

In prosecution for robbery where defendant's counsel, at time prosecuting witness was under cross-examination, asked that whole examination in police court be considered read into record, and also asked witness to read entire transcript, ruling upon objection that portions of transcript should be taken up one at a time held proper.

5. Criminal law ⇨633(1)—**Refusal to hear motion after close of evidence and arguments to jury before instructions in robbery prosecution held not denial of constitutional trial.**

Refusal to hear motion, nature of which was not disclosed, after evidence in robbery prosecution was closed and arguments to jury were concluded and court was about to instruct jury, where at conclusion of instructions nothing further was said by either party or court about making motion, held not to deny constitutional trial, since it was not an entire refusal to hear motion, but a refusal to hear it at a particular time, and order of trial court was discretionary.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Boyd Hanna was convicted of robbery in the first degree, and he appeals. Affirmed.

James Davis, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

KOFORD, P. J. The defendant appeals from a judgment of conviction of two robberies in the first degree and an order denying his motion for a new trial.

[1, 2] No point is made as to the sufficiency of the testimony. The points raised relate to procedure. Appellant and William Titlow in one information were jointly charged with having committed robbery on the night of December 24, 1928, and under another information they were jointly charged with having committed another robbery on the night of December 29, 1928. Defendant Titlow pleaded guilty to one of the two charges against him. At a hearing on February 20, 1929, the public defender appearing for and representing appellant, Hanna, the court granted the

motion of the people without objection of the appellant that the two defendants be tried separately and that the two charges against appellant Hanna be tried together. These orders appear in the clerk's transcript as well as in the reporter's transcript. After a number of continuances the case finally came on for trial. Appellant was then represented by attorney Ewell. The order consolidating the trial of the two charges against appellant was properly made under the authority of Penal Code, § 954, and the order directing separate trials of the two defendants was properly made under Penal Code, § 1098.

[3] Appellant claims that the court should have ordered a new information filed eliminating the name of defendant Titlow. No authority is referred to in support of this contention, and no part of the record which has been called to our attention shows that appellant requested the court to make such an order.

[4] While the prosecuting witness was under cross-examination, appellant's counsel asked that the whole examination in the police court be considered read into the record and also asked the witness to read the entire transcript. Upon objection made, the court ruled that portions of the transcript should be taken up one at a time. The ruling was correct under the authority of *People v. Lambert*, 120 Cal. 170, 175, 52 P. 307.

[5] After the evidence at the trial was closed and the arguments to the jury were concluded, the cause was continued until the next day. When the court was about to instruct the jury, appellant's counsel, Mr. Ewell, stated that he wished to make a motion. Objection was made upon the ground that the case had been finished, that the court was about to instruct the jury, and that any motions should be made afterwards. The court then refused to hear the motion and proceeded to instruct the jury. At the conclusion of the reading of the instructions nothing further was said or done by either party or the court about making the motion. It does not appear in the record nor in the briefs what motion appellant's counsel desired to make. Several different supposed or possible motions which might have been made have been suggested, but none of them are of such a character that they could not have been made after as well as before the reading of the instructions. The refusal of the court to hear the motion after submission of the cause and before the instructions did not amount to a denial of a constitutional trial. It was not an entire refusal to hear a motion, but a refusal to hear it at a particular time. The order of the trial in this respect was in the control of the court's discretion. Under the circumstances narrated, appellant's counsel should have offered whatever motion he may have had in mind after the instructions were concluded.

Other points on appeal are mentioned but are unsupported by argument or citation of authority and are not well taken.

The judgment and order denying a new trial are affirmed.

We concur: STURTEVANT J.; NOURSE, J.

100 Cal. App. 491

STEELE v. MARLBOROUGH HALL CORPORATION. (Civ. 6825.)

District Court of Appeal, First District, Division 2, California. Sept. 5, 1929.

1. Replevin ⇨46—Mortgagee gaining possession of mortgaged property by replevin cannot sell property pending action (Code Civ. Proc. § 509).

Mortgagee gaining possession of mortgaged property by replevin cannot sell property pending action and make it impossible for defendant mortgagor to gain possession in case his rights shall be adjudged superior, as replevin, under Code Civ. Proc. § 509, by which plaintiff or defendant may gain possession before final judgment, is auxiliary proceeding and does not give party claiming full right of possession.

2. Injunction ⇨39—Preliminary injunction restraining mortgagee from selling replevined property was properly granted, where mortgagor had no adequate legal remedy (Civ. Code, §§ 3379, 3380; Code Civ. Proc. § 509 et seq., and § 526, subd. 3).

Where mortgagee gained possession of mortgaged property by replevin as against storage company, mortgagor not having been made a party, and mortgagee threatened to sell property, mortgagor had no adequate remedy at law, as Civ. Code, §§ 3379, 3380, and Code Civ. Proc. § 509 et seq., recognize and protect right of possession of specific personal property, and that right to damages is not full and adequate remedy for deprivation of personal property, and preliminary injunction was properly granted under Code Civ. Proc. § 526, subd. 3.

3. Appeal and error ⇨863—Merits of original foreclosure action could not be determined on appeal from preliminary injunction enjoining lessor from selling lessee's personal property mortgaged as security for rent.

Right of lessees to set off breach of lease by lessor against lessor's claim for rent unpaid, and question of lessee's waiver of lessor's breach by remaining in possession, went to merits of original foreclosure action, and could not be determined on appeal from preliminary injunction enjoining lessor from selling lessee's personal property under mortgage given to secure payment of rent.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Della Steele against the Marlborough Hall Corporation. From an order

granting preliminary injunction enjoining sale under chattel mortgage, defendant appeals. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, for appellant.

Walter H. Linforth, of San Francisco, for respondent.

KOFORD, P. J. This is an appeal from a preliminary injunction enjoining defendant and appellant from selling the furniture and furnishings of the Marlborough Hall Apartments under the terms of a chattel mortgage executed to secure the performance of the terms of a lease, particularly the payment of the rent reserved.

Appellant's predecessors in 1920 leased the said apartments to respondent for the term of ten years. The lessee at that time executed to the lessors a chattel mortgage upon the furnishings and furniture contained in the apartment house as security for the performance by the lessee of the terms and provisions of the lease. In September, 1927, appellant brought an action against the respondent for breach of the lease, alleging nonpayment of rent and damage to the apartment house and seeking the foreclosure by court of the said chattel mortgage. The respondent answered, denying that rent was due and unpaid, and filed a cross-complaint alleging breaches of the lease upon the part of the appellant in failing to keep the building and its elevators in repair and asking for damages by reason of such alleged breaches. This action had not been tried at the time of the submission of this appeal. In December, 1927, appellant served upon respondent a three-day notice to quit or pay rent. Respondent vacated and commenced to remove the furnishings and furniture covered by the chattel mortgage. Appellant then applied to the court in said foreclosure action for a restraining order against the removal of the chattels. Both parties were represented at the hearing of this application. A restraining order was issued against the removal of the chattels then still remaining in the apartment house, and an order was issued for respondent to show cause why a mandatory preliminary injunction should not issue requiring respondent to replace the chattels already removed. Upon the hearing of this order to show cause, the requested mandatory preliminary injunction was denied. Appellant states that the court in denying this injunction took the view strongly urged by respondent upon the trial court that appellant had an adequate remedy at law by instituting a replevin action under the terms of the chattel mortgage. Appellant then commenced an action in replevin for the recovery of the chattels against the Bekins Van & Storage Company, in whose warehouse respondent had stored the furniture and furnishings removed from the apartments. Appellant filed a \$30,000 bond in

claim and delivery proceedings in that action. Respondent, who had not been made a party defendant in that action, filed a third party claim with the sheriff claiming to be the owner of and entitled to the possession of the property and alleging it to be of the value of \$35,000. Appellant gave the sheriff an indemnity bond in the sum of \$70,000 against this third party claim. Appellant thereupon gave notice that it would sell the chattels under the terms of the chattel mortgage which provided that "if the mortgagor fails to make any payment as provided in said lease, then the mortgagees may take possession of said property, using all necessary force so to do, and may immediately arrange to sell it. * * *". Thereupon the respondent filed the present action against appellant alleging the said facts, pleadings, and proceedings, alleging that no rent was "due or owing" respondent, and praying to be adjudged the owner of and entitled to the possession of the chattels and for a preliminary injunction enjoining the sale of the chattels by appellant. This preliminary injunction, after notice and hearing, was granted respondent upon giving a bond in the sum of \$1,000. From the order granting the same the present appeal is prosecuted.

Appellant's claims are: First, that it has the legal right under the terms of the mortgage to take possession of and sell the chattels for breach of conditions of the lease, that possession was essential to such sale, that replevin was the correct method of obtaining such possession, that, having obtained possession by claim and delivery proceedings and bond, it had full and complete legal possession, and that a replevin plaintiff in possession has the right to sell even before the final judgment in the action; second, that in weighing the equities and in exercising its discretion, the court should have denied the preliminary injunction, because respondent is in arrears in rent, because she would not suffer irreparable injury by the proposed sale by appellant, being protected by the large bond given the sheriff to indemnify him against her third party claim, and because she had an adequate remedy at law by instituting a new replevin action, she not having been a party to the appellant's replevin action against the storage company.

The respondent's contentions are: First, that the appellant had no right to sell the chattels because they were in custodia legis while held by appellant under claim and delivery proceedings pending the final judgment in the replevin action; second, that the court properly granted the preliminary injunction to preserve the property pending the determination of the issues joined in the foreclosure action, because otherwise a judgment for defendant would be unavailing, for the property would have passed into the hands of numerous purchasers at the sale.

[1] An action in replevin or in claim and delivery in this state is merely an action for the recovery of the possession of personal property. Code Civ. Proc., § 509. The proceedings allowed by section 509 et seq. of the Code of Civil Procedure, by which either the plaintiff or defendant may gain or keep possession before the final judgment in the action, are auxiliary proceedings. The possession obtained by the auxiliary proceedings of bond and claim and delivery is a temporary possession and does not operate to give the one so gaining possession the full right of possession like a final judgment in the action. A replevin plaintiff so gaining possession must keep the property so that it may be returned to the defendant in case the final judgment in the action awards it to the defendant. Such plaintiff, therefore, cannot sell the property pending the action and thus make it impossible for the defendant to regain possession in case he shall be adjudged to have the legal right of possession against the plaintiff. To hold otherwise would result in stripping an action for the recovery of possession of personal property of its distinctive character and make of it an action for conversion. To adopt appellant's view would mean that the defendant, who is by the Code given the last opportunity to bond and retain possession, could always force the plaintiff in the action to accept the value of the property instead of the property itself, which in a sense would be to force him to sell.

It has not been directly decided in California that such a replevin plaintiff may not divest himself of such possession by sale, but this result logically follows from those decisions which, in treating of the right to levy upon such property, hold that property thus possessed by a replevin plaintiff is in the custody of the law, that such possession is temporary, and that such plaintiff does not have the right to compel the defendant to accept the money value instead of the specific personal property. These cases are: *Hunt v. Robinson*, 11 Cal. 262; *Whetmore v. Rupe*, 65 Cal. 237, 3 P. 851; *Kneebone v. Kneebone*, 83 Cal. 648, 23 P. 1031; *Black v. Hilliker*, 130 Cal. 190, 62 P. 481; *Riverside Portland Cement Co. v. Taft*, 192 Cal. 643, 221 P. 357; *Hawi Mill, etc., Co., Ltd., v. Leland*, 56 Cal. App. 224, 205 P. 485; *Bisconer v. Billing*, 71 Cal. App. 779, 236 P. 329. There is some diversity in the decisions of other states upon the direct question of whether such a replevin plaintiff may sell and divest himself of possession pending the action, but the weight of authority is opposed to such right. *Wells on Replevin*, § 476; also, sections 470 and 474 to 480, inclusive; *Cobbey on Replevin*, §§ 702-706, 712-718, 720, and 722. In *Union National Bank v. Moline, Milburn & Stoddard*, 7 N. D. 201, 73 N. W. 532, the early cases on the point are compared, and it is stated that the weight of authority is that such plaintiffs may not sell pending the action. Cases directly in point

are: *Mohr v. Langan*, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503, overruling *Donohoe v. McAleer*, 37 Mo. 312, relied upon by appellant herein; *Scott v. Standridge*, 117 Okl. 111, 245 P. 591; *Federal National Bank v. McDonald*, 129 Okl. 75, 263 P. 105; *Mannausau v. Wallace*, 87 Mich. 543, 49 N. W. 1082; *O'Brien v. Curry & Whyte*, 111 Minn. 533, 127 N. W. 411, 137 Am. St. Rep. 563; *Republic State Co. v. Brown*, 158 Minn. 396, 197 N. W. 840, but holding otherwise where defendant merely claimed possession as security only, *Grattan v. Wilson*, 82 Colo. 239, 259 P. 6. The Pennsylvania and Massachusetts cases cited by appellant have been later distinguished. Perishable property and merchandise especially intended for sale have sometimes been referred to as an exception, but we are not here concerned with such property.

[2] Did respondent have an adequate remedy at law? As a third party claimant she could have sued the sheriff for damages for conversion, he being protected by an indemnity bond, but Civil Code, §§ 3379 and 3380, as well as Code of Civil Procedure, § 509 et seq., recognize and protect the right of possession of specific personal property. These sections recognize that the right to recover damages is not a full and adequate remedy for deprivation of personal property. The respondent was not made a party defendant in the replevin suit brought by appellant and could not reclaim possession of the property under Code of Civil Procedure, § 514, since the privilege of that section is given only to the defendant. Appellant does not claim that the statutory right given to a defendant to reclaim by bond would extend to a third party intervening in the action. Merely intervening would not stop the proposed sale by the replevin plaintiff. Appellant contends that respondent could have commenced a new and independent action in replevin against the appellant, but that would be in the nature of a cross-replevin, which has generally been disallowed. *Cobbey on Replevin*, §§ 708, 1225, and 1226; *Wells on Replevin*, §§ 257, 258. Replevin with claim and delivery proceedings by a third party against property already seized by the court in a prior replevin action would have little more in its favor than a levy in execution or attachment, which has been disallowed by the California authorities above cited herein. Such an action with claim and delivery proceedings, even if allowed, would be unavailing, since appellant herein, as defendant in such action, could reclaim the property upon a new forthcoming bond and, its possession remaining thus undisturbed, the proposed sale under the chattel mortgage would still threaten. It appears, therefore, that respondent had no adequate remedy at law with which to stop the proposed sale pending the determination of the issues tendered in the original foreclosure action commenced by the appellant.

[3] In that action the defendant, respondent

ent herein, denied that the rent was unpaid and also sought damages for breach of covenant of the lease by the plaintiff therein. Respondent claims that if this damage is allowed, it will offset as a counterclaim any rent unpaid because arising out of the same contract. While appellant claims that the lessee's covenant to pay rent secured by the chattel mortgage is a covenant which is independent of the lessor's covenant to keep in repair, nevertheless a proper counterclaim, if sufficient in amount, would result in no rent being due. Damages for breach of covenant may be offset in an action for rent (*McAlester v. Landers*, 70 Cal. 79, 11 P. 505), although it may not be done in an action of unlawful detainer (*Arnold v. Krigbaum*, 169 Cal. 143, 146 P. 423, Ann. Cas. 1916D, 370). The argument upon this point, however, as well as upon the question of whether the tenant waived the landlord's breach by remaining in possession, goes to the merits of the original foreclosure action which are carried into the merits of the injunction action. The ultimate merit of these actions cannot be determined upon this appeal from the preliminary injunction.

The statutory authority for the preliminary injunction appealed from is to be found in Code of Civil Procedure, § 526, subdivision 3, which allows an injunction to prevent a party to an action from doing "some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual."

The order appealed from is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

100 Cal. App. 482

COOKE v. DARNELL et al. (Civ. 6768.)

District Court of Appeal, First District, Division 1, California. Sept. 4, 1929.

1. Limitation of actions ☞192(3)—Allegations in complaint to set aside deed held to show discovery of fraud within period of limitations.

Allegation in complaint to set aside deed that plaintiff first began to discover fraud in month of December, 1922, but never fully discovered said fraud until 24th day of November, 1925, sufficiently stated discovery of fraud within period of statute of limitations, and action was not barred by such statute.

2. Deeds ☞211(3)—Evidence held to sustain allegation of fraud and failure of consideration in action to set aside deed.

In action to set aside deed because of fraud of grantee's representative in representing that deed was a temporary affair to raise money to secure medical treatment for grantor's brother, evidence held to sustain allegations of fraud and failure of consideration.

3. Appeal and error ☞173(10)—Laches is a defense and cannot be raised for first time on appeal.

Laches is a defense, and not condition of relief, and, if it does not appear on face of complaint, must be affirmatively pleaded and proved by defendant, and cannot be raised for first time on appeal.

4. Cancellation of instruments ☞34(1)—Laches was not available in action to set deed aside, brought within three years after grantee's representative told grantor that grantor had no interest.

Where grantee's representative told grantor in 1922 that grantor had no interest in property, defense of laches was not available in action brought within three years thereafter to set aside deed executed in 1919.

5. Cancellation of instruments ☞34(1)—Prejudice must be established before court will refuse to set aside deed on ground of laches.

In action to set aside deed because of fraud, prejudice must be established before relief will be denied on ground of laches.

6. Judgment ☞707—Judgment in action to set aside deed for fraud held not to affect validity of mortgages, where mortgagees were not proceeded against.

In action by grantor against representatives of decedent grantee to set aside deed because of fraud of representative of grantee in procuring deed, judgment had no effect on validity of mortgages; mortgagees not having been served with summons, nor appeared, and no evidence having been introduced to support allegations of complaint that mortgages were procured by fraud.

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Action by John Cooke against J. M. Darnell, individually and as administrator of the estate of Emma Darnell, deceased, and others. From a judgment for the plaintiff, the named defendant, individually and as administrator, appeals. Affirmed.

E. R. McNamara and Fred W. Carroll, both of Crescent City, for appellant.

George W. Howe, of Crescent City, for respondent.

KNIGHT, J. The defendant J. M. Darnell, in his own behalf and as administrator of the estate of his deceased wife, Emma Darnell, appeals from a judgment in an action brought by the respondent, John Cooke, to set aside a deed of grant, bargain, and sale whereunder respondent and Walter Cooke, as grantors, purported to convey to Emma Darnell title to a ranch in Del Norte county, containing 100 acres; it being alleged in the complaint that appellant obtained respondent's signature to said deed by fraudulent means and without the payment of any consideration. On stipulation, the action was tried before a jury sitting advisory to the court. Three special issues were submitted, all of which the jury de-

cided in favor of respondent, whereupon findings by the court were waived, and after adopting the special verdicts of the jury the court entered judgment for respondent.

The essential allegations of the complaint relating to the issue of fraud were as follows: "That the plaintiff was on November 26, 1919, a resident of and in Del Norte county, California, and was then unacquainted with legal documents and legal business, and was then on very friendly terms with said defendant J. M. Darnell, and was then and there worrying about the condition of his brother Walter Cooke (who was then and there suffering from a fatal disease), and thereby plaintiff was wholly incapacitated from attending to business, and the defendant J. M. Darnell then and there well knew these facts and conditions, and by reason thereof said defendant J. M. Darnell did then and there on said November 26, 1919, in said Del Norte county, California, take advantage of the plaintiff's said incapacity, and did then and there fraudulently procure the said plaintiff to sign a certain writing, without the payment or delivery to plaintiff of any consideration whatever therefor, which certain writing said defendant J. M. Darnell then and there falsely and fraudulently represented to plaintiff to be an instrument to be used by said J. M. Darnell in raising money to pay some expenses of said Walter Cooke (who afterwards died, March 30, 1920), and said defendant J. M. Darnell then and there falsely and fraudulently represented to plaintiff that said certain writing and instrument to be signed, and so signed, by plaintiff, at the request of said defendant J. M. Darnell, as aforesaid, was only a temporary affair."

It was further alleged that the representations so made were false, as appellant well knew; that said instrument was in fact a deed conveying all of respondent's interest in said ranch to appellant's wife; and that said deed was placed on record. The date of the recordation of the deed, however, was not stated. It was also alleged that within a few months after the execution of said deed Mrs. Darnell and appellant mortgaged the entire property to the defendant Sorensen to secure a note for \$500, and later Sorensen assigned a one-half interest in the mortgage to the defendant Evans; and three years subsequent to Mrs. Darnell's death appellant and his stepson (whose interest does not appear) placed a second mortgage on the entire property to secure the payment of an additional \$500, Sorensen and Evans being the mortgagees. Both mortgages, respondent alleges, were also fraudulent.

[1] Appellant demurred to the complaint upon the ground, among others, that the cause of action set forth therein was barred by the statute of limitations. The demurrer was overruled, and appellant assigns the ruling as error. It has been held that an allega-

tion that plaintiff did not know, understand, or discover the contents of the instrument at any time prior to the date within the period of the statute sufficiently states the discovery of the fraud within the period. *Moore v. Moore*, 56 Cal. 89; 4 Cal. Jur. 794. In the present case it was alleged "that plaintiff never knew that said writing [he had signed] was a deed, * * * nor that said deed was of record, until November 24, 1925"; also that "plaintiff first began to discover said fraud, hereinbefore referred to, in the month of December, 1922 (about the 10th day of December, 1922), but plaintiff, because of his poverty and his lack of knowledge of legal documents and legal business, never fully discovered said fraud until the 24th day of November, 1925." We are of the opinion that the foregoing allegations were sufficient to bring the complaint within the rule above mentioned, and that therefore the demurrer was properly overruled.

Answering the complaint, appellant denied the allegations of fraud, including the one charging that he represented to respondent that the instrument respondent was asked to sign was to be "only a temporary affair," and in respect thereto averred that when respondent signed the same he well knew the contents, nature, and legal effect thereof. The answer did not deny, however, the allegation that the instrument was executed "without the payment or delivery to plaintiff of any consideration whatever"; but, while testifying as a witness, appellant claimed, as will hereinafter appear, that he paid a consideration of \$600 for the conveyance of said property.

The three special verdicts submitted to the jury and its findings thereon were as follows:

"1. Did John Cooke know on the 26th day of November, 1919, that he signed a deed to his interest in the George Cooke estate? Answer—No.

"2. Did the defendant Darnell make the representations as alleged in substance in the complaint of plaintiff and were those representations false and believed by John Cooke? Answer—Yes.

"3. Do you believe that defendant Darnell paid \$600 to Walter Cooke for Walter Cooke and John Cooke for their signing that deed? Answer—No."

[2] We are of the opinion that the evidence is legally sufficient to sustain the allegations of fraud and failure of consideration, and also the special verdicts found by the jury and adopted by the trial court. It discloses the following facts: At the time the deed in question was executed, title to the ranch stood of record in the name of George Cooke, the father of respondent, John Cooke, Walter Cooke, and Mrs. Darnell. He died September 7, 1919, leaving surviving him as heirs at law the three children above named, and 2½ months subsequent to his death, and long before any steps

were taken to probate his estate, to wit, on November 26, 1919, the instrument in question was executed. It recites the payment to the grantors of a money consideration of \$350, and the indorsements thereon show that it was placed on record 2 days after the date of its execution. Walter Cooke died in March, 1920, 4 months after the deed was signed, and Mrs. Darnell's death followed about 2 years later, in January, 1922. Respondent lived on ranches in Del Norte county all his life, 39 years of which was spent on the ranch in question. He had practically no school education, having only finished the second grade, and was entirely unfamiliar with matters relating to the transfer of real property. There is no dispute about the fact that at the time the instrument was signed Walter Cooke was stricken with fatal illness and was seeking special medical treatment, but was unable to obtain the same because of lack of funds. Nor is there any question that the purpose of the transaction involving the execution of the deed was to raise money to secure such medical treatment. But the evidence is sharply conflicting as to the circumstances attending the signing of the deed.

Respondent testified that without previous appointment he met Darnell on the street in Crescent City on the morning of November 26, 1919, the day on which the instrument was signed, and that Darnell asked him to go to the law office of Hersch & McNulty and "sign a piece of paper temporarily," so that he (Darnell) could raise some money to pay for the medical services Walter Cooke was seeking; that, being perfectly willing that this should be done, he accompanied Darnell to said law office without further question, and that there the following occurred: "He [Mr. Hersch] produced a paper on one corner of the desk and walks up close to me and kind of holds it up close to me, reads three or four words, kind of mumbled—I did not hear, and pointed out for me to sign right here. I did not see any other signature only what I put down there. He takes the paper and I gets up and walks out." He further testified that he was not given an opportunity to read the paper, nor did any one read or explain it to him, but relying wholly upon Darnell's representation that it was merely a "temporary paper," which it was necessary for him to sign before money could be obtained to take care of his brother's sickness, he signed the same without question, and that, if he had known that the paper was a deed, he would not have signed it. Darnell denied having made the representations above mentioned, and in that connection testified that several days prior to the date on which the deed was signed he discussed Walter Cooke's condition with respondent, and as a result of such discussion agreed on behalf of his wife to purchase the interests of the respondent and Walter Cooke in their father's ranch for \$600,

so that Walter Cooke could use the money to obtain necessary medical treatment, and that when he met respondent on the street that morning it was in pursuance of an appointment to consummate the transfer. He further testified that after entering said law office Mr. Hersch, at his request, read the deed to respondent and informed him as to its legal effect, and that thereupon respondent signed the deed. Darnell's testimony as to what transpired in the law office was corroborated generally by the testimony of Mr. Hersch, and to some extent by the testimony of Mr. McNulty.

With reference to the question of failure of consideration appellant admitted that no money whatever was paid to respondent, but claimed that Walter Cooke signed the deed the day before respondent signed it, and was paid \$300 as his share of the purchase price, and that later, at respondent's request, he also paid Walter Cooke the remaining \$300 due for respondent's share. Respondent denied ever having made any such request, and at the trial appellant was able to produce only one receipt signed by Walter for \$300, claiming that the other receipt for a like amount and the original deed to the property had been lost.

In determining the truth of the testimony bearing upon the issues of fraud and failure of consideration, the jury in the first instance, and afterwards the trial court, accepted and acted upon the testimony given by respondent, and there is nothing inherently improbable in such testimony. Therefore the conclusions reached thereon by the jury and the trial court on those issues are final and conclusive on this appeal.

[3-5] Appellant contends, however, that the equitable relief sought by respondent should nevertheless have been denied upon the ground of laches; reliance being placed upon the fact that the deed was recorded within a day or two after it was executed, and upon a conversation which took place between appellant and respondent on the county road in said county in December, 1922, at which time appellant told respondent that respondent had "no more interest" in the property, that he had "signed it all over" to appellant. However, appellant did not plead the defense of laches in his answer, and, as pointed out in discussing the ruling on demurrer, nothing appears on the face of the complaint to warrant the denial of relief on that ground. In that state of the record it would seem that appellant may not raise the question of laches for the first time on appeal because, as held in a number of cases, " * * * laches is a defense, and not a condition of relief, and, if it does not appear on the face of the complaint, must be affirmatively pleaded and proven by the defendants." *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 P. 243, 250.

Assuming, however, that such defense is

available to appellant without having pleaded the same in his answer, we are of the opinion that the facts of the case are not such as demand the application of that doctrine as a matter of law, because there is sufficient evidence to prove that respondent did not in fact learn that the instrument he had signed was a deed, nor that the same was a matter of record, until shortly before the commencement of this action. In this regard he testified that, when appellant told him in December, 1922, that he had no more interest in the property, he was "kind of astonished," and called appellant's attention to the statements made by him at the time the deed was signed, to the effect that it was only a "temporary affair" and would be "straightened out" later, and that in reply Darnell merely repeated his statement and rode away; that consequently he "thought maybe he (appellant) was fooling," and afterwards he "did not think much about it" until the year 1925, at which time the sheriff of the county, during a friendly conversation with respondent, asked him if he did not own an interest in the ranch, and upon relying that he did, the sheriff told him that Darnell was about to probate the George Cooke estate, and suggested that he had better engage a lawyer to look after his interests; that he did so immediately, and soon thereafter was advised for the first time of the true nature of the instrument he had signed, and that the same was on record; and that within a few days thereafter he commenced suit to have the same set aside. The sheriff fully corroborated respondent's testimony with reference to said conversation.

Even though it could be fairly held as a matter of law, as appellant contends, that the conversation between Darnell and respondent in December, 1922, was sufficient to put respondent on inquiry, it would not operate as a bar to recovery, because the record shows that the action was commenced within three years thereafter, and, moreover, there was neither pleading nor corresponding proof of any prejudice having been suffered by appellant or the estate of Emma Darnell as a result of such delay, and such prejudice must be established before equitable relief will be denied upon the ground of laches. *Victor Oil Co. v. Drum*, supra; *Hill v. Garvey*, 56 Cal. App. 98, 205 P. 61. Appellant suggests the loss of the testimony of Walter Cooke and Mrs. Darnell, occasioned by their death; but the record shows that they died long before said conversation took place, and the delay mentioned could not have retarded the settlement of the estates of Mrs. Darnell and George Cooke, because appellant did not seek to probate either until shortly prior to the commencement of this action.

The case of *Blaisdell v. Leach*, 101 Cal. 405, 35 P. 1019, 40 Am. St. Rep. 65, cited by appellant, is essentially different from the present one, and therefore not in point. The action there was one by Blaisdell as mortgagee against Leach and his wife, to foreclose a mortgage executed by Leach, covering property standing of record in his name, and at the trial it was disclosed that the deed under which Leach claimed to have acquired title from his wife was a forgery. However, she had acknowledged the instrument before a notary public, believing it to be a lease, and it was held, therefore, that since she acknowledged the instrument, without informing herself as to its purport and effect, she was estopped from assailing its validity against the rights of the mortgagee, who had, in good faith and without any other knowledge than was conveyed by the instrument, parted with his property on the strength thereof. But in so holding the court clearly indicated that as between Mrs. Leach and her husband the deed was voidable on the ground of fraud.

[6] Here the action is between the grantor and the legal representative of the deceased grantee, and the rights of innocent third parties are not involved. True, the mortgagees were made parties defendant to the suit, and the judgment declares said mortgages to be inoperative against respondent's undivided one-third interest, and grants certain injunctive relief against the enforcement thereof against said interest; but, so far as the record shows, neither of the mortgagees was ever served with summons in the action, or ever appeared therein voluntarily by demurrer, answer, intervention, or otherwise; neither was there any evidence whatever introduced in support of the allegation of the complaint that said mortgages were fraudulent, nor any finding made by the jury or trial court with reference thereto. Manifestly, therefore, the judgment has no legal effect whatever upon the validity of said mortgages or the rights of the respective mortgagees thereunder, and in so far as its provisions purport to adjudicate those matters they are wholly nugatory.

Furthermore, the question whether or not appellant's fraudulent acts in procuring respondent's signature to said deed were binding upon his wife and her estate is unimportant, because, as shown, the answer filed by appellant in his own behalf and as administrator of his wife's estate admits that the conveyance to her was made without the payment to plaintiff of any consideration, and the jury and the trial court so found.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

100 Cal. App. 513

In re KECK et al. (Civ. 6940.)

District Court of Appeal, First District, Division 2, California. Sept. 7, 1929.

Parent and child $\Rightarrow$ 3(2)—Where it was not shown that money furnished by father was inadequate, mother, as guardian, was not entitled to deduct maintenance for children from their estates (Civ. Code, § 196; Code Civ. Proc. § 1757).

Mother, as guardian of children, was not entitled to deduct from estate of children maintenance for them, where it was not shown that sum furnished by father was not adequate to maintain family, or that father was unable to furnish greater amount, if necessary, as, under Civ. Code, § 196, and Code Civ. Proc. § 1757, estates of children cannot be resorted to for their maintenance, so long as parents are able adequately to support them.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Final accounting of Lizzie B. Keck, guardian of the persons and estates of Ella, George O., and John A. Keck. From the disallowance of certain items, Lizzie B. Keck appeals. Affirmed.

James P. Sweeney, of San Francisco, for appellant.

Farnsworth, Burke & Maddox, of Visalia, for respondent.

KOFORD, P. J. This is an appeal from an order settling final accounts of guardian and disallowing certain items of account.

Appellant, Lizzie B. Keck, the mother of the above-named minors, was the legally appointed guardian of their persons and estates from January 8, 1923, to January 15, 1927. On the last-named date she was by order of the court removed as such guardian, and her husband appointed in her place. She filed final accounts of her guardianship of the estate of each minor, and in each of said accounts credited herself with \$1,650, being \$60 per month maintenance for each minor for 27½ months. By an amendment to said accounts she also sought credit for \$288 for the purchase of a motorcycle for George and John, which she purchased subsequent to the court's order removing her as guardian. The amounts claimed by the appellant for maintenance of the minors were not actually withdrawn from the bank until after notice received of her removal.

The evidence received upon the hearing of the accounts and the objections thereto shows that during this period of four years the appellant received, directly and indirectly, from the father of said minors, funds aggregating over \$20,355.56, which were available for the support of herself and the said minors. No

showing was made that this sum was not adequate to maintain the family in the manner in which they had been accustomed, or that the father was unable to furnish a greater amount, if necessary. The capital of each minor, according to the accounts, amounted to \$2,546.12.

Parents are primarily liable for the support of their children (Civ. Code, § 196), and the estates of the children may not be resorted to for that purpose, so long as the parents are able adequately to perform this duty (Code Civ. Proc. § 1757). The items of \$1,650 were, therefore, properly disallowed.

No showing was made as to the necessity of purchasing the motorcycle, and appellant makes no argument against that part of the order disallowing it.

The order is affirmed.

We concur: STURTEVANT, J.:
NOURSE, J.

100 Cal. App. 521

WALKER v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 6959.)★

District Court of Appeal, First District, Division 2, California. Sept. 7, 1929.

Rehearing Denied Oct. 7, 1929. Hearing Denied by Supreme Court Nov. 4, 1929.

Auctions and auctioneers $\Rightarrow$ 5—Evidence in action on auctioneer's bond held insufficient to show goods were sold by auctioneer at auction (Pol. Code, §§ 3285, 3306-3308, 3310, 3324).

In action, under Pol. Code, § 3324, on auctioneer's bond, required by section 3285 to secure performance of auctioneer's duties under sections 3306-3308, 3310 by assignee of seller of musical instruments under conditional sales contracts, which instruments auctioneer purchased and resold, evidence held insufficient to show sale of instruments by auctioneer at auction.

Appeal from Superior Court, City and County of San Francisco; Claude F. Purkitt, Judge.

Action by Shirley Walker, as president of the Music Trades Association of Northern California, against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Reversed.

Hearing denied by Supreme Court; SEAWELL, RICHARDS, and LANGDON, JJ., voting for a hearing.

Horace W. B. Smith and P. R. Lund, both of San Francisco, for appellant.

Chauncey Tramutolo and Lemuel D. Sanderson, both of San Francisco, for respondent.

KOFORD, J. This is an appeal from a judgment given against the defendant upon a statutory bond executed by it, conditioned upon the faithful performance of the duties of C. H. Bossong as an auctioneer in the city

and county of San Francisco. The bond is required of an auctioneer by the provisions of Pol. Code, pt. 3, tit. 7, c. 13, § 3285. Section 3324 of the same chapter provides: "Any one aggrieved or damaged by any act of an auctioneer in violation of or contrary to the provisions of this chapter, has an action against him and his bondsmen on his official bond therefor." Other sections of chapter 13 make it the duty of such an auctioneer to keep books, in which he must enter a record of all sales (Pol. Code, § 3306), to make quarterly reports to the county auditor of certain details of his business and sales (Pol. Code, § 3310), to give previous notice in public newspapers of every auction sale (Pol. Code, § 3307), and to hold all public auctions in the day time (Pol. Code, § 3308).

Appellant's point on appeal is that the evidence at the trial was insufficient to show a violation by the auctioneer, Bossong, of any of the duties imposed upon him by the law above referred to, and that therefore no liability of appellant upon the bond was proven. The evidence relied upon by respondent to support the judgment is as follows:

Mrs. Bauer purchased upon conditional sales installment contracts numerous musical instruments from numerous music stores in San Francisco. Plaintiff is the assignee of these stores. Mrs. Bauer paid a small amount down upon each instrument, but never completed payment upon any one of them, so that each remained the property of the music stores. She communicated with Mr. Bossong in response to his newspaper advertisement, in which he offered to buy musical instruments. Bossong called at her residence about 17 times, each time taking away with him one or more instruments, paying her cash in full for the same. Officers in charge of the licensing departments of the city testified that the only license issued to Bossong, or which he possessed, was that of an auctioneer. One of these officers testified that Bossong's business was auctioning goods. Sergeant Bohr, of the police department, testified: "He was a furniture man." "He handled secondhand furniture. He was an auctioneer, and he had a place on the corner out there. He also handled new furniture and secondhand furniture." He also testified that Bossong never at any time showed the records of instruments recovered or disposed of, although Bohr asked him for such books and records. Sergeant Bohr repeated some declarations of Bossong made to him, indicating that Bossong had sold or in some manner disposed of some of the instruments, but this testimony was stricken out upon motion as not responsive.

Appellant also claims here, of course, that it was hearsay, so far as the appellant is concerned. Bossong was not a witness at the trial. Sergeant Gaughran testified in part as follows:

"Mr. Tramutolo: Q. What conversation did you have with him with regard to the books, Mr. Gaughran?

"Mr. Lund: That is objected to—

"The Court: Now, we are not interested in the conversation as much as we are interested in the books themselves.

"Mr. Tramutolo: Q. Did he produce any books? A. He did not.

"Q. Did you demand to see any books that he may have had? A. I did.

"Q. And what did he say with respect to the request for the books, if anything? A. He asked me what I was particularly interested in, and I told him. He showed me the books, and he had no record whatever of ever purchasing an instrument from Mrs. Bauer. * * *

At the conclusion of the respondent's evidence, appellant moved for a nonsuit. The motion was denied, and appellant offered no evidence. The finding of the court was that Bossong sold said instruments at public auction, and that each of the several assignors of respondent was damaged by the failure of Bossong to keep a record of the sale of the instruments.

Respondent argues that the evidence is sufficient to show a sale *at auction* by Bossong, because he had no license for any other kind of business. Appellant argues that the evidence shows that Bossong was also in the furniture business, and that if the instruments were sold by him in the capacity of a furniture dealer his surety upon his auctioneer's bond is not liable, and, further, that inasmuch as he had first purchased the goods from Mrs. Bauer, any sales made by him were sales as of his own goods, in which event it is contended he would not have been acting as an auctioneer, and his failure to make entries of such sales would not be a violation of the statute or a breach of the condition of his bond.

The evidence in this case is not such as to call for a decision of whether an auctioneer is by statute required to keep a record of the sale of goods which he has first purchased from a purported owner. No evidence is indicated, and we have found none, which shows that Bossong made any sale of the instruments whatever, whether as auctioneer or otherwise. That the instruments were not to be found after having been traced to his possession may be said to have been fairly established. Whether he concealed, destroyed or sold them, however, is merely a matter of conjecture, under the evidence remaining in the record. Bossong's auctioneer's license did not compel him to auction or sell all goods coming into his possession. Applying to him, with some misgivings, the presumption of fair and lawful conduct, would not result in the conclusion that he disposed of the goods by auction, since a licensed auctioneer, outside of his business as auction-

eer, enjoys the same freedom of contract as other individuals.

We conclude that the evidence received was insufficient to support the judgment. The judgment is reversed.

We concur: STURTEVANT, J.;
NOURSE, J.

Action by Onarles A. Eddy against Morris Demichalis. Judgment for defendant, and plaintiff appeals. Affirmed.

F. C. Huebner, of Fresno, for appellant.

W. M. Conley, Philip Conley, and Conley, Conley & Conley, all of Fresno, and Arthur Frame, of Clovis, for respondent.

100 Cal. App. 517

EDDY v. DEMICHALIS. (Civ. 6952.)

District Court of Appeal, First District, Division 2, California. Sept. 7, 1929.

1. Easements ⇨37—Whether plaintiff's possession or user of adjoining landowner's property for turn row was adverse, giving easement, held question of fact.

In action for damages and injunction based on claim of easement for use of land of adjoining landowner as turn row for purpose of turning teams and tractors drawing cultivating machinery, question whether plaintiff's possession or user was adverse was one of fact for trial court.

2. Easements ⇨36(3)—Finding of absence of adverse possession, relied on to establish easement for use of adjoining land for turn row, held justified, though defendant's predecessor gave plaintiff permission to use property.

In action for damages and injunction based on claim of easement in land of adjoining landowner for use thereof as turn row for purpose of turning teams and tractors drawing cultivating machinery, finding of trial court that there was no adverse possession or user was justified, notwithstanding conversation whereby defendant's predecessor gave plaintiff permission to use the land.

3. Easements ⇨8(2, 3)—Prescriptive title cannot arise out of permission, but must be acquired adversely.

Prescriptive title cannot arise out of an agreement or license or mere neighborly accommodation, but must be acquired adversely.

4. Adverse possession ⇨112—Clear evidence of adverse possession is necessary to overcome presumption in favor of paper title.

Presumption of ownership is with the paper title, and clear evidence of adverse possession is necessary to overcome this presumption.

5. Easements ⇨8(1)—Adverse claim must be proved to have been communicated by claimant to owner, to establish title by adverse possession.

To support claim of title or easement by adverse possession, adverse claim of right must not only exist in mind of claimant, but must be proved to have been communicated to the owner, so that his failure to object may be taken against him as an acknowledgment or acquiescence in the right claimed.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

KOFORD, P. J. Plaintiff by this action sought damages and an injunction based upon his claim of an easement upon the land of the defendant, an adjoining landowner. The easement claimed was the right to use as a turn row an open strip of land or avenue, which had been left unplanted to trees or vines, upon and along the boundary line between the lands of the two parties to this action. A turn row is understood by the parties as a place used, while cultivating the land, for the purpose of turning teams and tractors drawing cultivating machinery. Plaintiff is the owner of lots Nos. 30 and 31. Defendant is the owner of lot No. 32. The turn row is between lots Nos. 31 and 32. Plaintiff claimed the easement by adverse user and prescription. The court gave judgment for the defendant, and the plaintiff appeals.

[1] Substantially the only point argued at the trial and upon this appeal is the sufficiency of the plaintiff's evidence to show that his use and possession of the strip of land for the purpose of a turn row was adverse, as contended by plaintiff and appellant, or merely permissive, as contended by defendant and respondent. No point is made as to the sufficiency of the complaint to present this issue, either at the trial or on this appeal, and accordingly we will treat it in the same manner.

Practically all the evidence at the trial came from the witnesses called by the plaintiff. Appellant indicates certain testimony introduced by him which is uncontradicted and which he claims entitled him to a decision that he was the owner of the claimed easement by adverse possession. The plaintiff testified that in 1903 he purchased lot No. 31 from Shepherd-Teague & Co., who was then the owner of lots Nos. 30, 31, 32, and other lots. In 1906 plaintiff, a resident of Chicago, Ill., was visited by Teague, of Shepherd-Teague & Co., and was persuaded to purchase an additional lot, No. 30. In their conversation plaintiff testified that he inquired about the expense of building fences, and Teague said: "You don't need any fences." I asked him what about the straying of the cattle, wouldn't they destroy things, and I asked him about that, and he said, "No, it is not necessary, because, out there, if they come on your property, and do any damage, the owner has to pay for the damage they do." So, in that way he persuaded me not to put up any fences. 'But,' he said, 'there is an avenue

around the lot, and,' he said, 'I own all the land, and you have access to come across the land and turn on the property adjoining your field, to turn back again in the avenue in the opposite direction, and the party on the other property adjoining has the same right to go on your land and turn around to go back there, and,' he said, 'That avenue is private property of both parties to use that way, and the party on the other property has always the privilege to come across on your land for the purpose of turning around and going back, in working the field there, and you have the same privilege, that is what it is for, and,' he said, 'it has been used that way in the neighborhood of twenty years.'

In 1907 Shepherd-Teague & Co., under contract with plaintiff, planted lot No. 31 to grapevines, leaving a strip unplanted at the boundary between lots Nos. 31 and 32. Plaintiff arrived in California in August, 1908, and took possession of his land. From 1908 to 1916 he cultivated the land through an agent, and from 1916 to date has personally occupied and cultivated it, always using the turn row until objection and interference by defendant shortly before the commencement of this action, in 1925.

The ownership of defendant's lot No. 32 remained in Shepherd-Teague & Co., from 1903 to 1910, when it was sold to Sprague and Thureau, who owned it until 1918, at which time it passed to the defendant and respondent herein. The plaintiff was instrumental in helping Shepherd-Teague & Co., sell lot No. 32 to Sprague and Thureau in 1910, being a friend and fellow workman of Sprague. He testified that he told Sprague at that time about the turn row, and repeated to Sprague what Teague had told him in 1906. When lot No. 32 was planted in 1910 by Sprague & Thureau, an open avenue was also left at its common boundary with lot No. 31. The open space is thus partly on lot No. 32.

Appellant's testimony of his conversation with Teague and of his having repeated it to respondent's predecessor Sprague was uncontradicted; neither Sprague nor Teague appearing as a witness at the trial. Appellant claims that this testimony conclusively establishes the adverse character of his user, and cites authorities to the effect that a parol grant, though invalid, is a sufficient basis for the acquisition of the right by adverse possession. *Baldwin v. Temple*, 101 Cal. 396, 35 P. 1008; *Alper v. Tormey*, 7 Cal. App. 11, 93 P. 402.

Whether the appellant's possession or user was adverse was a question of fact for the trial court. *Franz v. Mendonca*, 131 Cal.

205, 63 P. 361; *Pinheiro v. Bettencourt*, 17 Cal. App. 111, 118 P. 941; *Alper v. Tormey*, supra. The question is, not whether the evidence would have supported a decision in favor of the appellant, but whether the decision made finds support in the evidence.

[2, 3] The conversation with Teague as narrated by appellant does not demand the interpretation of a parol grant. It is also fairly susceptible of being interpreted as a license or permission given as a matter of accommodation or as a description of a custom. The plaintiff's complaint was not put in evidence, and we will not refer to it as evidence, but it may be mentioned to illustrate the point that plaintiff's report of his conversation with Teague is fairly susceptible of being understood otherwise than as a parol grant. The wording of the complaint shows it was understood otherwise by those drafting and verifying the complaint. The only statement of plaintiff's claim of easement found in his complaint is in paragraph IV. It is: "That from the year 1907 until the year 1925 by mutual agreement between the plaintiff and defendant * * * there was maintained in common a turn row * * * (describing it and its use)." A prescriptive title cannot arise out of an agreement; it must be acquired adversely; it cannot be adverse when it rests upon a license or mere neighborly accommodation. *Pinheiro v. Bettencourt*, 17 Cal. App. 111, and cases cited at page 119, 118 P. 941, 945.

[4, 5] Likewise the conversation with Sprague does not demand the interpretation of notice of adverse user under claim of right. The user itself was not of such a character as to compel the conclusion that it was hostile to the rights of the defendant and his predecessors. The use of a turn row partakes so much of the nature of a custom as generally to excite no suspicion that it is hostile to the neighboring landowner. The presumption of ownership is with the paper title. Clear evidence is necessary to overcome this presumption. The adverse claim of right must not only exist in the mind of the claimant, but must be proven to have been communicated in some way to the owner so that his failure to object may be taken against him as an acknowledgment of or acquiescence in the right claimed. *Clarke v. Clarke*, 133 Cal. 667, 66 P. 10; *Tarpey v. Veith*, 22 Cal. App. 289, 134 P. 367; *Heenan v. Bevans*, 51 Cal. App. 277, 196 P. 802.

The judgment appealed from is therefore affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

WETENHALL v. CHAS. S. MABREY CONST. CO. et al. (Civ. 6962.) ★

District Court of Appeal, First District,
Division 2, California. Sept. 6,
1929.

Rehearing Denied Oct. 3, 1929. Hearing Granted by Supreme Court Nov. 4, 1929.

Partnership ⇨64—Name of individual trader followed by word "company" was not fictitious, and individual trading under that name could sue without filing certificate (Civ. Code, §§ 2466, 2468).

Sole trader's use of his name and initials, followed by word "company," did not necessitate filing of certificate stating name and place of residence under Civ. Code, §§ 2466, and 2468, as condition to maintaining action, since name adopted was not fictitious, in view of fact that individual business, and not partnership business, was involved.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by W. S. Wetenhall, doing business under the name and style of the W. S. Wetenhall Company, against the Chas. S. Mabrey Construction Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Robert H. Schwab, of Sacramento, for appellants.

G. R. Perkins, of San Francisco, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendants, Charles S. Mabrey Construction Company and Globe Indemnity Company, from a judgment entered against them upon the pleadings. This is an action by plaintiff against the contractor as principal and the bonding company, above named, as surety, for materials furnished to the contractor and used in the construction of a building in San Bruno, Cal.

Appellants rely upon two special defenses which are set forth in their answer: First, "that plaintiff has failed to comply with the provisions of section 2466 to section 2468, inclusive, of the Civil Code of the State of California, and for that reason said action is barred." Paragraph I of the complaint is as follows: "That plaintiff now is and was at all times herein mentioned doing business under the name and style of W. S. Wetenhall Company, with his office and principal place of business in the city and county of San Francisco." Section 2466 of the Civil Code provides: "* * * Every person transacting business in this state under a *fictitious name* and every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the coun-

ty in which his or its principal place of business is situated, a certificate, stating the name in full and the place of residence of such person and stating the names in full of all members of such partnership and their places of residence."

The first question, therefore, to be determined is whether the name "W. S. Wetenhall Company" is a fictitious name. An examination of the following authorities fully convinces us that the name "W. S. Wetenhall Company" is not fictitious. Spreckels v. Grace Darling Hospital Ass'n., 28 Cal. App. 646, 648, 153 P. 718; Pendleton v. Cline, 85 Cal. 142, 24 P. 659; Carlock v. Cagnacci, 88 Cal. 600, 601, 26 P. 597; McLean v. Crow, 88 Cal. 644, 647, 26 P. 596; Lamberson v. Bashore, 167 Cal. 387, 391, 139 P. 817; Andrews v. Glick (Cal. Sup.) 272 P. 587; Hall et al. v. King (Cal. App.) 279 P. 814.

If the name "W. S. Wetenhall Company" is not fictitious, then he does not come within the purview of section 2466 at all, for the reason that he is an *individual* doing business under the name and style of "W. S. Wetenhall Company," and is not a *partnership*. That portion of section 2466 of the Civil Code reading "or a designation not showing the names of persons interested as partners in such business," etc., refers *only to partnerships and not to an individual*. Or, in other words, if the name used by W. S. Wetenhall is not fictitious and *no other person* is interested with him in the business, he does not have to comply with said section 2466. This section is not susceptible of any other reasonable interpretation. Our conclusion is strengthened by the language used in the latter part of section 2468 of the Civil Code, which reads: "No person doing business under a fictitious name, * * * nor any persons doing business as partners contrary to the provisions of this article, * * * shall maintain any action * * * until the certificate has been filed and the publication has been made. * * *"

We are not unmindful of the fact that in such cases as Andrews v. Glick, supra; Hall v. King, supra; North v. Moore, 135 Cal. 621, 67 P. 1037; Schwarz & Gottlieb, Inc., v. Marcuse, 175 Cal. 401, 165 P. 1015; Nicholson v. Auburn Gold Min., etc., Co., 6 Cal. App. 547, 92 P. 651, and similar cases, the courts have held that the various names used, while not fictitious, were designations not showing the names of the persons interested as partners in the business, and therefore were required to file the certificate under section 2466 of the Civil Code. An examination, however, of these cases will show that in all of them *two or more persons* were interested in the business. We have been unable to discover any case in which a single individual who was doing business under a name not his own, but one which was not fictitious, was required to comply with said section 2466, before he

could maintain an action, notwithstanding, from the name used alone it might be impossible to determine how many persons were interested in the business.

The second contention made by appellants is wholly without merit. The portion of the answer relied upon does not raise any issue whatever, and needs no special discussion. We think the judgment should be affirmed, and it is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

MILO v. PRIOR. (Civ. 6728.)★

District Court of Appeal, First District, Division 2, California. Sept. 7, 1929.

Rehearing Granted Oct. 7, 1929.

1. Judgment $\S$ 562—Judgments not on merits are included in judgments which are not res adjudicata in whole or in part.

Judgments not res adjudicata in whole or in part include judgments which are not on the merits.

2. Judgment $\S$ 197—Judgments not res adjudicata in whole or in part are without prejudice, and it is proper, though not necessary, for judgment to so state.

Judgments which are not res adjudicata in whole or in part are without prejudice, and it is proper, although not necessary, for judgment itself to so state.

3. Judgment $\S$ 197—Judgment without prejudice is not proper where cause is tried and submitted only on merits.

A cause which is tried and submitted only on the merits should not result in judgment without prejudice.

4. Appeal and error $\S$ 223—Judgment without prejudice in personal injury action after trial on merits should not be affirmed on technical points court might find which were not raised in support of reservation.

Where judgment without prejudice was rendered in personal injury action, and on appeal, plaintiff assigned no reason for, or in support of, reservation in judgment, reservation should not be affirmed on any technical points court might be able to find which were not raised or mentioned in any way.

5. Judgment $\S$ 197—Judgment without prejudice in personal injury action after trial on merits held not entirely void.

Judgment without prejudice in personal injury action after trial on merits was not entirely void, since such a reservation may be properly made where evidence in proceedings at trial warrants such a judgment, notwithstanding Code Civ. Proc. $\S$ 581, subd. 1, providing action cannot be dismissed by plaintiff after its submission.

6. Appeal and error $\S$ 175(1)—Appellate court will not render final judgment against respondent where it would deprive respondent of right to appeal from final judgment on merits originally entered in appellate court.

Where plaintiff, in action for personal injuries, did not appeal from judgment which was satisfactory to her as a whole, appellate court, in reversing part of judgment appealed from, will not render a final and nonappealable judgment in favor of defendant on merits, where to do so would have effect of depriving plaintiff of right to assign errors and to appeal from final judgment on merits entered in appellate court for first time.

7. Appeal and error $\S$ 839(1)—Where part of judgment appealed from is not severable from remainder of judgment, court may review whole judgment.

Rule that only part of judgment appealed from will be reviewed by appellate court is subject to an exception when such portion is not severable from remainder of judgment.

8. Appeal and error $\S$ 839(1)—Without prejudice provision in judgment held not severable from entire judgment, and therefore appellate court on appeal from such part could review entire judgment.

Where defendant in personal injury action appealed from part of judgment without prejudice after trial on merits, part of judgment appealed from was not severable, and therefore appellate court could review entire judgment, since reservation entered into and qualified each and every part of entire judgment.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Hazel Milo by A. Milo, her guardian ad litem, against Leland S. Prior. From that part of judgment for defendant without prejudice, defendant appeals. Reversed, with directions.

Corbet & Selby, of San Francisco, for appellant.

Hubbard & Hubbard, of San Francisco, for respondent.

KOFORD, P. J. This action was for damages for personal injuries suffered by plaintiff in an automobile collision alleged to have been caused by the negligence of defendant. This action and two other actions between other parties based upon the same automobile collision were tried together upon the same evidence by the court sitting without a jury. After the causes were submitted and briefed, the court gave judgment in each case, denying relief to each of the several plaintiffs and cross-complainants. In this action judgment was announced for defendant without prejudice. Thereafter both plaintiff and defendant waived findings of fact, and after that a judgment was signed by the judge and filed. After stating the usual recitals and waiver of findings, it ordered judgment in favor of defendant "without prejudice to plaintiff's

bringing a new action herein if so advised." Defendant appeals from that part of the judgment alone which we have just quoted. The record contains the judgment roll of this case and the reporter's transcript of the testimony taken at the trial of the three cases, but does not contain the judgment roll in the other two cases nor any findings of fact.

At the time of the collision, the plaintiff, a minor, was riding in an automobile with Norma Furlong and Harry Deller, a minor, who was driving. The other automobile in the collision was driven by the defendant, Leland S. Prior, who was accompanied by his wife, Florence M. Prior. This action was by Hazel Milo against Leland S. Prior alone. The defendant denied negligence, and alleged negligence of Deller and contributory negligence of plaintiff. The other two actions, according to the briefs, were as follows: First, Leland S. Prior against Deller and his parents, for personal injuries and damage to Prior's automobile. In that action Deller's father filed a cross-complaint for damage to the car driven by his son Harry Deller. Second, Florence Prior against Deller and his parents for personal injuries. In that action Deller's father also filed a cross-complaint for damages to his car. In those two actions no one was awarded damages. This might mean that the court decided that both drivers were negligent or that neither was negligent. A final judgment upon the merits for defendant in Hazel v. Leland S. Prior might also mean either that Prior was not negligent or that both Hazel Milo and Leland S. Prior were negligent.

[1-3] Appellant contends that, the action having been fully tried and submitted, the judgment should have been a final judgment between the parties, and not merely a judgment without prejudice. He cites a number of California cases to the effect that a plaintiff may not dismiss an action without prejudice after the case has been tried and submitted, and from this argues that the court cannot decide the cause without prejudice after it has been submitted. Simply because a plaintiff is not permitted by the Code (Code Civ. Proc. § 581, subd. 1) to dismiss the action after its submission, it does not follow that in no case and under no circumstances may a court give a judgment without prejudice. Respondent cites a number of cases to the point that, where a judgment is not upon the merits or expressly provides that it is without prejudice, such judgment is not res adjudicata, the reservation itself being res adjudicata and prevents the raising of any question as to the right to maintain a subsequent suit. These authorities, which are collected in 34 Corpus Juris, 797, note 65, show, however, that such a reservation has been treated as valid in many instances. In Ahlers v. Smiley, 11 Cal. App. 343, 104 P. 997, such a reservation in a judgment is referred to and its effect considered, although the

propriety of the reservation is not directly passed upon. The reservation there was in respect to an issue of damages which could not be decided on account of the insufficiency of the pleadings. Many judgments are not res adjudicata in whole or in part. It will be sufficient for this case to say that they include judgments which are not upon the merits. 15 Cal. Jur. 124 et seq. Such judgments are without prejudice, and it is proper, although perhaps not necessary, for the judgment itself to so state. Lloyd v. Imperial Mach. Stamping & Welding Co., 224 Mass. 574, 113 N. E. 456. A cause which is tried and submitted only upon the merits, however, should not result in a judgment without prejudice. Parsons v. Riley, 33 W. Va. 464, 10 S. E. 806.

[4, 5] There was no motion for dismissal or nonsuit in this case. No findings were made, and so we cannot look to them to find the reason for the reservation. Respondent has suggested no reason for the reservation which he is willing to support, and the reservation should not be affirmed for any technical points we might be able to find, but which were not raised or mentioned in any way. The appeal is therefore well taken. The part of the judgment appealed from, however, is not entirely void, because such a reservation may be properly made where the evidence and proceedings at the trial warrant such a judgment.

[6-8] Supplementary briefs were filed in this court in which the appellant contends that the judgment of this court upon this appeal should have only the effect of eliminating that part of the judgment appealed from and leave the remainder stand as a modified judgment so that there would be a final and non-appealable judgment in favor of the defendant upon the merits. Respondent goes to the other extreme. She contends that the evidence wholly fails to show any negligence on her part, but that the evidence, as well as the court's decision in the companion cases, shows that the defendant was negligent. She therefore asks this court to enter judgment in her favor, or at least that an entire new trial be ordered by this court. As the respondent is not an appellant here, we may not adopt either of these courses upon assignment of errors by her. On the other hand, she should not be penalized for not having taken an appeal from the judgment or from a part thereof when it was satisfactory to her as a whole. For this reason we should not adopt appellant's suggestion, as it would have the effect of depriving respondent of her right to assign errors and to appeal from a final judgment upon the merits entered against her in this court for the first time. The rule that only the part of the judgment appealed from will be reviewed by the appellate court is subject to an exception when such portion is not severable from the remainder of the judgment. In re Yoder, 199 Cal. 699, 704, 251

P. 205; *Whalen v. Smith*, 163 Cal. 360, 125 P. 904, Ann. Cas. 1913E, 1319. In the instant case the part appealed from is not severable. The reservation enters into and qualifies each and every part of the entire judgment. *Wanzer v. Self*, 30 Ohio St. 378. The merit of this appeal is, not that such a reservation may never be made, but that the appellant was entitled, according to the record presented here, to have a judgment entered upon the merits either for or against him instead of a judgment which amounts only to a dismissal or nonsuit. According to the record, the case was fully tried and submitted upon its merits, but no judgment upon the merits has been rendered. A judgment which is erroneous because not on the merits is the only one which has been rendered.

The judgment is therefore reversed, and it is ordered that the trial court proceed to render and enter a new judgment upon the merits in the action according to the views herein expressed.

We concur: STURTEVANT, J.;
NOURSE, J.

200 Cal. App. 525

BEAVER v. CARPENTER et al. (Civ. 6555.)

District Court of Appeal, Second District,
Division 1, California. Sept. 7, 1929.

Appeal and error ⇨773(2)—On failure to file brief or points and authorities, excepting reply affidavit in opposition to motion to dismiss, appeal was dismissed.

Where appellants did not attempt to file brief or points or authorities within 30 days from time of filing transcript in appellate court, as provided by rules of court, excepting reply affidavit in opposition to motion to dismiss, and no sufficient reason was given for failure to comply with rules of court nor extension of time granted, appeal was dismissed.

Action by A. D. Beaver against W. T. Carpenter and others. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal. Appeal dismissed.

C. J. Novotny, of San Diego, for appellants.
Liggett & Liggett, of San Diego, for respondent.

PER CURIAM. This matter comes up on motion of respondent to dismiss an appeal taken by the defendants in the above-entitled action on the grounds: (1) That no opening brief and points and authorities have been served or filed in the above-named court within 30 days from the date of the filing of the transcript herein, or at all, as provided by the rules of this court; (2) that no extension of time for the filing of the same has ever been

granted, either by stipulation or affidavit, or at all.

The appellants have not even attempted to file any brief or any points or authorities, excepting only the reply affidavit of C. G. Novotny in opposition to the motion to dismiss. In said reply affidavit there is no sufficient reason given for the failure to comply with the rules of the court.

The appeal is therefore dismissed.

100 Cal. App. 503

JOHNSON v. PEARSON. (Civ. 6964.)

District Court of Appeal, First District, Division 2, California. Sept. 5, 1929.

1. Damages ⇨96—**New trial** ⇨74—**Damages for personal injuries are within sound discretion of jury, and trial judge's discretion in ruling on motion for new trial.**

Amount of damages in actions for personal injuries is committed first to sound discretion of jury, and then to discretion of trial judge, who, when ruling on motion for a new trial, may consider evidence anew, determine anew facts, and set aside verdict, if it is not just.

2. Appeal and error ⇨1004(1)—On appeal, award for personal injuries cannot be set aside, unless plainly and outrageously excessive, suggesting at first blush passion, prejudice, or corruption (Code Civ. Proc. § 657, subd. 5).

On appeal, decision of trial court and jury on amount of damages for personal injuries cannot be set aside, unless verdict is so plainly and outrageously excessive as to suggest at first blush passion, prejudice, or corruption on part of jury, in view of Code Civ. Proc. § 657, subd. 5, allowing new trial for excessive damages appearing to have been given under passion or prejudice.

3. Appeal and error ⇨932(1)—On appeal attacking verdict of jury as being excessive, every conflict in evidence must be resolved in favor of respondent.

Where verdict is attacked as being excessive, court on appeal must treat every conflict in evidence as resolved in favor of respondent, and must give respondent benefit of every inference that can reasonably be drawn in support of claim.

4. Damages ⇨32—Nervousness, when reasonable result of physical injuries, is always an element of damage.

Nervousness, when reasonable result of physical injuries, is always an element of damage, and evidence relating thereto may be properly submitted to jury.

5. Damages ⇨132(3)—Verdict for \$4,000, for injuries to face, shoulder, knee, spine, nervous shock, and minor injuries, held not excessive.

In action for damages for personal injuries sustained in automobile accident, where plaintiff was thrown through glass window of

automobile, and sustained injuries to her face, dislocation of right shoulder, laceration and contusion of knee, injury to lumbar region of spine, so as to cause impingement of nerves in the locale spine, and severe nervous shock and minor injuries, verdict for \$4,000 was not excessive.

6. Appeal and error ⇨216(1)—Defendant in personal injury action, not requesting instruction separating general damages from special damages, cannot complain of instruction failing to do so.

In action for damages for personal injuries sustained in automobile accident, if defendant desired instruction separating general damages from special damages, it was incumbent on counsel to have presented such instruction and requested court to give it, and, having failed to do either, defendant cannot complain of instruction which did not separate damages.

7. Appeal and error ⇨932(1)—Appellate court will presume sum awarded for personal injuries, where instruction did not separate general from special damages, was for injuries received, and not for special damages.

Where court, in action for personal injuries, gave instruction which did not separate general damages from special damages, appellate court will presume that sum awarded was for injuries received and pain and suffering endured, and that amount did not include anything for special damages.

8. Appeal and error ⇨1032(3)—Giving of instruction on future damages for personal injuries did not warrant reversal, where defendant wholly failed to show he sustained injury by such instruction.

Where defendant, sued for injuries arising in automobile accident, wholly failed to show that he sustained any injury by instruction on future damages, giving of such instruction did not warrant reversal.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Vivia D. Johnson against George C. Pearson. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Hampton Hoge, of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

PRESTON, Justice pro tem. This is an action for damages for personal injuries. The case was tried before a jury, which returned a verdict for plaintiff in the sum of \$4,000. From the judgment entered upon this verdict, the defendant, George C. Pearson, prosecutes this appeal.

An automobile driven by plaintiff collided with an automobile driven by defendant at the intersection of Peralta avenue and School street in the city of Oakland. As a result of the collision, plaintiff was thrown through the glass window of her automobile and sustained the following injuries: Her face was

lacerated and contused. Her right shoulder was dislocated. Her left knee was lacerated and contused. The lumbar region of the spine was bruised, contused, and so sprained as to cause an impingement of the nerves in the locale spine. She also received a severe nervous shock and minor injuries.

Each party charged the other with negligence; the principal act of negligence charged to the appellant being the excessive rate of speed that he was traveling at the time of the collision. Appellant concedes that the evidence is conflicting, and there is some evidence to support the verdict. For this reason no attack is made upon the judgment on that ground.

Appellant first contends that the amount of the verdict is grossly excessive, and was based upon passion and prejudice. A motion for a new trial was made upon several grounds, among them being "excessive damages, appearing to have been given under the influence of passion or prejudice." Code Civ. Proc. § 657, subd. 5. The motion for a new trial was denied.

[1] The rule is well established that the amount of damages in this kind of an action is committed first to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict, if it is not just.

[2] Upon appeal, the decision of the trial court and the jury on the subject cannot be set aside, unless the verdict is "so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on the part of the jury." *Reneau v. Hirsch*, 88 Cal. App. 1, 262 P. 1100, 1102, and cases cited. The evidence on the character and extent of plaintiff's injuries is decidedly conflicting; still there is ample evidence in the record, which the jury and trial judge undoubtedly accepted as true, that the plaintiff received severe and painful injuries, and as a result of such injuries she has become extremely nervous, and at times hysterical.

Appellant, in contending that the award of damages is excessive, lays great stress upon the fact that two physicians, who had examined respondent at his request, testified that respondent was not permanently injured, and that her only trouble was a nervous ailment, known as hysteria. In other words, appellant seems to contend that, because the respondent did not receive any broken bones in the collision, but only received cuts and bruises and a nervous shock, she could not have received any serious injury.

[3] This testimony did nothing more than raise a conflict in the evidence, which conflict was undoubtedly resolved in favor of the respondent, and the rule is well settled that, in considering an attack upon a verdict as being excessive, we must treat every conflict in the

evidence as resolved in favor of the respondent, and must give to her the benefit of every inference that can reasonably be drawn in support of her claim. *Kimic v. San Jose-Los Gatos, etc., Ry. Co.*, 156 Cal. 273, 104 P. 312; *Riffel v. Letts*, 31 Cal. App. 428, 160 P. 845; *Reneau v. Hirsch*, supra.

[4] Furthermore, nervousness, when the reasonable outcome of physical injuries, is always an element of damage, and obviously evidence relating thereto may properly be submitted to the jury. *Kuhns v. Marshall*, 44 Cal. App. 588, 591, 186 P. 632; *Easton v. United Trade School Con. Co.*, 173 Cal. 199, 203, 159 P. 597, 600, L. R. A. 1917A, 394; *Latky v. Wolfe*, 85 Cal. App. 332, 343, 259 P. 470; *Sloane v. Southern Calif. Ry. Co.*, 111 Cal. 668, 44 P. 320, 32 L. R. A. 193; *Thomas v. Gates*, 126 Cal. 1, 58 P. 315; *Freiburg v. Israel*, 45 Cal. App. 138, 142, 187 P. 130; *Jones v. Key*, 54 Cal. App. 677, 202 P. 478.

In *Easton v. United Trade School Con. Co.*, supra, the court said: "While touching the nature of the injuries in the case at bar it may be added that it is very properly declared in *Warren v. Boston Ry. Co.*, 163 Mass. 484, 40 N. E. 895, that 'it is a physical injury to a person to be thrown out of a wagon, or to be compelled to jump out, even though the harm done consists mainly of nervous shock.'" It is also a fact, well within human experience, that suffering from the disruption of the nervous system of the human body may be, and often is, more intense and severe than most any other form of suffering.

[5] We have carefully examined the entire record, including the evidence, and there is nothing in the record to show or suggest that the verdict was not the result of the fair and honest judgment of the jury. The award of damages made by the jury and sustained by the trial court is not large. We think, when the extent and character of the injuries received by respondent are all considered, the award is not at all disproportionate to the compensation reasonably warranted by the facts.

[6] Appellant next contends that "the court erred in instructing the jury as to the maximum amount the plaintiff was entitled to recover. The trial court erroneously failed in such instruction to segregate the items of special damage from the item of general damage." There is no merit in either of these contentions. The complaint was originally in three counts: The first for general damages on account of physical injuries in the sum of \$15,000; the second for special damages in the sum of \$1,500 for the loss of earnings of the plaintiff as a real estate saleslady for the three months intervening between the hap-

pening of the accident and the filing of the complaint; and the third for \$350 for property damage to plaintiff's automobile. The third count was dismissed by the plaintiff on the first day of the trial. The plaintiff, by permission of the court, filed an amendment during the course of the trial, praying for the sum of \$406 for nurses, physician, and X-ray bills.

The instruction complained of was given at request of respondent, and clearly and correctly stated the law, and, if appellant desired an instruction separating the general damages from the special damages, it was incumbent upon his counsel to have presented such an instruction and requested the court to give it. Having failed to do either, appellant is in no position to complain of the instruction given. *Wirthman v. Isenstein*, 182 Cal. 108, 111, 187 P. 12; *Weaver v. Carter*, 28 Cal. App. 241, 248, 152 P. 323; *O'Connor v. United Railroads of S. F.*, 168 Cal. 43, 48, 141 P. 809; *Townsend v. Butterfield*, 168 Cal. 564, 143 P. 760; *Putnam v. Pickwick Stages, etc.* (Cal. App.) 276 P. 1055; *Hardy v. Schirmer*, 163 Cal. 272, 124 P. 993.

[7] Furthermore, if there is no evidence to support a judgment for special damages, as appellant contends, there is, however, ample evidence in the record to support a judgment for \$4,000 for general damages, and, in the absence of any showing to the contrary, we must presume that the sum awarded respondent of \$4,000 is for injuries received and the pain and suffering endured, and nothing for special damages.

Lastly, it is contended that the court erred in instructing the jury as to future damages, because there was no evidence that respondent's injuries were permanent. This contention is likewise without merit. There is abundant evidence in the record from which the jury might well have concluded that respondent's nervous condition would be permanent.

[8] If, however, we concede that there was no evidence whatever that respondent's injuries were of a permanent nature, still the giving of the said instruction under such circumstances would not warrant a reversal of the judgment, because appellant has wholly failed to show that he has sustained any injury by the giving of such instruction. *Hardy v. Schirmer*, supra.

We think the instructions, when taken as a whole, clearly and correctly state the law applicable to all phases of the case.

It follows, from what has been said, that the judgment should be affirmed; and it is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 529

PARNAY v. E. C. AMLING CO. (Civ. 5377.)

District Court of Appeal, Second District, Division 2, California. Sept. 10, 1929.

Corporations §410—Purchase of nursery stock by president of corporation engaged in business of buying and selling cut flowers was binding on corporation.

Purchase of nursery stock by president of corporation engaged in business of buying and selling cut flowers was binding on corporation, as president of corporation may transact business for it and bind it in all matters coming within ordinary course of business.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Hripsime Parnay against the E. C. Amling Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Frank M. Smith and J. Gilbert Fall, both of Los Angeles, for appellant.

Carter & Webster, of Pasadena, for respondent.

BURNELL, Justice pro tem. This is an appeal from a judgment for the purchase price of certain nursery stock alleged to have been sold and delivered by respondent to appellant corporation. The sole question involved is the authority of the president of the corporation to make the purchase on its behalf.

There is evidence to establish the fact that E. C. Amling was president of the E. C. Amling Company and held a majority of its stock. About December 20, 1921, Amling, accompanied by his son Harold R. Amling, secretary, treasurer, and general manager of the corporation (the business of which was buying and selling cut flowers), went to the nursery of respondent at Pasadena and priced heather plants, inquiring particularly as to special rates on quantity lots, and finally agreed to purchase 1,500 heather plants in various sizes. This conversation was followed by a written order on the letterhead of the corporation, "confirming our conversation of yesterday," specifying delivery at Sawtelle, and inclosing a check for \$500 on account. It was signed, "E. C. Amling Co., E. C. Amling." Later on, and prior to delivery, E. C. Amling again visited the nursery, examined the plants, and agreed on cutting them back. He also attended to the delivery, sending trucks

for that purpose. Harold Amling, the son, testified that he knew nothing about the order at the time; but this is negated by the testimony of respondent's manager as to the former's presence with E. C. Amling when the verbal order was given.

The purchase seems to have been made in the ordinary course of business, and as was said in *Newhall v. Joseph Levy Bag Co.*, 19 Cal. App. 23, 124 P. 875, 880: "It is a fact of common knowledge that a very large part of the mercantile business of the country is, as a matter of convenience, if not, indeed, as a matter of necessity, carried on by corporate organizations rather than by partnerships. It would greatly hamper their usefulness if all the daily current purchases and sales of merchandise could be made only by resolution of directors, or that the public dealing with their officers would do so at the peril of having their contracts repudiated when they might happen to be unfavorable to the corporation, or less profitable than was anticipated when made. Suppose an incorporated mercantile house of San Francisco should, in its corporate name, signed by its secretary, and on the verbal authority of the president and one other of the five directors, cable an order to a Paris house for a bale of dry goods of a kind and value previously purchased from the latter by the former. Must the Paris house demand and receive an authenticated copy of a resolution by the board of directors of the San Francisco house, authorizing the order for goods, before the Paris house could safely fill the order? Suppose the Paris house should ship the goods, and on arrival it happened that they had depreciated in value, and the San Francisco house repudiated the contract, claiming their right to do so under the rule now contended for. A system of law that would tolerate such an evasion of responsibility would be unworthy of a civilized people."

In *Leitch v. Marx*, 21 Cal. App. 208, 213, 131 P. 328, 330, the rule is thus stated: "Under all the authorities, the president or manager or other officer having direct superintendence of the affairs of a corporation may transact for and bind it in all matters coming within its ordinary course of business."

We are satisfied that the order was binding on the appellant corporation.

Judgment affirmed.

We concur: **WORKS, P. J.; IRA F. THOMPSON, J.**

2. Automobiles ⚡216—"Pedestrians" having right to travel anywhere upon public highway, it is not negligence for them to do so.

"Pedestrians," that is, persons walking on highway, have right to travel anywhere upon public highway, and it is therefore not negligence for them to do so.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Pedestrian.]

3. Automobiles ⚡245(72)—Pedestrian is not contributorily negligent as matter of law because of failure to look behind him and discover approaching automobile.

Pedestrian is not guilty of contributory negligence as a matter of law because of failure to look behind him and discover approaching car which may heedlessly run him down.

4. Automobiles ⚡218—Pedestrian traveling off traveled portion of highway held not required to look back and ascertain danger from behind.

Where pedestrian traveling east on north side of highway along graveled portion and several feet off paved portion, where he might reasonably have looked for vehicles approaching from front without contemplating that automobile would come up from behind him, pedestrian was under no legal obligation to look back to see whether he was in danger of being struck from behind.

5. Automobiles ⚡218—Failure to keep constant watch behind for approaching vehicle while walking near paved portion of highway held not negligence per se.

Fact that one does not keep constant watch from behind for approaching vehicle while walking near paved portion of highway does not show want of ordinary care on his part or constitute negligence per se.

6. Automobiles ⚡246(4)—Instruction, in action for injuries, requiring defendant's driver to keep "proper" lookout for pedestrians on highway, held not misleading or unduly subject to speculation.

In action by pedestrian for injuries received when struck by automobile on public highway, instruction requiring defendant's driver to keep proper lookout for persons at any point on highway held not misleading, or to permit jury to speculate upon what might constitute proper lookout without regard to what ordinary prudent man would have done under circumstances; word "proper" indicating exercise of that degree of care which prudent man should use under same circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Proper.]

7. Automobiles ⚡246(4)—Trial ⚡296(3)—Instruction, in action for injuries sustained when struck by automobile, warranting recovery if pedestrian established case as charged in complaint, held not improper, especially in view of other instructions.

In pedestrian's action for injuries sustained when struck by automobile, instruction telling jury to find for plaintiffs if plaintiffs have established their case as charged in complaint

208 Cal. 105

BURK et ux. v. EXTRAFINE BREAD BAKERY et al. (L. A. 10052.)

Supreme Court of California. Sept. 13, 1929.

1. Appeal and error ⚡930(1)—On appeal, appellate court must assume that jury on conflicting evidence adopted theory finding support in evidence and according with verdict.

Where evidence bearing on question of contributory negligence of plaintiff struck by automobile on public highway was hopelessly conflicting, presenting case for trial court and jury, jury could take any view of facts justified by evidence, and on appeal appellate court must assume that jury adopted theory of plaintiffs which finds support in evidence and accords with verdict.

held not improper, on ground it was a formula instruction requiring elements of negligence and proximate cause to be included therein, especially where other instructions correctly and fully informed jury on law of proximate cause, contributory negligence, rights of persons using highways, and proper application of law to facts and circumstances of case.

8. Trial ⚡286—Word “believe” used in instruction means to exercise belief in, to credit it upon authority of another, to be persuaded of truth of, to regard, accept, or hold as true.

Word “believe,” used in instruction in personal injury action authorizing jury to award consequential damages if they believe wife has been unable since accident to perform usual services, means to exercise belief in, to credit upon authority or testimony of another, to be persuaded of truth of, to regard, accept, or hold as true.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Believe.]

9. Trial ⚡228(3) — Instruction, in action for injuries sustained when struck by automobile, on amount of damages to husband and wife, held not improper in using word “believe” (Civ. Code, § 3283).

In action for personal injuries sustained when struck by automobile on public highway, instruction respecting damages to be allowed to plaintiffs, husband and wife, held not improper by use of word “believe,” under Civ. Code, § 3283, providing that damages certain to result in future may be allowed, on ground that jury were left to speculate as to result of injuries or belief as to services wife was able to render after injury.

10. Appeal and error ⚡110—Appeal does not lie from order denying new trial.

Appeal does not lie from an order denying motion for a new trial.

In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by J. H. Burk and wife against the Extrafine Bread Bakery and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, and Swing & Wilson, of San Bernardino, for appellants.

E. B. Drake, of Los Angeles, for respondents.

WASTE, C. J. The plaintiffs, husband and wife, instituted this action to recover damages for severe personal injuries sustained by the wife, and for consequential damage to the husband, occasioned by the plaintiff wife being struck by a motortruck owned by the defendant bakery and operated by its employee, the defendant Harry B. Way. The case was tried by a jury, which rendered a verdict for the plaintiffs in the sum of \$10,750. Judgment was entered in that amount,

and the defendants have appealed, urging that the evidence establishes contributory negligence on the part of the injured wife, as a matter of law, and that the trial court erred in instructing the jury.

[1] Appellants argue that all of the credible evidence establishes that the wife was guilty of contributory negligence. The contention calls for but little consideration, for the evidence bearing on the actual happening of the accident is hopelessly conflicting, and presents a case for the consideration of the trial court and the jury, and not one for an appellate court. The testimony on the part of the plaintiffs abundantly supports the verdict of the jury; the testimony on the part of the defendants would support a verdict in their favor. The accident happened on Holt avenue, a highway leading from Pomona to Ontario, in the county of San Bernardino, between 4 and 5 o'clock on a foggy morning, July 3, 1926. It is the theory of the plaintiffs that while Mrs. Burk was walking along the left side of the avenue in an easterly direction, and distant two or three feet northerly from the paved portion of the highway, the defendants' motortruck, also proceeding in an easterly direction, without any occasion therefor, left the concrete pavement, swerved to the left, also in a northerly direction, and, after striking Mrs. Burk, ran on for some distance until it came to an orchard bordering the highway, where it overturned. Mrs. Burk was severely injured on the left side of her head, body, and limbs. The theory of the defendants is that plaintiffs had stopped their automobile on the south half of the paved portion of Holt avenue, and were standing on the paved portion on the left, or northerly, side of the automobile; that defendants' truck, approaching from the west, to avoid running down the plaintiffs, turned to the left, whereupon Mrs. Burk ran suddenly out upon the north half of the pavement, and the driver, Way, swerved the motortruck still farther to the left in a northerly direction to avoid striking her; that Mrs. Burk ran directly into the side of the motortruck as it was being swerved to the left, and was knocked down by the collision; that had she remained standing beside the automobile on the south half of the pavement she would not have been struck.

The evidence on behalf of the plaintiffs placed Mrs. Burk, after being struck, as lying unconscious, on the northerly graveled portion of the highway, almost in the gutter alongside the orchard, and immediately behind the overturned truck. The evidence for the defendants is that, following the accident, she was lying in the center of the paved portion of the roadway. Both plaintiffs testified that their automobile had been in collision with an automobile driven by an unnamed party just prior to the injury to Mrs. Burk;

that they had driven their automobile on to the right graveled side of the paved highway, had stopped, and had gone back to talk to the driver of the other machine, which was on the north side of the roadway and west of Ramona avenue; that Mrs. Burk was walking back from that place to their own automobile, but was traveling on the north side of the highway on the graveled portion, and a number of feet north of the paved portion. Mrs. Burk testified that, after crossing Ramona avenue she was suddenly aware of a light about her on the highway; that she looked behind her, saw the lights of an automobile, and in less than a second's time was run down by the truck approaching her from the rear. Mr. Burk testified that when he was standing by the automobile with which his own had been in collision, he saw the truck approaching from the west and some distance away. It was coming rapidly along the center of the paved portion of the highway; that, after crossing Ramona avenue and before reaching the place where the automobile of the plaintiffs was standing, the truck turned to the left and north and off the paved portion of the roadway, striking Mrs. Burk. The defendant, Way, driver of the truck, testified that the automobile of the plaintiffs was stopped on the southerly paved portion of the highway; that the plaintiffs were standing by it; that after crossing Ramona avenue he saw the standing automobile, and gradually veered to the left to avoid striking the plaintiffs; that Mrs. Burk ran suddenly into the path of his truck, and was struck by the side of the machine as he swerved it still farther to the left to avoid hitting her. Aside from other contradictions in the testimony, the defendant Way was contradicted by plaintiff Mr. Burk and by a disinterested witness, Olsen, as to a conversation, immediately after the collision, in which Way stated that he did not see Mrs. Burk before she was struck.

The jury could take any view of the facts justified by the evidence, and on appeal, and with a record like the one now before us, we must assume that it adopted the theory of the plaintiffs, which finds support in the evidence, and which accords with the verdict. *Simmons v. Pacific Elec. Ry. Co.*, 60 Cal. App. 140, 143, 212 P. 641.

[2-5] The appellants complain of certain instructions. The plaintiffs both testified that Mrs. Burk was walking in an easterly direction along the graveled portion of the roadway, and several feet off the paved portion. The truck approached from the west, and behind the plaintiffs. If those were the facts, and, in order to arrive at the verdict, the jury must have accepted them as the established facts, Mrs. Burk was in a situation which justified the trial court in instructing the jury that Mrs. Burk, "as a pedestrian was under no legal duty to keep a constant lookout back or constantly watch behind her to see

whether she was in danger of being struck or run down by any vehicle approaching her from the rear; therefore she was not guilty of negligence or contributory negligence in not doing so, even should [the jury] find she did not." By another instruction the jury was told that: "It is the settled law in this state that pedestrians, meaning persons walking upon the highway, have a right to travel anywhere upon the public highway, and it is, therefore, not negligence for them to do so." That is the law in this state. *Hatzakorjian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 95, 239 P. 709, 41 A. L. R. 1027. Therefore, a pedestrian is not guilty of contributory negligence, as a matter of law, because of a failure to look behind him and discover an approaching car which may heedlessly run him down. *Devecchio v. Ricketts*, 66 Cal. App. 334, 226 P. 11. A person traveling on foot on a part of the road, and under circumstances where he may reasonably look for vehicles approaching him from in front, but may not contemplate that an automobile will come up behind him, is not under a legal obligation to look back to see whether he is in danger of being struck from behind (*Raymond v. Hill*, 168 Cal. 473, 482, 143 P. 743; *Fahey v. Madden*, 58 Cal. App. 537, 539, 209 P. 41), and the fact that one does not keep a constant watch behind for an approaching vehicle while walking near the paved portion of the highway, does not show a want of ordinary care on his part, nor constitute negligence per se (*O'Connor v. United Railroads*, 168 Cal. 43, 49, 141 P. 809).

[6] At another point in the charge, the court told the jury that it was the duty of the driver of defendants' automobile to anticipate that he might meet persons at any point on the highway, and he must, in order to avoid a charge of negligence, "keep a proper lookout for them, and keep his machine under such control as would enable him to avoid a collision with another person using care and caution," and that a failure, if any, on his part to use that care was negligence. Objection is made by appellants to the use of the words "proper lookout," it being argued that their use permitted the jury to speculate upon what might or might not constitute a proper lookout, without regard to what an ordinarily prudent man would have done under the circumstances. This instruction was, no doubt, based upon the law as decided by this court in *Rush v. Lagomarsino*, 196 Cal. 308, 237 P. 1066; and what was said in the case of *Ballos v. Natural (Cal. App.)* 269 P. 972, concerning the use of the words "proper lookout," may well apply here. It was there held (page 973) that the employment of the word "proper" to indicate the care required of a defendant means only the exercise of that degree of care which a prudent man should use under like circumstances, and which is the degree of care which the law imposes upon the other. In this, as in that case, the jury

was fully and fairly instructed as to the degree of care required of both parties. Therefore, the instruction was not misleading, or unduly subject to speculation.

[7] The court also instructed the jury that if, after taking into consideration all the facts and circumstances proved in the case, it should "find that the plaintiffs have established their case as charged in the complaint," it should find damages in favor of the plaintiffs and against the defendants. Appellants contend that this instruction omits entirely any requirement that the negligence alleged in the complaint should be the direct and proximate cause of the injuries complained of, and omits any condition that plaintiffs should have been free from contributory negligence. We do not regard this portion of the charge as such a formula instruction as to require all the elements of an instruction of that nature to be present. The court read to the jury the charge of negligence contained in the complaint, and told it "that if you find that the defendants were guilty of the negligence thus charged and that the same was the sole proximate cause of any injuries to the said Emma Burk, then you will find damages in favor of the plaintiffs. * * *" In other instructions the jury was correctly and fully informed on the law of proximate cause and contributory negligence, and of the rights of persons using the highways, and as to the proper application of the law to the facts and circumstances of this case.

[8, 9] Lastly, it is contended that the court erred in instructing the jury respecting the damages to be allowed to the plaintiffs. The instruction to which this complaint is addressed is one relating only to the consequential damages to be allowed to the husband and coplaintiff of the injured woman. It is as follows: "If you should conclude that the plaintiffs, J. H. Burk and Emma Burk, should recover herein, and if you further find that Emma Burk before the accident in controversy was in charge of the household of, and performed the usual duties therein for her husband, J. H. Burk, and shall further believe that she has been unable since said accident, and will be unable in the future for any length of time, to perform the same services by reason of any injuries received in the accident in controversy here, then I instruct you that you may find for the plaintiff, J. H. Burk, such sum in damages as will reasonably and fairly compensate for such loss of services, and in addition thereto you will allow him such sum as the evidence shows he has necessarily and reasonably incurred or paid in employing physicians and surgeons to treat his said wife, together with any reasonable and necessary amount paid or incurred for hospital and ambulance bills, in all not exceeding the amount alleged therefor, to-wit, \$10,198.00." Exception is taken to the use of the words "believe that she * * * will be unable," as contravening section 3283 of

the Civil Code, which provides that damages may be awarded in a judicial proceeding for detriment resulting after the commencement of the action "or certain to result in the future." The complaint is that the jurors were not told that they could consider damages certain, or reasonably certain, to result in the future, but were left to speculate as to the result of the injuries, "or believe that she would be unable" to render the same services for her husband and family as before the accident. The instruction was loosely drawn, but, read in the light of all the instructions comprising the charge, the criticism becomes highly technical. In the first place, as noted, the instruction relates to the consequential damages resulting to the husband and coplaintiff of the injured wife through loss of her services in the household and for the expenses incidental to her care and treatment. There was much testimony concerning the extent of the injury suffered by Mrs. Burk, and her physical condition before and after she was injured. That she was severely injured is not disputed. There was considerable evidence touching her inability to perform her household duties to the extent she did before she was hurt. Touching her personal injuries, the jury was properly instructed that it should consider their extent and nature and to what extent any of them were permanent in character, as well as the physical pain and mental anxiety which she "has suffered, or will certainly suffer in future because of her injuries." Objection to the use of the word "believe" is hypercritical. It was used in the same sense as the words "conclude" and "find" which preceded it. "To believe is to exercise belief in; to credit upon the authority or testimony of another; to be persuaded of the truth of; * * * to regard, accept, or hold as true." Webster's International Dictionary. Language used by this court in *Melone v. Sierra Ry. Co.*, 151 Cal. 113, 117, 91 P. 522, cited by appellants as sustaining their criticism, must be read in connection with the record in that case which we have had produced from our files. We find that the court was there considering instructions which told the jury that it might consider the pain and anxiety and the physical and mental suffering which the plaintiff there "may suffer in the future." The citation, *Pennsylvania Co. v. Files*, 65 Ohio St. 403, 62 N. E. 1047, in the *Melone* Case, was not properly explained, for all that the Ohio court said that was germane to the *Melone* Case was: "The jury in assessing prospective damages should have been confined to such as were reasonably certain to follow from the injury complained of." In this case, if the jury "concluded" that the plaintiffs should recover, and "believed" that because of her injuries Mrs. Burk would be "unable in the future" to perform the same services that she had theretofore rendered in her household, all as instructed by the court, it must have

been persuaded that the loss of her services was a detriment "certain to result in the future." However, we see no reason why experienced counsel will persist in asking trial courts to give inartificially drawn instructions, only to be called upon to spend much of their own energy and our time in defending them.

[10] An appeal does not lie from an order denying a motion for a new trial. The appeal in this case from such order is dismissed. The judgment is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; SIENK, J.; LANGDON, J.; PRESTON, J.

208 Cal. 123

PEOPLE v. CROCE. (Cr. 3231.)

Supreme Court of California. Sept. 14, 1929.

1. Criminal law $\S$ 273—General plea of guilty of murder, first degree, foreclosed any question of defendant's sanity when homicide was committed (Pen. Code, $\S$ 1026, as added by St. 1927, p. 1149, $\S$ 4).

Where, on day of trial, defendant through his counsel was permitted to withdraw his general plea of not guilty and special plea of not guilty by reason of insanity and enter a general plea of murder in the first degree, any question of defendant's sanity at time homicide was committed was thereby foreclosed, under Pen. Code, $\S$ 1026, as added by St. 1927, p. 1149, $\S$ 4.

2. Homicide $\S$ 270—Evidence held insufficient as matter of law to create doubt as to sanity, and refusal to submit question to jury was not abuse of discretion (Pen. Code, $\S\S$ 1367, 1368).

In prosecution for murder, in which accused entered general plea of guilty of murder, first degree, evidence held insufficient as a matter of law or fact to create in mind of court a doubt as to the sanity of defendant, within Pen. Code, $\S\S$ 1367, 1368, and trial court's refusal to submit question of defendant's present sanity to jury did not constitute abuse of discretion.

3. Criminal law $\S$ 331—Burden of proving insanity is on one asserting it.

The burden of proving insanity is on the party asserting it.

In Bank.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Mario Croce was convicted of murder in the first degree, and he appeals. Affirmed.

J. R. Thomas and Will Van Dyke, both of Ukiah, for appellant.

U. S. Webb, Atty. Gen., J. Chas. Jones and Lionel Browne, Deputy Attys. Gen., and Lilburn I. Gibson, Dist. Atty., of Ukiah, for the People.

SEAWELL, J. Upon the plea of guilty to an indictment charging the defendant with murder, the trial court, upon a hearing conducted for the purpose of fixing the punishment which the defendant should suffer, determined that he was guilty of murder in the first degree and adjudged that as the penalty therefor he should suffer death. Section 190, Pen. Code.

Three grounds of appeal are presented: First, that the judgment is not sustained by the evidence; second, that the finding that the defendant was guilty of murder in the first degree is not sustained by the evidence; third, that the court erred in denying defendant's motion for a suspension of judgment and refusing his request for a trial by jury for the purpose of determining, as provided by sections 1367, 1368, Penal Code, the question as to the defendant's sanity at the time of trial. Said sections read as follows:

"1367. A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane.

"1368. If at any time during the pendency of an action up to and including the time when defendant is brought up for judgment on conviction a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the court, during the pendency of the issue of insanity."

The specific act charged against the defendant was the taking of his wife's life at Elk, more commonly known as Greenwood, situated in the county at Mendocino, this state, on the 26th day of December, 1928. Both the defendant and his wife had arrived at middle life and were natives of Italy, where their eldest daughter was born. The other five children were born in this country. The husband and wife resided at Greenwood for a number of years with their family, and finally acquired the property known as the Union Hotel, which they conducted for some time; the wife doing the cooking and the greater part of the work incidental to such a business. The property was incumbered. On February 1, 1928, both joined in a lease of said property to one Vellutini upon negotiations conducted by the defendant. The lease contained a provision that the deceased should "continue to work in said place and attend to the kitchen and board the family, receiving in compensation sixty dollars per month for her services in said place." The lease provided for an option to purchase said hotel property. The terms and conditions of said lease and option having no bearing on the questions presented by the appeal, no further consideration will be given to that subject.

The domestic relations of the defendant and his wife had, for many years prior to the homicide, been frequently openly disturbed. The evidence is overwhelming that he was unusually cruel in his general course of treatment of his wife and children, and upon several occasions in bursts of anger, aroused by an excessive use of intoxicating liquors, he inflicted physical injuries upon his wife and on one occasion upon his eldest daughter. His children held him more or less in dread. His notion, as expressed by him, was that he should keep them reminded that he was the "boss." He was also addicted to the excessive use of intoxicating liquors. The wife had made repeated complaints to the justice of the peace of the township in which Greenwood is situate that her husband had made threats against her life and she feared he would execute his threats, but when told that nothing could be done unless she made a formal criminal charge against him, she refused to make such charge, giving as her reason that she did not want her husband in jail, and that she would not do it. He was arrested and detained in jail for a short time upon one occasion for a battery made or assault committed upon said daughter.

The wife finally filed an action for divorce against defendant in the superior court of the county of Mendocino, charging him with treating her extremely cruel. The defendant consulted a lawyer upon several occasions, and, while he made no formal appearance and his default was entered, he was present at the hearing of the proceeding. Following the conclusion of the proceeding, to wit, on October 31, 1928, the court made its interlocutory decree, which was thereafter filed with the clerk, granting the wife a decree of divorce from the defendant and appellant upon the ground of extreme cruelty. The decree awarded the care, custody, and control of the minor children to the wife and also directed that defendant pay to his wife the monthly sum of \$50 for the care, education, and maintenance of said minors. The hotel property, found to be community property, was assigned to the wife absolutely as her separate property.

For some time prior to the homicide the defendant was in and out of Greenwood, visiting in San Francisco and elsewhere. In August or September, 1928, he fell from a fruit tree while engaged in gathering fruit near Santa Cruz and suffered a fracture of the leg and received minor bruises about the shoulder and head. Said injuries in no way affected his mentality.

Subsequent to the execution of said lease, defendant began to suspect that undue intimacy existed between Vellutini and his wife. Mrs. Croce and her children occupied rooms on the ground floor adjoining the kitchen. Several of her children shared the room with her. Vellutini occupied a room on the second

floor facing the stairway. The defendant claims that upon one occasion he and a friend of his made an unexpected entry into the lower floor of the hotel and Vellutini made a rapid exit from Mrs. Croce's room. Other incidents which were related by him would likely have a tendency to arouse suspicion in a husband who had reasoned himself into the belief that his wife had transferred her affections from him to another. Those who were in the best position to generally observe Mrs. Croce's actions, as well as her children, resented the suggestion that there was any ground for defendant's belief that the relations between her and Vellutini were improper. Her reputation for chastity seems to have been above suspicion so far as the neighborhood was concerned. It is clear from the evidence presented upon said proceedings that the defendant grew more suspicious as time went on, and upon one occasion Vellutini ejected him from the hotel because of his accusations as to said improper relations with Mrs. Croce. Throughout all of the period of domestic trouble and practically at all other times mentioned herein, the defendant was more or less affected with intoxicating liquors. He was seldom, if ever, in a condition of total incapacity, but was habitually under its irritating influence. He complained bitterly to others upon a number of occasions of being deprived of the care, custody, and control of his children and the orders assigning the community property to his wife and requiring him to pay the sum of \$50 for the education and maintenance of said minors. The wife, he claimed, was training the children to have nothing to do with him and he was not allowed to visit with them. He had made threats against the lives of both Vellutini and his wife. About a month prior to the homicide he purchased a pistol and cartridges. Returning to Greenwood about a week before the homicide with a friend, he took a room next door to the Union House. He sent his friend to talk with his wife and inform her that if she would give him \$250 he would leave Greenwood, knowing that she was in an uneasy state of mind as long as he was near her. She replied to the request or demand that before giving it to him she would burn it in her kitchen stove. This answer was conveyed to defendant and seemed to have perceptibly stung him, as did other refusals of his propositions.

On Christmas day he met one of the children and asked the child if he could eat Christmas dinner with the children and the child replied that it did not know. His testimony is that he went to his room in the hope of being called when dinner was to be served, but he waited in vain for a call. Afterwards he ate with a friend. That night he went to bed at an early hour, meditating upon what his course should be. He arose at his usual waking hour, at about 5:30, armed himself,

and placed himself at the kitchen door, knowing that his wife would resume her duties at about that hour. His testimony was that he intended to shoot either Vellutini or his wife, whichever he should first see. The wife was the first to present herself. Without uttering a word, standing at a distance of not more than a few feet from her, he began firing at her and fired four bullets into her body, in rapid succession, two of which inflicted mortal injuries. She ran to her eldest daughter's bedroom, mortally wounded, screaming: "He killed me; he killed me; I knew he would do it some day." The suddenly awakened daughter laid her across her bed where she expired a few minutes thereafter. The defendant being familiar with the adjoining premises, ran to and concealed himself in the lower room of a tankhouse, located some 75 feet from the place where he fired the shots, where he remained until discovered some three hours and a half thereafter. He had reloaded his pistol and remarked thereafter that he had plenty of cartridges left for Vellutini had he appeared. He was observed in the tankhouse by a little girl, and soon thereafter Sheriff Byrnes, who had arrived from Ukiah, the county seat, in company with another officer, Conway, walked out to the tankhouse and the sheriff called to him that he wanted to see him, and the defendant answered, "All right," and came out. He said he had been waiting for the sheriff to arrive to surrender himself to him. He was placed under arrest and on the following day made a statement in which he specifically detailed the grounds upon which he predicated charges of his wife's infidelity, and he went at some length into what he claimed to be the causes that led to his separation from his family and prompted him to commit the crime. The causes stated by him were put in the light most favorable to himself and may be epitomized in the following excerpt taken from his somewhat lengthy statement:

"Then Christmas come, the 25th, and my brother come in from Santa Cruz to have Christmas with the family, because my brother he loan me the money to buy the hotel. I tell my kids on the outside, 'You think Mama let me go inside and eat dinner with you kids and my brother too, like we used to do before?' Last Christmas I was in the hospital, and those kids say 'I don't know,' and I say 'That's all right'—I get disgusted.

"Q. That was on Christmas morning? A. And all of the people say 'What's the matter they don't let you go inside?' and I say if I catch Vellutini there I shoot Vellutini and if I catch my wife I shoot her—which one show up first. I wanted to clean up the scandal.

"Q. You had it in your mind that you were going in there and find Vellutini—if you found him you would shoot him and if you didn't find him you would shoot your wife? A. Yes.

"Q. And early yesterday morning you made up your mind you were going in the hotel and if Vellutini was there you would shoot him and if not you would shoot her, is that right? A. Yes.

"Q. So you went to the hotel? A. In front of the back door at five o'clock in the morning and she open the door and I see my wife and I shoot her.

"Q. What did you have? A. Pistol—thirty-two; I never thought to kill her with a small pistol like that.

"Q. She opened the door and you just shot her? A. I shot her two times and after I look I see four shells; I was crazy.

"Q. When she came to the door you didn't look for Vellutini at all? A. She was alone; Vellutini was not there; he don't get up.

"Q. What did you do then? A. I just shoot her in front of the door and I run around to the tankhouse and wait for the sheriff to come down; I could tell the sheriff's voice and then I come out.

"Q. Was she facing you when you shot her, —were you looking at her or she looking at you? A. To tell you the truth I don't know nothing about it.

"Q. Had you been drinking? A. No, sober.

"Q. Hadn't had a drink all night. A. No, I make up my mind to finish that scandal, that's all.

"Q. When did you make up your mind to do that—to kill one of them,—yesterday morning or day before? A. Christmas night.

"Q. When you asked the children if they would let you and your brother eat dinner and they said they didn't know, then you made up your mind soon after that you would kill them? A. Yes, that's right."

[1] Three attorneys of recognized ability and high standing at the bar of this state were appointed by the court to represent the defendant, and a fourth attorney, ranking equally as high, was added in place of one who had withdrawn from the case. Without hope of compensation they devoted themselves unsparingly to defendant's cause, and became earnest, if not exceptionally zealous, advocates in his defense. Upon arraignment the general plea of not guilty was entered and also the special plea of not guilty by reason of insanity. Upon the day of trial, after mature deliberation, the defendant, through his counsel, was permitted to withdraw his former general plea of not guilty and the special plea of not guilty by reason of insanity and enter a general plea of murder in the first degree. This action under the statute foreclosed any question of defendant's sanity at the time the homicide was committed. Section 1026, Pen. Code (as added by St. 1927, p. 1149, § 4). On this issue, however, it is proper to observe that there was no question but that the defendant was legally responsible for the crime committed, as the testimony of many witnesses, including his own testimony, indisputably

proved that he fully understood the nature and quality of the act he committed and he knew it was wrong and a violation of law to commit it.

[2] At the proceedings had upon the withdrawal of said pleas the defendant was personally interrogated by the trial judge as to whether or not he desired to enter a plea of guilty, and he replied that he did, and, when asked what his plea was, replied: "I plead guilty, I shoot her, but don't intend to kill her." The court, not being satisfied with that sort of plea, asked the defendant the pointed question as to whether he pleaded guilty to the charge of murder, and the defendant gave the following qualified answer: "Not murder; I don't know what I was doing." Again the court insisted that he must enter an unqualified plea to the charge of murdering his wife, and the defendant replied: "I plead guilty, but I don't try to do that." Again the court asked the defendant if he pleaded guilty to the charge of murder, and the defendant responded, "No, not murder; I plead not guilty to cold blood." At this point one of the attorneys interceded and explained to the court that the defendant wished to enter a plea of guilty provided he be permitted to produce evidence in mitigation of the punishment. The trial judge then said he wished to know if the defendant entered a plea of guilty to the charge of murder. The defendant thereupon replied: "Yes; I want my witnesses and everything." The court informed him that he could have his witnesses at the hearing and again asked if he pleaded guilty to the crime charged against him and the defendant answered, "Yes." It is very clear from the proceedings that the defendant, before entering his plea of guilty, wanted to be assured that he would have the right to offer evidence in order to reduce the punishment from the death penalty to life imprisonment or a lesser punishment and did not purpose to prejudice any right in that respect by his plea. The plea having been entered, the jurors present to try the cause were dismissed. The prosecution thereupon proceeded with its witnesses to establish the facts and circumstances of the crime and the defense was allowed until the following day to offer evidence in mitigation of the punishment. At the conclusion of the proceeding conducted for the purpose of determining the degree of the murder of which the defendant was guilty and whether there existed any facts or circumstances which would warrant the court in mitigating the punishment from the death penalty to imprisonment, during which much evidence was adduced directed to the mental status of the defendant, the trial judge announced that nothing appeared in the evidence that would warrant him in relieving the defendant from the extreme penalty of the law, as the evidence showed without conflict that the defendant was guilty of willful, deliberate, and

premeditated murder. The court thereupon determined that the defendant must suffer death for his crime and set a day certain for pronouncing judgment, on which day counsel for defendant, upon the reconvening of court, moved for the arrest of further proceedings, particularly the pronouncing of judgment, and requested that the question as to the present sanity of the defendant be determined by a jury under the provisions of section 1368, Penal Code, and other kindred sections. Counsel, in making his motion, stated that the defense had no further evidence to offer touching the issue of defendant's present sanity, but thought the evidence taken in the proceedings was sufficient to create a doubt in the mind of the court as to the sanity of the defendant and specially stressed the testimony of one of the attorneys for the defendant in the case and the testimony of another attorney who had withdrawn from the case. The ground urged was that said attorneys testified that they were not able to get rational assistance from the defendant in the preparation of his case and believed his mind to be impaired. The argument stressed in the court below and repeated here is that the defendant, by slaying his wife, "thought he was righting a worse wrong in correcting the scandal going on in connection with his family." At the conclusion of full arguments on the motion to submit the issue of defendant's then mental condition to a jury, the court denied the motion and pronounced the formal judgment that defendant suffer death as the penalty for the murder of which he stood convicted.

We have read the entire record of the proceedings had in the trial court, which includes the testimony given by the defendant at the hearing, and fail to find any substance in the contention that the evidence was sufficient as a matter of law or fact to create in the mind of the court a doubt as to the sanity of the defendant. Applying the rules by which human motives are ordinarily determined, the act of the defendant was attributable to a feeling and was consummated with a purpose of avenging the losses which he had sustained in both property and family relationship from causes which he insisted at the hearing he was not the author of and from which he should not be made to suffer. The testimony of the defendant is a complete refutation of the claim that he was unable to give assistance to his attorneys in the conduct of his case. The familiar rule formulated by Blackstone and since restated by appellate courts of this state (*People v. West*, 25 Cal. App. 369, 143 P. 793, 794), is in these words: "Also, if a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he

ought And if, after he had pleaded, the prisoner becomes mad, he shall not be tried—for how can he make his defense? If after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane memory execution shall be stayed, for, peradventure, says the humanity of English law, had the prisoner been of sound memory he might have alleged something in stay of judgment and execution."

[3] The foregoing rule does not fit the appellant's case. He showed a good memory and was able to reason from cause to effect and recounted his domestic difficulties covering a series of years with meticulous detail. He fixed dates and named places and persons in the narration of his matrimonial troubles with more than ordinary accuracy, and he gave his story at least the show of plausibility. Aside from the strength of his own testimony as to his sanity, witnesses were called who had known the defendant for a number of years and gave added evidence of his present sanity at the hearing, as well as at all other times during their acquaintanceship with the appellant. It is the law that the burden of proving insanity is upon the party asserting it. There could exist no doubt as to the soundness of the trial court's determination of this issue if the rule had been the reverse.

In two comparatively recent cases, *People v. Gilberg*, 197 Cal. 306, 240 P. 1000, 1002, and *People v. Sloper*, 198 Cal. 238, 244 P. 362, we had occasion to construe section 1368, Penal Code, which cases may be cited in affirmance of the trial court in the instant case. In *People v. Gilberg* the court said: "The existence of a doubt as to the sanity of the defendant means, of course, any doubt that may be created in the mind of the trial court arising from a consideration of all the facts and circumstances which the situation may disclose, and he may, upon his own motion, in the exercise of a sound discretion, submit the question of the defendant's sanity to the determination of a jury. Such a doubt must be supported by facts and circumstances of a substantial character. This right does not arise merely because the defendant asserts insanity, however baseless the claim may be. To justify the dismissal of the jury or the suspension of a trial the court must entertain a doubt founded upon substantial grounds. In other words, there must exist reason to believe that the claim of insanity made on behalf of the accused is genuine and not simulated as a means of defeating or delaying the law's penalties in cases where all other means of evading punishment would seem hopeless. *People v. Fountain*, 170 Cal. 460, 150 P. 341, is in point."

On the question of judicial discretion the

decision continues: "In the determination of this question, as in that of any other fact from oral evidence, he [court] of necessity, must be conceded to be the best judge of what the evidence shows, since he has before him many elements of fact which cannot be transmitted to paper, but which enable him to more correctly weigh the evidence, and exercise a wiser discrimination as to what it shows than one who reads but a naked statement of the evidence, without the presence of the witness. And so it has been held, and wisely, that the trial judge is to be accorded wide discretion and latitude in this respect; and his ruling will not be disturbed except where the evidence is so lacking as to leave no just room for question that the discretion has been improperly exercised. *People v. Pico*, 62 Cal. 53; *Estate of Carpenter*, 94 Cal. 414, 29 P. 1101; *People v. Lane*, 101 Cal. 516, 36 P. 16; *People v. Schmitt*, 106 Cal. 52, 39 P. 204."

There is no room for the claim that the court in any manner abused its discretion or acted arbitrarily in the slightest degree. On the other hand, the court was patient, indulgent, and liberal in its rulings and conducted the proceedings in a manner which well becomes a trial court sitting in a hearing in which the right of a human being to live is the issue to be decided. We find that the defendant was denied no substantial right.

Judgment and orders affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; LANGDON, J.; CURTIS, J.

208 Cal. 121

GOODSPEED v. ASSOCIATED ALMOND GROWERS OF PASO ROBLES.
(L. A. 10019.)

Supreme Court of California. Sept. 13, 1929.

Vendor and purchaser — Evidence held to sustain finding that sale of land was made from unauthenticated map, and contract of sale was therefore void (St. 1907, p. 290, § 8).

Where contract of purchase described land as lots 10 and 12 and purchaser testified that vendor located land by use of unrecorded map, in action to rescind contract and to recover amounts paid thereunder on ground that contract was void because made in violation of provisions of St. 1907, p. 290, § 8, which required that no person shall sell land by reference to map unless such map has been certified, evidence held to sustain finding that sale of land was made from unauthenticated map.

In Bank.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Edith I. Goodspeed against the Associated Almond Growers of Paso Robles.

From a judgment for plaintiff, defendant appeals. Affirmed.

Griffith & Thornburgh and Wm. G. Griffith all of Santa Barbara, for appellant.

Webster & Lyon, of Paso Robles, for respondent.

PRESTON, J. The judgment of the court below is affirmed.

On June 25, 1920, respondent contracted with defendant to purchase 20 acres of land set to almond trees, described in the agreement of purchase as follows: " * * * And the said Buyer agrees to buy and pay for twenty acres of almond land situated in the Paso Robles District, California, which said land is described as follows, to wit: Lots 10 and 12 of Associated Almond Orchards, Loma Robles Tract, containing 20 acres of 4 year old trees."

Plaintiff visited the tract, and appellant's salesman showed her the property supposed to be covered by the contract, identifying its location, she claims, by the use of an unrecorded map in his possession and by pointing out its dimensions from certain individual trees in the tract. She paid the installments due on the purchase price of \$16,000 until June 24, 1923, on which date her total payments aggregated \$9,857, including interest and taxes. Thereafter she brought this action to rescind the contract and to recover the amounts paid thereunder upon the ground that it was null and void because made in violation of the provisions of the act of 1907 (St. 1907, p. 290, § 8), which require that no person shall sell or offer for sale any parcel of land by reference to any map or plat, unless such map or plat has been made, certified, indorsed, acknowledged, and filed in all respects as therein provided. Defendant by its answer denied that said sale was made by reference to an unrecorded map.

The court, however, found that the term "Lots Ten and Twelve" as used in said contract of purchase was intended by the defendant to and did indicate and designate two lots or subdivisions of a certain tract as delineated on the survey of said land and the map or plat thereof made by defendant prior to execution of the contract; that said map was used by defendant in offering for sale and selling plaintiff said property; that it had not been filed or recorded in the office of the county recorder of San Luis Obispo county or elsewhere; and in fact that no map or plat of said lands had ever been filed in the office of the said county recorder. The court accordingly gave judgment for plaintiff, from which defendant has appealed.

The description itself, as it appears in the contract, calls for the use of some map or plat for identification of the property, without which said description is plainly unintelligi-

ble and perhaps void for uncertainty. In short, an examination of the evidence shows that it is ample to sustain the findings made by the court that the sale was made from an unauthenticated map or plat, and hence brings into operation the rule many times stated by this court, that a contract to sell lots described only by reference to an unrecorded map, contrary to the provisions of the statute hereinabove referred to, is void and unenforceable and the purchaser thereunder may recover the amount paid by him. *Smith v. Bach*, 183 Cal. 259, 191 P. 14; *Smith v. Bach*, 54 Cal. App. 236, 201 P. 611; *White v. Jacobs* (Cal. Sup.) 267 P. 1087; *Hartzell v. Doolittle* (Cal. Sup.) 269 P. 527; *Krause v. Marine T. & S. Bank* (Cal. App.) 270 P. 246; *Letteau v. Dumas* (Cal. App.) 278 P. 459.

Further discussion is not required.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

208 Cal. 134

CARLSON v. LANTZ. (L. A. 10014.) ★

Supreme Court of California. Sept. 14, 1929.

Rehearing Denied Oct. 14, 1929.

1. Executors and administrators ⇨426—Special administrator had authority to maintain action to have attorney declared trustee of property alleged to have been obtained from deceased by fraud.

Special administrator, appointed to preserve personal property and manage real estate and maintain all suits necessary to carry out these powers, had authority to maintain action to have attorney alleged to have obtained property from deceased by fraud, declared trustee of such property.

2. Trusts ⇨107—If relation of attorney and client existed, burden, in suit to declare trust, was on attorney to negative fraud in transaction in which he obtained property from deceased.

In action to have defendant declared trustee of property alleged to have been obtained from plaintiff's deceased by fraud of defendant, if relation of attorney and client existed between defendant and deceased, burden was on defendant to negative fraud in transaction.

3. Trusts ⇨110—Evidence, in suit to establish trust, held to support finding that attorney had gained advantage over aged client from whom he had obtained realty.

In action by special administrator of deceased to have attorney declared trustee of property, where attorney promising that he would see that client, since deceased, would not be in want of necessities of life, obtained property from aged client, weak in mind and easily influenced, evidence held to support finding that attorney had gained advantage over client.

4. Trusts ⇨110—Evidence, In suit to establish trust, held to show that attorney and client from whom attorney had obtained property had not dealt at arm's length.

In action by special administrator to have attorney declared trustee, where attorney obtained such property from aged client, since deceased, weak in mind and easily influenced, and had not suggested to client that she might obtain advice independent of his counsel, and there was indication that client had not consulted any other counsel, evidence held to show that parties had not dealt at arm's length.

5. Trusts ⇨377—Cost of photographs incurred in one action could not be taxed as cost of another action between same parties, although photographs were used in other action.

Where cost for photographs was incurred in will contest case between special administrator of estate and devisee under will, such cost could not be taxed in action by administrator to have such devisee declared trustee of property belonging to estate, although not itemized as cost in will contest case and used in case to have devisee declared trustee.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Harold Carlson, special administrator of the estate of Bertha Carlson, sometimes known as Bertha Carlson Witt and Bertha Schubert Witt, against Charles Lantz. From a judgment in favor of the plaintiff and an order taxing cost, defendant appeals. Judgment affirmed; order modified, and as modified, affirmed.

Newby & Newby and Winslow P. Hyatt, all of Los Angeles, for appellant.

Marshall Stimson and Noel C. Edwards, both of Los Angeles, for respondent.

PER CURIAM. This is an appeal from a judgment for the plaintiff entered on the trial court's findings of fact and conclusions of law.

The plaintiff is a son of Bertha Carlson Witt, sometimes called Bertha Carlson or Bertha Schubert Witt, and sues in his representative capacity as special administrator of her estate. Bertha Carlson Witt died about February 5, 1923. Thereafter and about the 21st day of February, 1923, a will dated January 5, 1921, by which the decedent devised and bequeathed all of her property to the defendant, Charles Lantz, was filed by Lantz for probate. A proceeding contesting the probate of that will was instituted by the plaintiff. On March 9, 1923, the plaintiff procured letters as special administrator, and on December 4, 1923, he filed the original complaint in the present action. On May 14, 1924, a jury in the proceeding contesting the probate of the will returned three special verdicts, namely: (1) That said Bertha Carlson was of unsound mind on the 5th day of Janu-

ary, 1921; (2) that the alleged will of January 5, 1921, was procured by undue influence of Charles Lantz; (3) that the alleged will of January 5, 1921, was procured by the fraud of Charles Lantz. The judgment in favor of the contestant in that proceeding, who is the plaintiff here, was affirmed by this court. Estate of Witt, 198 Cal. 407, 245 P. 197.

[1] After the trial of the issues raised in the will contest, the plaintiff in this action by leave of court amended his complaint to conform to the facts adduced in that proceeding. There is no serious objection that the trial court, sitting as a court of equity, did not have the power and discretion to grant leave to file the amended complaint. Neither is the plaintiff's capacity to sue in his representative capacity seriously brought into question. The grant of power to collect and preserve all the personal property and all the rents, etc., of the real and personal property and all claims and demands of the estate, and take charge of and manage the real estate, and preserve the same from damage, etc., and commence, maintain, and defend all suits and other legal proceedings necessary to carry out these powers, contained in the order appointing the plaintiff as special administrator, was sufficient authority to commence and maintain the present action. These points will therefore not further be noticed.

The amended complaint, among other allegations, in substance alleges that at the time of her death Bertha Carlson Witt was the equitable owner and in the possession of certain described real property which comprises several lots and parcels of land in Carlson terrace, Elysian Heights tract, and Angeleno Heights tract in the city of Los Angeles; that in April, 1920, the decedent employed the defendant as her attorney to act for her in matters relating to the property described; that the decedent at that time was ill and frail, mentally and physically, and, imposing upon the confidence which the decedent reposed in him, the defendant, with fraudulent intent to obtain for his own gain all of the described property, by various described transactions procured the legal title either in himself or for his benefit in one Thomas A. Davis, a cousin of the defendant who resided at Goshen, Ind. The details of these transactions as alleged and proved are more fully stated in the opinion in the Estate of Witt, supra, which may be referred to for greater particularity. The complaint also alleges the conditions surrounding the execution of the will and the fact that the petition for probate of the will described as the estate left by the decedent only some personal property valued at about \$250. The plaintiff sought to have the defendant declared a trustee of the legal title to the real property described and for an accounting. The trial court found that the decedent was the equi-

table owner and in the possession of the real property described and entered its judgment that the defendant holds the legal title of said property as trustee for the plaintiff as special administrator of the estate of Mrs. Witt and directing the defendant, or the county clerk in the event of his refusal, subject to a lien in defendant's favor in the sum of \$6,816.16, payable within a year, to execute within 15 days a deed conveying the property described to the plaintiff as such administrator.

The main contentions made by the defendant by his answer, at the trial, and on this appeal, are that he was not acting as the attorney for Mrs. Witt, but was in fact acting only as her banker or other such agent to finance the recovery or redemption of the properties involved for their mutual benefit, and that the burden was therefore not on him to negative fraud in the transactions, but that the burden was on the plaintiff to prove affirmatively the existence of any fraud on the defendant's part; that the plaintiff has not sustained that burden; that therefore the defendant's motion for a nonsuit should have been granted; that, at any rate or from any view, the transactions were fair and the parties were dealing at arm's length.

[2] As to the first contention, that the defendant was not acting as attorney in the matters and therefore the confidential relationship of attorney and client did not exist, it might be stated at the outset that the basis offered by the defendant for that assertion is his own opinion which he testified he arrived at after mature consideration, as against the trial court's finding based on other sufficient evidence in the record to support it that the relationship did exist at all times, and the admissions of the defendant on the will contest that he was acting as attorney for Mrs. Witt. However, looking only at the factual evidence produced at the trial of the present action, we are satisfied that, whatever may be its nominal designation, such a fiduciary and confidential relationship was established between the defendant and Mrs. Witt throughout all the transactions involved as to make it incumbent upon the defendant so to conduct himself that no suspicion could be cast in his direction. If therefore such a relationship or the relation of attorney and client did exist, the motion for a nonsuit was properly denied.

We are compelled to the conclusion, from a review of the record, that the trial court's finding that the relationship of attorney and client did exist at all times is fully supported by the evidence. Whether, therefore, such fraud was alleged or proved as would sustain the rulings and judgment in the absence of any such relationship is not necessary to be considered. The well-settled law as to the duties and burdens of an attorney in his relationship with his client are summarized by

the following language used by this court in *Estate of Witt*, supra, at page 419 of 198 Cal., 245 P. 202: "All dealings between an attorney and his client for the benefit of the former are not only closely scrutinized, but are presumptively invalid on the ground of constructive fraud and such presumption can be overcome only by the clearest and most satisfactory evidence. Not only must the attorney offer clear and satisfactory evidence that the transaction between himself and his client was fair and equitable and no advantage was taken by him, but he must also offer proof that the client was fully informed of all matters relative to the transaction and was so placed as to be able to act understandingly and to deal with the attorney at arm's length. *Kissling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Cooley v. Miller & Lux*, 156 Cal. 510, 105 P. 981; *Clark v. Millsap*, 197 Cal. 765, 242 P. 918." See, also, Civ. Code, §§ 2224, 2235.

[3] Whether the defendant planned or intended to gain an advantage over the fair value of his services is a question for the trial court, and if he did gain such an advantage then the burden was upon him to show that the transaction was fair. *Pomeroy v. Collins*, 198 Cal. 46, 69, 243 P. 657. There is sufficient evidence in the record to sustain the court's finding "that in all of the transactions between himself and Bertha Carlson, as evidenced by the various agreements between the said Charles Lantz and Bertha Carlson, * * * said Charles Lantz was seeking his own advantage rather than that of Bertha Carlson." The evidence fully supports the finding that an advantage was gained by the defendant. If the advantage be gained, then the burden is upon the defendant to show that the transactions were fair and that the parties dealt at arm's length, and unquestionably the defendant has not sustained that burden. It is claimed by him that four contracts dated May 17, 1920, whereby he was to receive certain shares or interests in the proceeds or profits realized from property redeemed or recovered were merged into and were superseded by a later agreement comprising what is designated as the "Happy New Year" letter written by Mrs. Witt on January 3, 1921, and the defendant's acceptance thereof. In the "Happy New Year" letter, so called because it contained that greeting before the salutation, Mrs. Witt expressed her realization that, due to illness, her days were short, that "something might happen rather suddenly," and requested the defendant to prepare a "paper" by which she would bequeath all of her property to him, leaving trinkets, etc., to her two boys. She expressed the assurance that Mr. Lantz, during her lifetime, would never see her in want, but that he or his successor would see to it that she would be supplied with the necessities of life and that provision would be made for her burial in Rosedale Cemetery; that

she would, in case she sold anything, report to him the sale and "hand over" to him the proceeds therefrom, "or if in need hold or ask part of it, just as I or he sees best for me." In this letter Mrs. Witt also stated that "all of property which comes through Borden can be transferred at once," and closed with the statement, "Mr. Lantz will know best how and what else to write, as I have complete trust and confidence in him, God bless him." By his letter of acceptance, also dated January 3, 1921, the defendant agreed, in consideration of the proposed bequest and the request that he "perform certain services," that he would see to it that Mrs. Witt should not be in want, "that she will have substantial, of the necessities of life," that when she passes away he will comply with her wishes as to her burial, and expressed the desire that his son fulfill the agreement in the event of his death before Mrs. Witt's demise. It will be noted that it was at about this time that the will was executed. Pursuant to the arrangement set out in these letters the defendant paid to Mrs. Witt \$60 a month up to the time she died, that is, for about two years, and paid her doctors' and nurses' bills. The court found that during that period he collected \$2,409.25 in rentals and advanced in all \$8,976.41 in connection with the property and to and for Mrs. Witt personally; that he was entitled to a fee of \$250 for services rendered in a foreclosure proceeding, leaving as the net amount of advances the sum of \$6,816.16. The evidence fairly supports the finding that, though the properties were partially incumbered, the defendant stood to gain many more times, the value of his net advances, and his services; that, as the trial court stated, "the value of the interest of Bertha Carlson in and to the property described * * * and to which the defendant obtained title, was many times greater than any consideration which the defendant furnished to the said Bertha Carlson." It was also in evidence that the properties had increased considerably in value since the defendant obtained title thereto and before Mrs. Witt's demise. In view of the seriously impaired condition of her mind and body and the short expectancy of life of Mrs. Witt, known both to herself and to the defendant, the so-called agreement cannot be said to bear the earmarks of a conscionable "trade."

[4] Neither is there any evidence in the record that the parties were dealing at arm's length. The defendant at no time during the transactions appeared to be interested in Mrs. Witt's obtaining advice independent of his counsel. He admitted that at no time did he suggest to her that she might do so and there is every indication that she did not consult any counsel outside of Mr. Lantz's office. The finding of the trial court that Mrs. Witt did not have any independent advice in connection with any of the transactions involved is sustained by the record. For the defend-

ant merely to state that Mrs. Witt was free to seek independent advice had she so chosen does not sustain the burden on him of showing that the parties dealt at arm's length. A statement which is very pertinent to the case before us was made by this court in *Pomero v. Collins*, supra, at page 70 of 198 Cal., 243 P. 667: "Surely, a transaction such as has been outlined should command the close scrutiny of a chancellor. Whether the transactions contain within themselves the seeds of an iniquitous purpose is a question solely for his conscience, and his decree will not be disturbed if there be any substantial evidence to support his conclusion, even though an opposing conclusion may find some support in conflicting or contradictory evidence."

The trial court in the present case found that the allegation that Mrs. Witt was of unsound mind during the times involved was not true, but did find that she was weak in mind and easily influenced. This court in *Estate of Witt*, supra, doubted that the evidence sustained the jury's verdict of unsoundness of mind, but concluded that there was sufficient evidence to sustain the verdict on the grounds of fraud and undue influence. *Estate of Witt*, supra, at page 414 of 198 Cal., 245 P. 197. But as suggested by this court in that case (page 419 of 198 Cal., 245 P. 197), the evidence of weakness of mind is nevertheless illuminating on the issues of fraud and undue influence. The defendant is fearful that this court will be swayed in its conclusions by the decision in the *Estate of Witt*, and that that case on the issues of fraud and undue influence will be considered *res judicata* of the issues in the present action. We have, however, carefully reviewed the record presented here without considering the question whether the judgment in *Estate of Witt* is *res judicata* on any of the issues involved in the present case, and the record compels the independent conclusion that all of the trial court's findings are sufficiently supported by the evidence and that no prejudicial error in the rulings and orders of the court was committed. Other points made on the case in chief do not require specific notice.

[5] There is also an appeal from the order taxing costs made on the motion of the defendant to tax the same. The motion was granted, but further items not stricken from the bill are not objected to. Item 31 in the sum of \$28 was not incurred in this action, but was incurred for photographs in the former case (*Estate of Witt*, supra), in which case it was properly taxable. The fact that it was not itemized in the former case did not, we think, justify its inclusion in the present case even if the photographs were used herein. The other items objected to appear to have been properly included.

The judgment is affirmed. The order taxing costs is modified by striking therefrom item 31 in the sum of \$28. As so modified, the order is affirmed.

208 Cal. 114

**SUN OIL CO. OF CALIFORNIA v. UNION
DRILLING & PETROLEUM CO.***
(L. A. 9695.)

Supreme Court of California. Sept. 13, 1929.

As Modified on Denial of Rehearing Oct. 8, 1929.

1. Appeal and error ⇨878(6)—Defendant, failing to appeal from part of judgment awarding balance on cross-complaint, was without right on appeal to review as respected further recovery.

Where defendant, in action for injunction alleging breach of contract to drill oil well, recovered a balance on its cross-complaint, and failed to appeal from that part of judgment, thereby presumably accepting payment of amount allowed, it was without right on appeal to review, in so far as right to recover damages or to recover on quantum meruit was concerned, since it was required either to seek a reopening of the whole issue or be precluded by amount awarded.

2. Appeal and error ⇨1172(1)—Appellate court cannot, where provisions of judgment are interdependent, reverse part complained of and permit remainder to stand.

Where provisions of judgment are interdependent, appellate court may not properly reverse judgment as to part complained of and permit the remainder to stand.

3. Mines and minerals ⇨109—Company, agreeing to drill oil well to depth of approximately 3,600 feet, was not entitled to recovery on failure to drill to specified depth.

Company, agreeing to drill oil well to an approximate depth of 3,600 feet under contract providing that, in event it should cease to perform work on well for period of 30 days, that owner could enter on premises and take over operation of well without any compensation, was not entitled to recovery on failure to drill well to specified depth, and thereafter attempting to put well on production by means constituting menace to property, with probability of injury.

4. Contracts ⇨278(1)—Recovery cannot be had under contract requiring full performance until completion, unless performance was excused or unavoidably prevented (Civ. Code, § 1511).

Where person agrees to do a thing for another for specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, act of God, or public enemy, as specified in Civ. Code, § 1511.

5. Evidence ⇨129(6)—Court did not abuse discretion in refusing to allow proof of previous contract, as bearing on issue of necessity of drilling oil well to specified depth.

Where issue under contract to deepen oil well to depth of approximately 3,600 feet was whether well was to be completed to actual depth of 3,600 feet, in order to recover compensation therefor, the refusal to allow proof of

previous contract between parties, showing acceptance of well drilled within 270 feet of approximate depth, held not abuse of discretion.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by the Sun Oil Company of California against the Union Drilling & Petroleum Company, wherein defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

Superseding opinion, in 277 P. 350.

Newby & Palmer, and Nathan Newby, Jr., all of Los Angeles, for appellant.

John B. Haas, John D. Home, and Oliver O. Clark, all of Los Angeles, for respondent.

PRESTON, J. The judgment is affirmed. This conclusion clearly results from the following statement of facts, taken from the findings of the court and properly supported by the evidence adduced upon the trial:

On February 7, 1924, plaintiff was the owner of well No. 5, located on block 1904 of the Vista Del Mar tract at Huntington Beach, Cal. On said date, said well being then 2,914 feet deep, plaintiff in writing engaged defendant to deepen it to "an approximate depth of 3,600 feet," defendant to be paid \$40,000 for said work out of 50 per cent. of the gross first production from said well after its completion. The work was to be done in accordance with the rules, regulations, and orders of the California State Mining Bureau. Plaintiff was to furnish the rotary equipment, including approximately 3,200 feet of used 4-inch drill pipe, also fuel, light, and water, and to allow the use of its boilers for generation of steam, and was to do and perform certain other specified acts, but was to furnish no "labor, fixtures, material or otherwise" "than provided" in connection with said work, and was not to be put to any expense whatever for the drilling of said well, "except as hereinabove provided." Defendant was to furnish all other material, supplies, and services necessary and needful to drill and complete the said well to said depth, and specially covenanted to supply the necessary casing, etc., therefor.

Pursuant to said contract, defendant forthwith went into possession of said property and deepened said well to a depth of about 3,330 feet, reaching said depth on or about July 18, 1924. Between said date and the date of the filing of this suit, December 8, 1924, defendant remained in possession of said property, endeavoring by the use of various devices to put the well on production, and during said period a small quantity of oil was produced, which was sold and the proceeds divided in accordance with the plan prescribed by said contract. The well was never accepted by plaintiff as being completed at

said depth, and plaintiff never in any respect waived full performance of said contract by defendant, and never relieved defendant from carrying out the agreement as originally drawn. Defendant failed, refused, and neglected, and continued to so fail, refuse, and neglect, to drill said well to any depth greater than 3,330 feet, and likewise refused to furnish the casing required to drill said well to said depth of 3,600 feet, and on November 25, 1924, it notified plaintiff that it did not intend to drill said well to said 3,600 feet, or to any greater depth than 3,330 feet. On the 8th day of December following, plaintiff brought the present action against defendant for an injunction, alleging breach of said contract on the part of defendant, and further that the work of defendant had been unskillfully done, and, unless defendant was restrained from experimenting with said well, it would be in such shape that it could never be completed, and praying for a permanent injunction and for damages.

Answering said complaint, defendant alleged that plaintiff acquiesced in and consented to the cessation of drilling at said depth of 3,330 feet, and consented to the attempts made by defendant to put said well upon production, and further pleaded that it had put said well on production by said acts, to which plaintiff had consented; that on or about July 18, 1924, plaintiff accepted possession of said well as completed, and continued in such possession until October 25, 1924, at which time defendant alleged it again took possession of said well for the purpose of attempting to improve the production thereof, which possession under said arrangement continued until the restraining order in this action was served upon it. Defendant admitted that the well had not been drilled to a depth of 3,600 feet, but denied that the contract made it necessary for it to drill to said depth. It further pleaded that it was the duty of plaintiff to furnish an additional string of casing to bring said well to said depth of 3,600 feet; that plaintiff had refused to comply with a request therefor, and further that oil to the value of \$6,329.58 had been abstracted from said well; that defendant had received only \$664.79 thereof, and was entitled to the balance of 50 per cent. of the gross amount received from said production; and asked for an accounting.

At the same time defendant filed its cross-complaint, claiming completion of said well and delivery of possession thereof to plaintiff on July 18, 1924; alleging that the \$40,000 called for by said contract had been earned and should be collected from the production of said well, but that \$664.79 only had been paid thereon, whereas \$2,500 or more, at least, should have been paid to it on account. As a second cause of action, defendant pleaded the completion of said well under said contract, delivery of possession thereof to plaintiff as above set forth, and then set up the

issuance of said injunction, with alleged resultant interference with production of oil in said well on account thereof; further, that had plaintiff allowed defendant to supervise the production therefrom, it would have received oil of a value sufficient to satisfy said contract; that for that reason defendant had been damaged in said sum of \$40,000, less \$664.79 paid thereon.

Answer was made to said cross-complaint, putting in issue all the material allegations thereof. The cause went to trial. Plaintiff was granted the injunction prayed for, and, while the court found that plaintiff had suffered damages, it also found that they were difficult to estimate, and so difficult that none were allowed. Defendant was denied all relief, both under its answer and cross-complaint, except the sum of \$5,000 awarded it by the judgment, as a matter of equity, as and for the value of a 6¼-inch water casing placed in said well by order of said State Mining Bureau, the court holding in this respect that plaintiff had been benefited by this casing. Likewise defendant was allowed to retain the \$664.79 received out of the sale of oil from the well. Defendant appealed from all of the judgment entered in said cause, except so much thereof as awarded it said sum of \$5,000.

The only reasonable construction that may be put upon the findings of the court is that the court found that the operations conducted by defendant upon said property of plaintiff were not performed in a skillful or a good and workmanlike manner, and that they were hazardous and a menace to the property, with the probability of injury resulting to said well therefrom, and, if not restrained, they would prevent it ever being deepened to 3,600 feet, or any other depth. The deduction is also clear that, weighing the damages suffered by plaintiff on account of the failure to perform against the benefits resulting from partial performance the court declared a balance of \$5,000 in defendant's favor. But defendant expressly failed to appeal from this portion of the judgment. Nevertheless it urges that it should have either damages to the extent of the balance of the contract price, or at least a quantum meruit recovery on the principle of acceptance by plaintiff of work done and material furnished that was beneficial to it, and to this end it invokes the doctrine of certain cases, which announce an exception to the general rule against recovery, to wit, cases where one party acting in good faith has partially performed, and the other party has accepted the part performed, and the same was of value to him and he is denied a recovery on the contract, but permitted a quantum meruit remuneration, citing *Katz v. Bedford*, 77 Cal. 319, 19 P. 523, 1 L. R. A. 826; *Jones & Laughlin, etc., Co. v. Doble Co.*, 162 Cal. 497, 505, 123 P. 290.

[1, 2] It is our conclusion that, in so failing to appeal from all the judgment and presum-

ably accepting payment of the \$5,000, appellant may not have reviewed either of these contentions, and, in fact, presents little, if any, substance for consideration on this appeal. This award was allowed at defendant's own request, and must be held properly allocated to one or the other of the contentions made by it. If so, this item is either damages for a breach of the contract by plaintiff, or it is a quantum meruit recovery for materials furnished in good faith that were of benefit to plaintiff and accepted by it. Upon either theory, it is the complete award allowed to defendant by the court, and disposes of the whole issue. Defendant expressly accepted this part of the judgment and omitted to appeal from it. By thus accepting expressly the benefit of this award on its cross-complaint, it may not be allowed to hold fast to that which it hath and appeal to the court for more relief in kind. It must seek a reopening of the whole issue, or be precluded by the amount awarded. Where the provisions of the judgment are interdependent as here, an appellate court may not properly reverse the judgment as to the part complained of, allowing the remainder to stand. This is the principle announced in the following cases: *Walnut Irr. Dist. v. Burke*, 158 Cal. 165, 110 P. 517; *Preluzsky v. Pac. Co-op. Co.*, 195 Cal. 290, 293, 232 P. 970; *Turner v. Markham*, 152 Cal. 246, 92 P. 485. The case of *Murphy v. Spaulding*, 46 N. Y. 556, expounds the principle under facts similar to those of the case before us.

Under this holding, whether plaintiff did or did not breach the contract is immaterial, as is also the question of whether the injunction was or was not properly allowed. It would seem, therefore, that the propriety of the item of costs is about the only thing reviewable under this notice of appeal as drawn. However, no attack is leveled at the cost bill.

[3] But, viewing the case on its merits, under the finding of the court, a judgment for plaintiff and a denial of all relief to defendant would have been justified. The case as found offers no room for the principle of benefits received and accepted by plaintiff from

partial performance. The contract was entire and indivisible, and contained the following covenant: "It is further understood and agreed that in the event said party of the second part shall cease to perform work upon said well for a period of 30 days, then and in that event the party of the first part may enter on said premises and take over the operation of said well without any compensation to the party of the second part. * * *"

[4] Defendant did not substantially perform, but after a partial performance refused to proceed further under its covenants. The case is, therefore, one within the general rule, stated by this court as follows: "Where a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy, as specified in section 1511 of the Civil Code." *Carlson v. Sheehan*, 157 Cal. 692, 696, 109 P. 29, 30. See, also, *Snow Mt. W. & P. Co. v. Kraner*, 191 Cal. 312, 325-327, 216 P. 589; *Marchant v. Hayes*, 117 Cal. 669, 49 P. 840; *Laidlaw v. Marye*, 133 Cal. 170, 65 P. 391; *Gale v. Dixon* (Cal. App.) 267 P. 342.

[5] There is no ambiguity in the contract respecting the furnishing of casing. Defendant specifically covenanted to do this. Nor is there any room for the contention that 3,330 feet is "approximately" 3,600 feet. The court did not abuse its discretion in failing to allow proof of a previous contract between the parties, wherein a well drilled within 270 feet of the approximate depth was accepted as completed by the plaintiff. Special reasons may have existed for this action, one of which could have been the finding of production at the lesser depth. Be that as it may, no basis can be found for the review of the trial court's discretion in this behalf.

This disposes of all the questions urged by appellant.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

100 Cal. App. 526

BENGEL v. TRAEGER. (Civ. 6826.)

District Court of Appeal, Second District, Division 2, California. Sept. 10, 1929.

1. Appeal and error $\S$ 347(2)—Sixty days for appeal commences to run from date of entry on minutes of order granting nonsuit, though judgment of nonsuit is postponed (Code Civ. Proc. $\S$ 581, 664, 672, 939).

Sixty-day period for appeal from entry of judgment or order under Code Civ. Proc. $\S$ 939, held applicable to judgment of nonsuit, under section 581, from date of entry of nonsuit on minutes, and not from date of entry of judgment pursuant thereto, since section 581 makes entry on minutes effective for all purposes when so entered; judgments entered and docketed in compliance with sections 664 and 672 being decisions of the court.

2. Judgment $\S$ 270—Nonsuit is not decision in favor of either party as regards provisions for entry and docketing of judgments (Code Civ. Proc. $\S$ 664, 672).

If nonsuit is granted, no decision is rendered in favor of either of parties within requirements of Code Civ. Proc. $\S$ 664 and 672, relative to entry and docketing of judgments.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge pro tem.

Action by E. M. Bengel against William I. Traeger. From a judgment of nonsuit, plaintiff appeals. On motion to dismiss appeal. Appeal dismissed.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for the motion.

Chas. M. Easton, of Los Angeles, opposed.

CRAIG, J. An action of the appellant against the respondent was tried in the superior court of Los Angeles county on October 25, 26, 29, and 30, 1928, on which last-mentioned date, the respondent's counsel having moved for a nonsuit, the minutes of the clerk recite: "Defendants' motion for nonsuit as to defendant Wm. I. Traeger in case No. 201623 is by the court granted." A formal judgment of nonsuit was signed and filed in said court on January 2, 1929, and was entered in book 701, at page 224, of Judgments, on the day following.

[1] The plaintiff appealed on March 26, 1929, "from that certain judgment of nonsuit therein made, rendered and filed in the said superior court, and docketed and entered therein on January 3rd, 1929." The respondent moved this court for a dismissal of the appeal, assigning as grounds therefor that it was not filed until after the judgment had become final, and that the time for appeal expired 60 days after October 30, 1928. The appellant contends that such time did not commence to run until the judgment was entered.

Both parties rely upon section 581 of the Code of Civil Procedure, which reads as follows:

"An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * *

"5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. * * *

"The dismissals mentioned in subdivisions three, four and five of this section must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered; but the clerk of the court must note such orders in his register of actions in the case." (Italics ours.)

It is contended by the appellant that the "entry" of the fact that a nonsuit is granted must, for the purposes of appeal, be made in the same manner as is done in rendering any judgment upon the merits of the case effective for that purpose. Section 939 of the Code of Civil Procedure provides that:

"An appeal may be taken from any judgment or order of a superior court from which an appeal lies under any provision of this code, or of any other code, or under any other statute, within sixty days from the entry of said judgment or order." (Italics ours.)

Conceding, for the sake of argument, that appellant's theory was correct, it would not aid him, since he admits that the formal judgment was entered in the office of the clerk on January 3d, and that he did not appeal until March 26th. But we think the reading of the sections quoted is too plain to require extended discussion. Section 939 of the Code of Civil Procedure requires that an appeal be taken within 60 days from the entry of a judgment or order. Section 581 provides that a judgment of nonsuit may be entered upon the minutes of the court when the plaintiff fails to prove a sufficient case, and, while the clerk must note it in the register of actions in the case, the entry upon the minutes is "effective for all purposes when so entered." This interpretation of section 581 was expressed in *Commis v. Guaranty Oil Co.*, 29 Cal. App. 139, 154 P. 882, 883, wherein it was said:

"It would seem under the present state of the law that none of the orders or judgments provided to be made by section 581, Code of Civil Procedure, need be entered in the judgment book at all or appear in any record except that containing the minutes of the court. This conclusion is sustained by the decisions of *Matthai v. Kennedy*, 148 Cal. 699, 84 P. 37, and *Pacific Paying Co. v. Vizelich*, 141 Cal. 4, 74 P. 352. We do not believe that a formal judgment of dismissal must follow the order or judgment of nonsuit, for the judgment of nonsuit in itself constitutes a dismissal of the action."

[2] It may also be said that, in addition to

making an entry in the minutes effective for all purposes, said section merely specifies a clerical duty of noting it in the register of actions. Judgments entered and docketed in compliance with sections 664 and 672 of the Code of Civil Procedure are decisions of the court. If a nonsuit be granted, no decision is rendered in favor of either of the parties. *Ferris v. Baker*, 127 Cal. 520, 59 P. 937, cited by appellant, reserved decision of the question before us, and is not applicable.

The facts here are different from those presented in *Gullick v. Interstate Drilling Co.* (App.) 279 P. 828, where entry of a minute order did not appear to have been entered.

The motion to dismiss is granted. The appeal is dismissed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

100 Cal. App. 515

GILES v. WELLING et al. (Civ. 6949.)

District Court of Appeal, First District, Division 2, California. Sept. 7, 1929.

1. Brokers ⇐4—Broker's bond given prior to 1925 amendment held not to cover conversion or misappropriation of client's funds by broker (St. 1917, p. 673, as amended; St. 1925, p. 962).

Complaint declaring on broker's bond, given pursuant to provisions of St. 1917, p. 673, as amended and prior to amendment of 1925 (St. 1925, p. 962), alleging that defendant sold securities for plaintiff, and out of proceeds kept \$7,000, and fraudulently failed to reinvest such sum or return it to plaintiff, held not to state a cause of action, since such bond did not cover case of conversion or misappropriation.

2. Brokers ⇐4—Where broker's bond was given pursuant to statute before amendment, cause of action which arose after amendment did not bring action on bond under amendment (St. 1917, p. 673, as amended; St. 1925, p. 962).

In action on surety's bond given pursuant to St. 1917, p. 673, as amended, where complaint alleged that defendant sold securities of plaintiff, and out of proceeds kept \$7,000, fact that plaintiff's cause of action did not arise until after amendment by St. 1925, p. 962, did not bring action on bond under amendment, where bond was drawn under and worded according to the act as it existed prior to the amendment.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Harriet Giles against R. N. Welling and others. From a judgment in favor of

defendants the *Ætna Casualty & Surety Company* and another, plaintiff appeals. Affirmed.

Daniel A. Ryan, of San Francisco (Geo. F. Snyder, of San Francisco, of counsel), for appellant.

Redman, Alexander & Bacon, of San Francisco, for respondent.

KOFORD, P. J. The plaintiff appeals from a judgment which was given in favor of defendant upon a motion for judgment upon the pleadings made upon the ground that the complaint did not state a cause of action. The complaint declared upon a broker's bond executed by respondent for defendant Welling, on May 7, 1925, pursuant to the Corporate Securities Act (St. 1917, p. 673, as amended). The bond was therefore given pursuant to the provisions of that act as it existed prior to the amendment of 1925, which was approved May 23, 1925 (Stat. 1925, p. 962), and which took effect 90 days after the Legislature adjourned. The complaint alleged that plaintiff in May, June, and July, 1925, employed defendant Welling to sell for her "certain stocks and bonds," and to reinvest the proceeds thereof; that said defendant sold said securities, and out of the proceeds thereof kept \$7,000, and fraudulently failed and refused to reinvest said sum or to return said sum to plaintiff upon demand.

[1] The motion for judgment upon the pleadings was properly granted, because the complaint did not state a cause of action upon the broker's bond. All the points raised by appellant have been directly passed upon by the decisions of the Supreme Court and the District Courts of Appeal. The broker's bond given pursuant to the Corporate Securities Act, as it existed prior to the amendment of 1925, has been held not to cover cases of breach of contract, conversion, or misappropriation. *Mitchell v. Smith* (Cal. Sup.) 267 P. 540; *Blumenthal v. Larson*, 79 Cal. App. 726, 251 P. 241; *Anthony v. Van* (Cal. App.) 274 P. 563.

[2] Appellant also contends that her claim for the return of the money did not arise until the date of her demand, which date is alleged in her complaint to be August 5, 1925, which is subsequent to the effective date of the amendment of 1925; but that fact would not bring her cause of action upon the bond under the amendment, because the bond was drawn under and worded according to the act as it existed prior to said amendment. *Anthony v. Van* (Cal. App.) 274 P. 563.

The judgment is affirmed.

We concur:

STURTEVANT, J.; NOURSE, J.

100 Cal. App. 537

PEOPLE, on Complaint of BOURDETTE, v. CITY OF BELMONT et al. (Civ. 6378.)★

District Court of Appeal, First District, Division 1, California. Sept. 11, 1929.

Rehearing Denied Oct. 10, 1929. Hearing Denied by Supreme Court Nov. 4, 1929.

1. Municipal corporations ⇨12(4)—Affidavit of three qualified electors certifying genuineness of signatures to petition for municipal incorporation held sufficient to authorize supervisors to proceed (Municipal Corporation Bill, § 2).

Where affidavit of three electors residing within the limits of proposed municipal corporation certifying to genuineness of signatures to petition for incorporation was filed with petition, board of supervisors had jurisdiction without further evidence to proceed, in view of Municipal Corporation Bill, § 2 (Deering's Gen. Laws 1923, Act 5233), providing that affidavits of three qualified electors residing within proposed limits certifying to genuineness of signatures filed with petition shall be prima facie evidence of requisite number of signers.

2. Municipal corporations ⇨12(4)—Petition for incorporation of municipal corporation held sufficient, although dates when various electors signed petition were not affixed (Municipal Corporation Bill, § 2; Pol. Code, § 1083a).

Where clerk examined petition under Municipal Corporation Bill, § 2 (Deering's Gen. Laws 1923, Act 5233), for proposed incorporation of territory into a municipal corporation, and found signers of petition to be qualified, clerk's determination, in absence of fraud, is final, notwithstanding dates when petition was signed by various electors were not affixed beneath their signatures, since Pol. Code, § 1083a, requiring signers of any petition to affix thereto date of such signing, although mandatory on petitioners, is only for benefit or convenience of clerk.

3. Municipal corporations ⇨12(7)—Determination that territory included within proposed municipal corporation does not include center of population or other prohibited territory held exclusively for supervisors (Municipal Corporation Bill, § 2).

Under Municipal Corporation Bill, § 2 (Deering's Gen. Laws 1923, Act 5233), providing for the incorporation of territory into a municipal corporation, determination of question whether any portion of included territory is included within any existing municipal corporation, or whether boundaries contain center of population subdivided into town or other lots or an area of ranch land or outside acreage, owners of which have not petitioned to be included within limits of proposed corporation, is exclusively within jurisdiction of board of supervisors.

4. Municipal corporations ⇨12(12)—Extent and character of territory to be included in proposed municipal corporation is exclusively for supervisors, and courts will only interfere for fraud or illegality (Municipal Corporation Bill, § 2).

Under Municipal Corporation Bill, § 2 (Deering's Gen. Laws 1923, Act 5233), providing

for incorporation of territory into a municipal corporation, question of extent and character of territory proposed to be included in corporation is exclusively within jurisdiction of board of supervisors, and courts will only interfere where some substantial provision of law has been violated or where fraud was perpetrated in matter of boundaries.

Appeal from Superior Court, San Mateo County; John L. Hudner, Judge.

Action in quo warranto by the People, on the complaint of John W. Bourdette, against the City of Belmont and others, to set aside incorporation of defendant city. Judgment for plaintiff, and defendants appeal. Reversed.

Roger Sherman, of San Francisco (Donovan O. Peters, of San Francisco, of counsel), for appellants.

William J. Locke, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from the judgment in which it is adjudged that defendant city of Belmont is not now and never was incorporated or organized as a municipal corporation, and has not now and never had any legal existence. The action is one in quo warranto brought against the city of Belmont to set aside the incorporation on the grounds that plaintiff's (Bourdette's) three lots, consisting of an undivided parcel of 30 acres of land, had been included within the incorporated boundaries without his petition, and that the city's petition for incorporation is illegal, in that the dates the signers signed the petition were omitted after the signatures thereto.

The complaint contains three causes of action. Inasmuch, however, as plaintiff is not urging his third cause of action, and no finding thereon was made by the trial court, we are concerned only with the first and second causes of action: The first placing in issue the jurisdiction of the board of supervisors to act on the petition by reason of the omission of dates opposite the signatures thereon, and the second placing in issue the authority of the board to act by reason of the inclusion of plaintiff's ranch land or outside acreage within the boundaries of the incorporated area without his petition or acquiescence.

[1] The petition was filed with the board on August 2, 1926. Section 2 of the Municipal Corporation Bill then provided, and still provides (Deering's Gen. Laws 1923, Act 5233), that a petition signed by at least 50 of the qualified electors of the county residents within the limits of the proposed corporation shall be presented to the board, and that the affidavit of three qualified electors residing within the proposed limits "certifying to the genuineness of the said signatures, filed with the petition, shall be prima facie evidence of the requisite number of signers." The suffi-

ciency of the petition with respect to the signatures was not required to be certified or determined by the county clerk, but the question was one to be determined by the board, and the affidavit of the three electors filed with the petition, in so far as jurisdiction depended upon the number of signatures, was sufficient without further evidence to give the board power to proceed. *Hoffecker v. Board of Supervisors*, 23 Cal. App. 405, 138 P. 371.

The court found "that none of the signers of said petition for incorporation affixed to said petition the date of signing the same either at the time of so signing or at any time thereafter, or at all," and further, "that in the territory embraced within the boundaries of said alleged corporation there were at the time of said election, and still are, certain portions thereof more densely populated than others which had been subdivided into town or other lots and delineated upon a recorded map under the map law of March 15, 1907, as amended; that the territory within said boundary also contains areas of ranch land or outside acreage including the aforesaid lands of plaintiff which the board of supervisors included within said boundaries, in addition to said subdivided area, notwithstanding the fact that the owners of said ranch land or outside acreage including plaintiff had not petitioned to have said lands included therein."

[2] As to the failure of the signers to affix the dates on which they signed the petition, it may be said that the fact is undisputed that the clerk satisfied himself that such signers were qualified electors. Plaintiff does not in his complaint or otherwise question the fact that at the time of signing the petition the signers were qualified electors, but contends that the provisions of section 1083a of the Political Code, which provides that the signers of all petitions shall put down the date of signing the same, is a mandatory requirement. In the recent case of *Carter v. Green* (Cal. App.) 276 P. 120, 121, in which case a rehearing in the Supreme Court was denied, this court said: "Respondents contend, however, that section 1083a of the Political Code, which provides that 'wherever, by the Constitution or laws of this state, any initiative, referendum, recall or nominating petition or paper, or any petition or paper, is required to be signed by qualified electors, * * * such signers shall at the time of so signing such petition or paper affix thereto the date of such signing,' not having been complied with by a number of the signers equal to one-fourth of the qualified electors of the municipality, the petition was properly rejected. The purpose of the statute was to guard against signatures by persons who were not qualified electors at the time of signing the petition (*Chester v. Hall*, 55 Cal. App. 611, 619, 204 P. 237), and it has been held that noncompliance therewith is a justification for

refusal by the proper officer to certify as sufficient the names of the signers as to whose signatures the dates of signing are not affixed (*Boggs v. Jordan* [Cal. Sup.] 267 P. 696; *Chambers v. Glenn-Colusa Irrigation Dist.*, 57 Cal. App. 155, 206 P. 773). But, as was in effect held in the above cases, where the officer whose duty it is to determine the sufficiency of the petition from the registration records found the same to have been signed by the requisite number of qualified electors, the fact that the dates of signing were not affixed by them but by another will not render void the proceedings based thereon. This was not equivalent, however, to holding the above provision to be merely directory, or that such officer would be bound to act notwithstanding the signers had failed to comply with the statute; for, as the court said in *Chambers v. Glenn-Colusa Irrigation Dist.*, supra: "The requirement is, of course, plain and unequivocal, within the power of the Legislature to prescribe, and there is no good reason for holding it to be otherwise than mandatory." In other words, the provision of the statute requiring signers to petitions to "affix thereto the date of such signing," while mandatory on the petitioners, is for the benefit or convenience of the clerk whose duty it is to check the signatures on the petition with the registration records to determine whether or not the persons signing are qualified electors, and, while the clerk is not required to go beyond an examination of the petition itself (*Chambers v. Glenn-Colusa Irrig. Dist.*, 57 Cal. App. 155, 206 P. 773), he having done so, and having found the signers of the petition to be qualified, in the absence of fraud his determination of this question is final, as the statute imposed upon him the duty, and vested in him the authority, to examine the petition which was filed with him, and from the great register ascertain whether or not such petition is signed by the requisite number of qualified electors of the territory described therein. *Watts v. Superior Court*, 36 Cal. App. 692, 173 P. 183; *Good v. Common Council*, 5 Cal. App. 265, 90 P. 44; *Beecham v. Burns*, 34 Cal. App. 754, 168 P. 1058; *Williams v. Gill*, 65 Cal. App. 129, 223 P. 559; *Chester v. Hall*, 55 Cal. App. 611, 204 P. 237.

As is said in *People v. Town of Ontario*, 148 Cal. 625, 637, 84 P. 205, 210: "As was said by the same author in the section already quoted (*Freeman on Judgments*, § 523) 'the only difficulty in cases of this class is in deciding whether the board is vested with authority to determine that it is properly signed, or, in other words, whether it is empowered to decide upon its own jurisdiction. This power need not be conferred in express terms.' This court has repeatedly held that statutes of a similar character give such power to the tribunal to which the petition is presented, and that the very act under consideration gives such power to the board to which the petition is presented, and that its conclusion

thereon is beyond review and final so far as quo warranto proceedings are concerned, was definitely decided in *People v. Los Angeles*, 133 Cal. 338, 65 P. 749. Under the decisions, the order of the board calling the election must here be taken as conclusive evidence that the petition presented, sufficient on its face, was, in effect, sufficiently signed by electors to confer the requisite power, and that the finding of the board to that effect, be it express or implied, was sustained by satisfactory proof." Here, the board "did resolve, ascertain and determine that said petition was regularly signed and subscribed by the prescribed number of legally qualified petitioners." Further, "the making of the order for the election implies not only the determination, as we have already seen, but also that such determination was reached upon proofs satisfactory to the board. The statute makes no provision as to the character of proof essential in such a case. Whatever may be the rule applicable in certiorari, which is a direct attack upon the particular order alleged to have been in excess of jurisdiction (see *Stumpf v. Board of Supervisors*, 131 Cal. 364, 63 P. 663, 82 Am. St. Rep. 350), the decisions in this state compel us to hold that even an implied finding is conclusive in a quo warranto proceeding, or in any case where the order is collaterally attacked." *People v. Town of Ontario*, supra.

The Municipal Corporation Bill (Act 5233, General Laws), after setting forth the number of inhabitants required to organize a municipal corporation, in section 2 of the act provides: " * * * And provided further, in the case of municipal corporations of the sixth class that in the event that the proposed boundaries of such corporation contain both a center of population subdivided into town or other lots delineated upon a map recorded as provided by an act entitled 'An Act requiring the recording of maps of subdivisions of land into lots for the purpose of sale, and prescribing the conditions on which such maps may be recorded and prohibiting the selling or offering for sale of land by reference to said maps unless the same are recorded,' approved March 15, 1907, as amended, and an area of ranch land or outside acreage, the said board of supervisors shall include within said proposed boundaries in addition to said subdivided area only such portion of said area of ranch land or outside acreage as the owners thereof shall have petitioned to have included within the limits of said proposed corporation. The boundaries so established by the board of supervisors shall be the boundaries of such municipal corporation until by action, authorized by law for the annexation of additional territory to, or the taking of territory from, said municipal corporation, such boundaries shall be changed. * * *"

[3] Under the above provision, in order that the signature of the owner of ranch land

or outside acreage included within the proposed boundaries be a necessary prerequisite, two conditions must exist: One, there must be a center of population; and the other, the center of population must be subdivided into town or other lots delineated upon a recorded map. Here no point is made respecting the recording of the map; the controversy, in so far as the question now being considered is concerned, turns upon whether or not the proposed boundaries contain a center of population. As to this fact there is a conflict in the testimony. The plaintiff testified that there is a center of population, while George A. Kneese, the county surveyor, and Donald S. Mulford, assessor for the sanitary district which includes the area of Belmont, both testified that there is no center of population in the city of Belmont, but that there are some portions more densely populated than others. On this issue the only finding of the court is: "That in the territory embraced within the boundaries of said alleged corporation there was at the time of said election, and still are, certain portions thereof more densely populated than others which had been subdivided into town or other lots and delineated upon a recorded map under the map law of March 15, 1907, as amended," and no finding is made as to whether or not there existed a center of population. As we view the case, however, this question becomes unimportant, as the board of supervisors determined as a fact "that no portion of said territory within said boundaries is a part of or included within any existing municipal corporation nor do said boundaries contain a center of population subdivided into town or other lots and an area of ranch land or outside acreage, the owners of which have not petitioned to be included within the limits of said corporation," and the determination of this question is left exclusively to such board.

In *People v. City of Los Angeles*, 154 Cal. 220, 225, 97 P. 311, 313, the court says: "Under the Constitution all questions as to population and extent and character of territory to be included in the incorporation of cities or towns is left entirely to the Legislature, and that, under its power to provide for the incorporation of such municipalities, the question of the extent and character of territory proposed to be incorporated is left, under the general Municipal Incorporation Act, as the Legislature was authorized to leave it, exclusively to the board of supervisors of the county in which the city is to be incorporated, and that the courts have no control of the subject." In *People v. Town of Loyalton*, 147 Cal. 776, 781, 82 P. 620, 623, in considering the question of the refusal of the court to permit plaintiff to show that the board of supervisors mistakenly thought certain property was included in the proposed boundaries, and as to population, at the time it heard and determined the eligibility of the signers to the petition, the court concludes:

"But we think such proposed evidence was entirely immaterial. As we have seen, it was for the board of supervisors to finally determine both of these matters from the evidence submitted to them, and neither the evidence nor the mental processes by which their conclusion was reached are reviewable here."

[4] The action appears to have been brought on the mistaken theory that this question was an original one for the court to decide, and, as there is nothing in the record showing what evidence was taken by the board of supervisors upon which it determined that there was not a center of population, we cannot say that its judgment lacks support. If, however, upon the hearing before the board, the same evidence was presented as was presented to the trial court with the same conflict, the board's finding would not be disturbed by the court, as the question of the extent and character of the territory proposed to be included in the corporation is left exclusively to the board of supervisors, and the courts have no control of the subject. With the wisdom of the board's determination in the matter the courts cannot interfere. They only interfere where some substantial provision of the law has been violated, or where fraud was perpetrated in the matter of the boundaries (*People v. Los Angeles*, supra), and here no fraud is pleaded or claimed.

Upon the record as presented, the judgment must be reversed, and it is accordingly ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

100 Cal. App. 531

McINTYRE v. HICKS et al. (Civ. 5469.)

District Court of Appeal, Second District, Division 2, California. Sept. 10, 1929.

1. Principal and agent §183(2)—Owner of paper route, who made contract for advertising space in his own name, was real party in interest and as such capable of maintaining action to recover therefor in his own name (Code Civ. Proc. § 369).

Owner of paper route, who solicited and made contract in his own name with third party for publication of advertisements in paper and was liable to publisher for space, was real party in interest and as such capable of maintaining action in his own name to recover for advertising space alleged to have been purchased from him by defendants, as under Code Civ. Proc. § 369, person in whose name contract is made for benefit of another may sue without joining with him persons for whose benefit action is prosecuted.

2. Principal and agent §183(2)—Agent who is liable to principal for price of thing sold may institute in his own name action for purchase price.

Agent who is liable to principal for price of thing sold may institute in his own name action for purchase price.

3. Appeal and error §1071(5)—Finding that owner of paper route, who made contract in his own name with third party for advertising space, was independent contractor, if error, held harmless.

Finding that owner of paper route, who made contract in his own name with third party for advertising space, was independent contractor, if error, held harmless, as owner was nevertheless proper party plaintiff, as contract had been made in his name, and he was therefore entitled to sue in his own name as trustee of express trust.

4. Contracts §28(3)—Evidence held to sustain finding that corporation had agreed to pay owner of paper route for advertising.

Where owner of paper route testified that he submitted copy of advertisement to president of defendant corporation and president said he would pay for such advertisements and did pay for part thereof, evidence held to sustain finding that corporation had agreed to pay owner for advertisements.

5. Damages §68—Allowance of interest on amount recovered on express agreement to pay for advertising space was proper (Civ. Code, § 3287).

In action based on express agreement to pay for advertising space, allowance of interest on amount found due was proper, under Civ. Code, § 3287, providing that person entitled to recover damages certain is also entitled to interest thereon.

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by N. E. McIntyre against Hendri Hix, Mox, Incorporated, and another. From a judgment in favor of the plaintiff, the second named defendant appeals. Affirmed.

Samuel H. French and F. H. Snyder, both of Los Angeles, for appellant.

Arthur Crum, of Los Angeles, for respondent.

BURNELL, Justice pro tem. This action was brought by the owner of a newspaper route to recover for advertising space in the Los Angeles Times, claimed to have been purchased from him by the defendants. From a judgment for plaintiff, one of the defendants, Mox, Incorporated, has taken this appeal.

There is no dispute as to the fact of publication of the advertisements or as to the amount of the bill therefor, but appellant contends that respondent was not an independent contractor, but a mere agent for the Times, and hence that not he but the publish-

er of the newspaper was the real party in interest and, under the provisions of section 367 of the Code of Civil Procedure, the only party capable of instituting and maintaining the action. Appellant further argues a lack of evidence to support the finding that it ordered or agreed to pay for the advertisements.

As to the first of these points, it appears without contradiction that respondent owned a Times route or, as it is referred to in the written contract between himself and the Times-Mirror Company, publishers of that newspaper, a "carrier service district or agency of the Los Angeles Times." This contract is silent upon the question of advertising, the agreement as to the handling of that part of the business being oral and as follows, according to the testimony of Mr. Denning, assistant credit manager and chief clerk of the Times-Mirror Company: The purchaser and owner of such a route is to solicit advertising "at will," the Times charging all such advertising to the account of the route owner, who receives a percentage commission thereon. The route owner "is his own solicitor and his own credit man," with no right to extend credit on behalf of the newspaper. If the advertiser fails to pay, the loss is his, not that of the Times, which knows "no one connected with the advertising except the agent himself." This then, was the relationship with respect to advertising which existed between the respondent and the Times. His was the responsibility for payment; to him alone was the credit extended.

[1] "An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished." *Green v. Soule*, 145 Cal. 96, 78 P. 337, 339. Whether or not respondent falls within this definition it is unnecessary for us to decide, since it is obvious that he is "the real party in interest" and as such capable of maintaining the action in his own name as plaintiff. Even if we are to adopt appellant's theory that McIntyre was merely an agent of the Times and the advertising was received by him for the benefit of that newspaper, we are brought squarely within the purview of section 369, Code of Civil Procedure, which declares that a trustee of an express trust "may sue without joining with him the persons for whose benefit the action is prosecuted," and adds the definition: "A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." Thus in *Tandy v. Waesch*, 154 Cal. 108, 97 P. 69, 70, the plaintiff had entered into a contract for the purchase of land in his own name but for the benefit of a third party. In an action instituted by him in his own name it was contended that not he but said third party was the real party in interest. Holding adversely

to this contention, the Supreme Court said: "Tandy, however, was a proper party plaintiff. To the general rule laid down in section 367, Code Civ. Proc. that every action must be prosecuted in the name of the real party in interest, there are certain exceptions specified in section 369, Code Civ. Proc. That section authorizes the trustee of an express trust to sue without joining the beneficiary, and declares that a person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section. The contract having been made in Tandy's name for the benefit of Garland, Tandy thus became the trustee of an express trust and entitled to maintain the action"—citing many California cases on this point.

In *Harris v. Clayton*, 186 Cal. 445, 199 P. 776, 778, the action was by the assignee of a salesman to recover for goods sold by him for his firm. Passing upon the contention that the agent had no right to assign the account in his own name and that the firm was the real party in interest, the court said: "We are satisfied under this state of the evidence that the plaintiff could maintain this action as the assignee of Conroy either on the theory that he was the real party in interest, or, if an agent, was acting with authority to carry and collect the account in his own name, and thereby became a trustee of an express trust within the meaning of section 369, Code of Civil Procedure." To the same effect are the decisions in *Lauer v. Williams*, 32 Cal. App. 590, 163 P. 687, where it was held that a cashier of a bank who has taken a note and mortgage in his own name but for the bank's benefit may foreclose the mortgage without joining the bank as a party plaintiff, and *Kelley-Clarke Co. v. Leslie*, 61 Cal. App. 559, 215 P. 699, where the plaintiff was agent for an undisclosed principal.

[2] Both by reason of statutory enactments similar to section 369 of our Code of Civil Procedure and on well-known principles of law it has been almost universally held that an agent who is liable to his principal for the price of the thing sold may institute in his own name an action for the purchase price. A typical case is that of *Lamb v. Connor*, 84 Wash. 121, 146 P. 174, where the plaintiffs, agents for certain insurance companies, sued the insured for unpaid premiums on policies written by them. The court held the contention that the agents were not the real parties in interest untenable, saying: "It is quite generally held—in fact, it seems to be held in all late cases—that an agent who, in discharge of his obligations to his principal, pays the debt of the other contracting party to his principal, may be subrogated to the right of the principal to maintain an action. * * * The testimony shows that the insurance companies held respondents responsible for their payment of the premiums on all policies written by them." To the same

effect are the decisions in the following cases: *Waters v. Wandless* (Tex. Civ. App.) 35 S. W. 184; *Bang v. Farmville, etc., Co.*, 2 Fed. Cas. 585, No. 838; *Willey v. Fidelity & Cas. Co.* (C. C.) 77 F. 961; *Gaysville Mfg. Co. v. Phoenix Mut. Fire Ins. Co.*, 67 N. H. 457, 36 A. 367; *Overholt v. Dietz*, 43 Or. 194, 72 P. 695; *Carruth v. Port Hudson Oil Developing Co.*, 159 La. 236, 105 So. 302; *Winter v. Lewis*, 132 Ark. 399, 200 S. W. 981; *King v. Farmers' Grain Co.*, 194 Iowa, 979, 188 N. W. 720; *Shirai v. Blum*, 239 N. Y. 172, 146 N. E. 194, 38 A. L. R. 603; and *Chambers v. Independent Asphalt Paving Co.*, 90 Wash. 380, 156 P. 14.

[3] Respondent thus being a proper party plaintiff, it is immaterial whether or not the trial court was justified in finding that he was an independent contractor, since even if the finding had been otherwise a different conclusion would not have necessarily followed. *Trout v. Ogilvie*, 41 Cal. App. 167, 182 P. 333. Conceding for argument's sake, but not so deciding, that the finding was erroneous, it was at most a finding on an immaterial fact, and as such would of itself furnish no cause for reversal of the judgment. *Faure v. Drollinger*, 60 Cal. App. 594, 213 P. 724; *Dougherty v. Coffin*, 69 Cal. 454, 10 P. 672; *Klockenbaum v. Pierson*, 22 Cal. 160.

[4] As to the second point urged by appellant, namely, the lack of evidence to support the finding that it had agreed to pay plaintiff for the advertising published, we think it is without merit. Appellant and a Miss Thomas, who was admittedly merely a dummy for one Hicks, had entered into a contract whereby appellant agreed to furnish all materials for the construction of houses on eight lots to be secured by Thomas (Hicks) from the Mercantile Investment Company. Hicks was to act "in the capacity of general manager, superintendent and designer," appellant was "to pay for all labor, advertising and other expenses connected therewith," and on the sale of the lots and houses the net receipts were to be divided between the contracting parties. The advertisements in question were of the houses built pursuant to this contract. They were ordered from respondent by Hicks, at whose direction respondent charged them to appellant. Before the advertisements were published in the Times, appellant, according to his testimony, submitted the copy to Mr. Mox, president of appellant corporation, and to Mr. Johnson, its secretary, and Mr. Mox said that he would pay for the advertisements and did, in fact, pay \$486.80 on the bill. Respondent's stepson, a Mr. Shelton, at respondent's request, called Mox, Incorporated, on the telephone to verify the authority of Hicks to order the advertisements and charge them to appellant, and was told that "it was O. K. to run them." Hicks himself testified that he "took up the matter of inserting these ad-

vertisements in the Los Angeles Times with * * * Mox, Incorporated. Mox agreed to let me go ahead," and said he would pay for the advertising. While appellant's witnesses disputed some of this testimony, it was for the trial judge to determine the facts, and we are satisfied that his findings are amply supported.

[5] Appellant's claim that the allowance of interest on the amount found due was erroneous is untenable. The action was not for recovery of an uncertain or unliquidated amount, but was based upon an express agreement, and the court below found in accordance with this theory. Interest was properly allowed. Civ. Code, § 3287; *Keyes v. Nims*, 43 Cal. App. 1, 15, 184 P. 695; *Mix v. Miller*, 57 Cal. 356; *Sea v. Lorden*, 37 Cal. App. 444, 174 P. 85.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

100 Cal. App. 559

PEOPLE v. PUPPILO. (Cr. 1833.)

District Court of Appeal, Second District, Division 1, California. Sept. 13, 1929.

1. Criminal law ☞29—Finding two pistols simultaneously in different parts of alien's house established single offense; "pistol" (*Deering's Gen. Laws 1923, Act 1970, p. 662; Civ. Code, § 14.*)

Where revolver was found in trunk in front room of defendant's house, and another of different caliber found in bureau drawer in bedroom at the same time, during course of search of premises by police officers, there was but a single offense committed, under *Deering's Gen. Laws 1923, Act 1970, p. 662*, denouncing possession of pistol by unnaturalized foreign-born person; singular number including plural, under Civ. Code, § 14.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pistol.]

2. Criminal law ☞878(4)—Acquittal under second count for possessing pistol operated as acquittal of offense under first count of possessing a different pistol, where counts did not differentiate between pistols (*Deering's Gen. Laws 1923, Act 1970, p. 662; Civ. Code, § 14.*)

In prosecution of unnaturalized foreign-born defendant for possessing pistol in violation of Gun Law (*Deering's Gen. Laws 1923, Act 1970, p. 662*), jury's verdict of not guilty as to count 1 of information operated as acquittal of offense under another count of possessing a different pistol, where the counts did not differentiate between the separate revolvers, one of which was claimed by defendant to have been the sole property of his wife, since singular number, as used in statute, includes plural, under Civ. Code, § 14.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mike Puppilo was convicted of possessing a pistol as an unnaturalized foreign-born person, and he appeals. Reversed.

Wm. T. Kendrick, Jr., of Los Angeles (W. T. Kendrick, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Buron Pitts, Dist. Atty., and William R. McKay, Deputy Dist. Atty., all of Los Angeles, for the People.

HAHN, Justice pro tem. The defendant, Mike Puppilo, was charged in an information filed by the district attorney of Los Angeles county in each of two counts, with a violation of section 2 of the so-called "Gun Law," being an act of the Legislature adopted in 1923 (Act 1970, p. 662, Deering's Gen. Laws 1923). The portion of the section material to our discussion reads as follows:

"On and after the date upon which this act takes effect, no unnaturalized foreign-born person * * * shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person. The terms 'pistol,' 'revolver,' and 'firearms capable of being concealed upon the person' as used in this act shall be construed to apply to and include all firearms having a barrel less than twelve inches in length. Any person who shall violate the provisions of this section shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in a state prison for not less than one year nor for more than five years."

The charging portions of the information read as follows:

Count I: "The said Mike Puppilo is accused by the district attorney of and for the county of Los Angeles, state of California, by this information, of the crime of violation of Gun Law, Assembly Bill 363, a felony, committed as follows: That the said Mike Puppilo, on or about the 24th day of July, 1928, at and in the county of Los Angeles, state of California, was an unnaturalized, foreign-born person, and the said Mike Puppilo then and there did willfully, unlawfully, and feloniously have in his possession and under his control a firearm having a barrel less than twelve inches in length, to wit, a pistol."

Count II: "For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in count I hereof, the said defendant is accused by the district attorney of and for the county of Los Angeles, state of California, by this information, of the crime of violation of the Gun Law, Assembly Bill 363, a felony, committed as follows: That the said Mike Puppilo on or about the 24th day of July, 1928, at and in the county of Los Angeles, state of California,

was an unnaturalized, foreign-born person, and that the said Mike Puppilo then and there did willfully, unlawfully, and feloniously have in his possession and under his control a firearm having a barrel less than twelve inches in length, to wit, a pistol."

The jury returned a verdict of "guilty" as to the charge in count I, and "not guilty" as to the charge in count II. Appealing from the judgment of conviction and the order denying his motion for a new trial, defendant and appellant urges several grounds for reversal. Inasmuch as we have arrived at the conclusion that the judgment must be reversed for the reason that the evidence discloses that but one offense was committed, and the verdict of "not guilty" rendered as to count II acquitted the defendant of that offense, we will limit our résumé of the evidence to such as may seem necessary to the discussion of this point.

On behalf of the prosecution, a police officer by the name of F. L. James testified that on the 24th day of July, 1928, he, together with two other police officers, arrested the defendant about 4 o'clock in the afternoon at his place of business at Twelfth and Western avenue in the city of Los Angeles; that the defendant told him he resided at 2902 Palm Grove avenue; that about two hours later the witness, together with Lieut. Jones, another police officer, went to the residence at 2902 Palm Grove avenue, the defendant not being present, and there searched the premises; that there were present in the house at that time Mrs. Mike Puppilo, wife of defendant, Mrs. Otto Puppilo, his sister-in-law and a little boy; that in a trunk in the front room of the house they found a 32-caliber Smith & Wesson revolver, which was subsequently admitted in evidence as People's Exhibit 1. The witness further testified that in a bureau drawer in a bedroom in the same house they found a 22-caliber Harrington & Richards revolver, which later was admitted in evidence as People's Exhibit 2.

Over the objection of defendant's counsel that no proper foundation had been laid therefor, and no corpus delicti shown, the witness was permitted to testify that subsequent to the finding of the revolver in question he had a talk with the defendant in the office of the detective bureau at Central Police Station, at which time the defendant again gave his residence as 2902 Palm Grove avenue, and stated that the Smith & Wesson revolver, which was shown him by the officers, was his revolver, and that the Harrington & Richards revolver was the property of his wife. Whereupon the district attorney requested that the Smith & Wesson revolver be admitted in evidence as People's Exhibit 1 and the Harrington & Richards revolver admitted in evidence as People's Exhibit 2. Defendant objected to the introduction of each of the revolvers, on the ground that the same was incompetent, ir-

relevant, and immaterial, which objections were overruled.

On behalf of the defense, the defendant's wife took the stand and testified that she resided with her husband, child, and sister-in-law at 2902 Palm Grove avenue in the city of Los Angeles; that she was at home on July 24, 1928, when the officers came and searched the house and found the two pistols put in evidence; that the 32-caliber Smith & Wesson revolver was found in a trunk, which the witness unlocked to enable the officers to search it; that this revolver was found by the witness in the defendant's billiard room in Chicago, while the defendant was absent in Italy in January of 1928; that she took the revolver from the billiard room and placed it in a trunk; that the defendant had no knowledge of the fact that she had taken the revolver and put it in the trunk, nor had he any knowledge that the revolver had been brought to California; that he had never to her knowledge seen the revolver in California, and in fact the revolver had never been removed from the trunk since it had been brought to California, until the officers found it. She further testified that the other revolver, found by the officers in the dresser drawer in their home, was her revolver; that during the defendant's absence in Italy, in the spring of 1928, while she was visiting in Springfield, Ill., she purchased the revolver and took it home with her and kept it; that the defendant had never seen it, and to her knowledge did not know that she possessed it; that they had no cartridges to fit either of the revolvers.

It is urged by appellant that under the evidence, assuming for the argument that the evidence before the jury was all properly admitted, only one offense appears to have been committed, and that, inasmuch as the jury returned a verdict of "not guilty" as to count II, the verdict of "guilty" as to count I becomes a nullity.

[1] We are of the opinion that appellant's contention that the facts shown by the evidence constituted but one offense must be sustained. The evidence without conflict shows that the two revolvers were found in the residence of the defendant at the same time, on July 24, 1928. Assuming that there is competent evidence to support the district attorney's contention that both of the revolvers were in the custody and control of the defendant, we cannot conceive upon what theory it can be maintained that he was guilty of two separate distinct crimes. If, at the time the defendant was arrested, the officers had found the Smith & Wesson revolver in defendant's hip pocket and the other revolver in the defendant's inside coat pocket, it could not be successfully contended that the defendant, by having two revolvers on his person, was guilty of two offenses. The act denounced by the statute is the possession of a firearm, as therein described. While it is

true that the singular number is used, it is almost axiomatic, and is in fact so provided by our statutes, that the singular number includes the plural. Section 14, Civ. Code.

The principle here involved has been repeatedly recognized by courts of this and other jurisdictions. In the case of *People v. Stephens*, 79 Cal. 428, 21 P. 856, 4 L. R. A. 845, the defendant was charged with the publication of a libelous statement. It appears that the defendant had been previously acquitted of a similar charge, arising out of the publication of the same article, although in the first trial the libelous matter charged differed from that upon which the defendant was the second time brought to trial. The court, in reversing the judgment, held that, inasmuch as the defendant had previously been placed on trial charged with the publication of the same article, although it was a different portion than that which was set forth in the second information, his plea of once in jeopardy was good, as the publication of the entire article, if libelous, constituted but one offense.

So in the case of *Fisher v. Commonwealth*, 1 Bush (Ky.) 211, 89 Am. Dec. 620, the defendant stole a horse, wagon and harness at the same time. He was first charged by information with stealing the horse. Of this charge he was acquitted. When he was brought to trial upon a second information charging the stealing of the wagon and harness, he set up the plea of former jeopardy by reason of his acquittal of the charge of stealing the horse. This was held good, for the reason that, the horse, wagon, and harness having been taken at the same time, there was but one offense committed.

In the case of *State v. Benham*, 7 Conn. 414, it appears that the defendant was arrested, charged with having in his possession two forged bank notes, one of the Troy Bank and the other of the Mechanics' Bank. He was first brought to trial upon an information charging possession of the forged Mechanics' Bank note, of which charge he was found guilty. Subsequently, when brought to trial upon an information charging him with the offense of having in his possession the forged Troy Bank note, he put in a plea of former jeopardy by reason of the trial upon the Mechanics' Bank note. This plea was sustained, upon the ground that having possession of the two forged notes at the same time constituted but one offense.

In *People v. Willard*, 92 Cal. 482, 28 P. 585, 587, the defendant was charged with having received stolen property. It appears that the defendant's alleged husband had burglarized the house of one Hazard, and also the house of one Williams. Goods from both places were found in the possession of the defendant. The court in commenting on this fact said: "The same proof, and the only proof, of a receipt of the Hazard goods on or about March 11th, equally proves a re-

ceipt of the Williams goods at the same time; and, if both were received at the same time, it was one offense, and the acquittal on the first charge was a bar."

The Attorney General in his brief, in urging the same theory as did the district attorney in the course of the trial, namely, that, because two revolvers were found in the defendant's house, he was guilty of two separate offenses, has cited the case of *People v. Degnen*, 70 Cal. App. 567, 234 P. 129, as supporting this theory. There is nothing in this case which conflicts with the authorities cited in support of appellant's contention. In the *Degnen* Case, one count charged the defendant with assault with intent to commit murder, and the other count charged the defendant with the crime of rape. Mr. Justice Works discusses at some length the question as to whether or not the demurrer filed to the indictment was good, and held that the demurrer was not well taken, in that the crime charged in each count constituted a separate offense. The appellant in that case, as here, urged that the evidence showed that but one offense, if any, had been committed, in that all of the acts that formed the basis of both counts occurred at the same time. The court definitely refused to determine the question as to whether or not the facts in that case constituted but one offense.

Nor does the case of *People v. Stone*, 199 Cal. 610, 250 P. 659, cited by the Attorney General, aid in the determination of the question. There the evidence clearly showed that two children met their deaths through criminal agencies. The defendant was charged in one count with the murder of one child, and in the other count with the murder of the other child. The taking of the life of each child constituted a separate offense, even though the killing of both was accomplished by the same act or simultaneously. So, too, the case of *People v. Pozzi* (Cal. App.) 266 P. 860, is not in point. There the defendant was charged with maintaining a nuisance on three separate days. The maintaining of the place on each day was declared a separate offense. This ruling is in harmony with the long line of decisions that hold the doing of a prohibited act, or the maintaining of a prohibited place, on each day, constitutes a separate offense.

The case of *People v. Follette*, 74 Cal. App. 178, 240 P. 502, is urged as a complete answer to appellant's contention on this point. In that case it appears that an indictment had been found charging the defendant with perjury. Subsequently a second indictment was returned by the grand jury, charging defendant with perjury. The second indictment included all of the matters set forth in the first indictment, and in addition thereto other separate instances wherein the defendant was alleged to have committed perjury. It was evidently the intention of all of the par-

ties, including the district attorney, the defendant, and the court, that both cases should be consolidated and tried as one case, and the trial was so conducted. The jury brought in but one verdict, finding the defendant "guilty of perjury as charged in the indictment." This verdict carried the number 21289, which was the number of the second indictment. It was urged by appellant that the failure of the jury to return a verdict on the first indictment operated as a verdict of acquittal of the charges in the first indictment, and that, having thus been acquitted of the charges contained in the first indictment, which charges were also contained in the second indictment, the acquittal on the first indictment was so in conflict with the verdict of guilty on the second indictment that its effect was to nullify the verdict returned. Mr. Justice Curtis, in writing the opinion in the *Follette* Case, points out that there were other instances of perjury set forth in the second indictment that did not appear in the first indictment, and that the effect of the failure to bring in a verdict on the first indictment was simply to furnish to the defendant a plea of "former jeopardy" in the event he was put to trial upon the matters charged in the first indictment. So, too, the case of *People v. Rabe*, 202 Cal. 409, 261 P. 303, is clearly distinguishable from the facts in the instant case. There the defendant was charged in several counts with obtaining money under false pretenses. The false representations were all made at the same time, but the money was obtained from the complaining witness at different times. The opinion points out, in discussing the question as to whether the facts constitute one or more crimes, that the actual obtaining of the money by defendant constituted an essential element of the crime and not until the money was received was the crime complete. Hence each time the defendant obtained money from his victims a separate offense was committed.

If the evidence showed that on July 24, 1928, the defendant was in possession of the Smith & Wesson revolver, and on some subsequent day he was in possession of the Harrington & Richards revolver, then each possession would constitute a separate offense; but, under the evidence as shown by the record, possession of both revolvers was simultaneous in point of time. These facts would, we are satisfied, constitute but one offense.

[2] The Attorney General interprets the verdicts of the jury as meaning that the jury, in returning their verdict of guilty as to the first count, did so upon the belief that the Smith & Wesson revolver was the property of the defendant, while the Harrington & Richards revolver was the property of Mrs. Puppilo, the defendant's wife. Unfortunately for this contention, there is nothing in count I from which it can be determined that that count referred to the Smith & Wesson revolver, nor is there anything in count II to

indicate that that count referred to the other revolver. We have, therefore, concluded that the verdict of not guilty as to the crime charged in count II operates as an acquittal of the offense. Hence the verdict of guilty as to count I becomes a nullity and of no effect.

In view of our conclusion upon the point we have discussed, we do not deem it necessary to consider the other questions raised and discussed in the briefs filed. We are moved to suggest that there is some doubt in our minds as to the sufficiency of the language used in the information to state a public offense. The wording "the crime of violation of Gun Law, Assembly Bill 363," is, to say the least, very indefinite, if, indeed, it has any worth as a pleading.

The judgment and the order denying a new trial are reversed.

We concur: HOUSER, J., Acting Presiding Justice; YORK, J.

100 Cal. App. 557

PEOPLE v. BARBA. (Cr. 1829.)★

District Court of Appeal, Second District, Division 1, California. Sept. 12, 1929.

Rehearing Denied Sept. 24, 1929. Hearing Denied by Supreme Court Oct. 7, 1929.

Jury Ⓒ29(6)—Failure of defendant to personally consent to waiver of jury trial defeated jurisdiction of trial court (Const. art. 1, § 7).

Where defendant in prosecution for sale of intoxicating liquor did not personally consent to waiver of jury trial, as required by Const. art. 1, § 7, trial court was without jurisdiction, regardless of stipulation entered into between district attorney and attorney representing defendant.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Bill Barba was convicted for sale of intoxicating liquor, and he appeals. Reversed.

Fred H. Thompson, of Brawley, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the offense of unlawfully selling intoxicating liquor and from an order denying his motion for a new trial.

On the trial of the action, by stipulation entered into between the district attorney and the attorney representing the defendant, a jury trial was waived. Defendant now raises the point that as he did not personally consent to a waiver of a jury trial, the trial court was without jurisdiction in the premises.

Relying upon the case of *People v. Garcia* (Cal. App.) 277 P. 747, wherein the provisions

of section 7, article 1 of the Constitution are thoroughly considered, it is ordered that the judgment and the order denying the motion for a new trial be and they are reversed.

We concur: CONREY, P. J.; YORK, J.

CLARK v. HAMILTON DIAMOND CO. et al.†
(Civ. 5471.)

District Court of Appeal, Second District, Division 2, California. Sept. 7, 1929.

As Modified Sept. 11 and 16, 1929. Hearing Granted by Supreme Court Nov. 4, 1929.

1. Sales Ⓒ221—Seller of diamond ring accepting worthless check would be entitled to repossess ring as against purchaser or subsequent purchasers with knowledge.

Where owner of diamond ring sold it and accepted check which was later found to be worthless, and purchaser had traded ring to another, who in turn traded it to a retail jeweler, from whom another obtained it and sold it to diamond company, seller would be entitled to ring as against purchaser or any other subsequent purchaser with knowledge of transaction.

2. Sales Ⓒ234(5)—Innocent purchaser for value of diamond ring held entitled thereto as against original seller who accepted check later found to be worthless.

Where subsequent purchaser of diamond ring was an innocent purchaser for value, he was entitled to ring as against original seller who accepted check later found to be worthless.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Charles H. Clark against the Hamilton Diamond Company and another. Judgment for plaintiff, and defendant J. S. Cohen appeals. Reversed, with directions.

Charles A. Bank, of Los Angeles, for appellant.

Henry M. Lee, of Los Angeles, and Thomas A. Joyner, of Pasadena, for respondent.

CRAIG, J. The plaintiff and respondent filed an action in claim and delivery, alleging that the defendants had wrongfully acquired possession of a diamond ring of which he was the owner. The defendants answered, denying ownership in the plaintiff, alleging that they lawfully acquired possession of said property, that the defendant corporation purchased the same for value, and that, since filing the complaint, the plaintiff had wrongfully taken the ring. They also prayed judgment for possession or the value of the property. The trial court, after hearing the evidence, rendered judgment in favor of the plaintiff, and the defendant Cohen appealed upon the judgment roll alone.

The findings of fact recite that one Harry Justice fraudulently purchased the ring from the plaintiff, and gave therefor a worthless check; that he traded it to one Dye, who, in turn, delivered it to one Allen, a retail jeweler; that one Friedman obtained it from Allen and sold it to the defendant Cohen, who was doing business as Hamilton Diamond Company. It is further recited by the findings that defendant Cohen "did purchase said ring without knowledge of said transaction between plaintiff and said Harry Justice." The trial court further found that, immediately upon the return of the worthless check, Clark by proper proceedings repossessed the ring; that no muniments or indicia of title were ever transferred to any of the parties other than Cohen, and that he did not rely upon any muniments or indicia of title when he purchased said personal property.

[1, 2] It is apparent that taking these findings of the court as true—and there is no evidence in the record before us—Clark would be entitled to the ring as against Justice or any other subsequent purchaser who had knowledge of the transactions between the parties. On the other hand, under the finding that Cohen was an innocent purchaser for value, he would be entitled to judgment. *Wendling Lumber Co. v. Glenwood Lumber Co.*, 153 Cal. 411, 95 P. 1029.

The judgment is reversed, with directions that judgment be entered in favor of the defendant and appellant for the return to defendant of the personal property described in the pleadings, or the payment to defendant of the sum of \$500, the value thereof as found by the trial court, together with interest from the date of the taking thereof by plaintiff, in the event that a delivery cannot be had.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

100 Cal. App. 593

FULLER et al. v. EVERETT. (Civ. 5484.)

District Court of Appeal, Second District, Division 2, California. Sept. 17, 1929.

- 1. Executors and administrators** ⚡221(5)—Evidence, in suit against executor, must indicate that both parties expected compensation should be made to warrant inference that mother became indebted to daughter for personal services.

In action by daughter against executor for reasonable value of services rendered to mother, since deceased, to warrant inference that mother became indebted to daughter for board and lodging, nursing and personal attendance, evidence must be such as to reasonably indicate that it was expectation of both parties that compensation should be made therefor.

- 2. Executors and administrators** ⚡221(5)—Finding that services were gratuitously rendered to mother, since deceased, held warranted by evidence.

In action by daughter against executor for reasonable value of board and lodging, nursing and personal attendance rendered to mother, since deceased, where mother had said she would pay daughter and pay her well, but there was no understanding or agreement sufficiently shown to render it binding, evidence held to warrant finding that presumption of gratuity prompted kindness and close relationship had not been overcome.

- 3. Evidence** ⚡151(1)—Objection to question whether daughter intended to donate services to mother, since deceased, was properly sustained.

In action by daughter against executor for reasonable value of board and lodging, nursing and personal attendance rendered to mother, since deceased, objection to question whether daughter intended to donate her services or to waive right to compensation was properly sustained as attempting to prove undisclosed intent.

- 4. Appeal and error** ⚡203(4)—Objection to admissibility of plaintiff's testimony in previous case, raised for first time on appeal, could not be considered.

Objection that reference to plaintiff's testimony in another case for purposes of impeachment was allowed without sufficient foundation having been laid therefor, raised for first time on appeal, could not be considered.

Appeal from Superior Court, Los Angeles County; Robert E. Abbott, Judge.

Suit by Helen Fuller and husband against I. Worth Everett, as executor of last will and testament of Sarah C. Guess, deceased. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. S. Knott, J. H. Ardis, and J. Vincent Hannon, all of Los Angeles, for appellants.

Newlin & Ashburn, of Los Angeles, and J. W. Falkner, of El Monte, for respondent.

CRAIG, J. The appellant Helen Fuller, joined by her husband for the purposes of suit, instituted this proceeding against the executor of the last will and testament of her mother, Sarah C. Guess, deceased, upon a rejected claim for the reasonable value of board and lodging, nursing and personal attendance. The plaintiffs alleged that Mrs. Guess came to their home at her own request, and that the maintenance and services were rendered at her special instance, upon a promise to pay them therefor. The defendant denied any agreement to compensate the plaintiffs, alleging that Mrs. Fuller's mother was freely and voluntarily accepted into their home, and that it was the filial duty of the daughter to so care for her because of her age and infirmities. Evidence was introduced

by the respective parties, and the court rendered judgment in favor of the executor, from which the plaintiffs appealed.

The principal ground of appeal is that the evidence was not sufficient to warrant the following findings of the trial court:

"It is true that the said Sarah C. Guess was the mother of the plaintiff, Helen Fuller, and that the services rendered to her said mother by the said plaintiff in the furnishing of board and lodging and nursing and attendance and otherwise, were rendered voluntarily as a filial duty and without any expectation on the part of the said Sarah C. Guess to pay therefor and without any expectation on the part of the plaintiff, Helen Fuller, or her husband, Calvin Fuller, to charge therefor, or to receive any payment therefor.

"It is not true that the said Sarah C. Guess during her lifetime paid or compensated the plaintiffs or either of them for said or any of said things, but it is true that there was no contract, express or implied, for payment by the said Sarah C. Guess to plaintiffs, or either of them, * * * and that the said Sarah C. Guess was not at any time during her lifetime liable for said or any of said things, and that her estate is not liable therefor."

Mrs. Fuller's testimony alone strongly tends to support the findings of the trial court. She swore that on or about December 5, 1922, her mother was ill and confined to her bed at her own residence; that she said to the appellant, "I am going home with you," to which the latter "must have said, 'Yes, come and go with me,'" but that nothing was then said about payment for support or attention. It is not denied that Mrs. Guess repeatedly thereafter remarked that her daughter was kind to her, and that "she does take fine care of me," and "will never regret what she has done for me." Appellant also testified, however: "She often said she intended to pay me and pay me well for taking care of her." "She did not say when, nor how she would pay me," and appellant did not ask her. "I thought she would do what was right by me." "I might have said to her that I felt indebted to do these things, that it was my place to look after her." She admitted that it was her duty toward her mother at that time, and that she did not regret having cared for her; that Mrs. Guess was her mother, and that she felt it was her duty as a daughter; that it was no additional expense except for board and attention, because her mother paid her own doctor, and for her own clothes and medicines. Other witnesses testified that the decedent had often stated that she would "pay her well," but that she could "pay her own way," that she "could help herself a little," and did not say how or when she was going to pay her daughter.

[1, 2] The foregoing presents appellant's side of the case in its strongest light, yet there is no evidence of a meeting of the minds upon

any agreed kind or amount of compensation. Mrs. Fuller always replied to statements by her mother that as to payment, "Well that is your business," and that she "did not want to bother her." To warrant an inference that one relative became indebted to the other for such service, the evidence must be such as to reasonably indicate that it was the expectation of both parties that compensation should be made therefor. *Murdock v. Murdock*, 7 Cal. 511; *Moulin v. Columbet*, 22 Cal. 508. The presumption ordinarily prevailing that the services were to be paid for cannot be invoked in such cases. *Newbert v. McCarthy*, 190 Cal. 723, 214 P. 442. On the contrary, as was said in *Ruble v. Richardson*, 188 Cal. 150, 204 P. 572, 575: "Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where services are rendered by members of a family, living in one household, to each other, or necessities are supplied by one near relation to another, the law will presume that they were gratuitous favors merely, prompted by friendship, kindness, and the relationship between them. And in such case, before the person rendering the service can recover, the express promise of the party served must be shown or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation of one of receiving, and by the other of making compensation therefor." We are unable to say as a matter of law that the trial court erred in finding from the evidence adduced that this presumption of gratuity, prompted by kindness and close relationship, had not been overcome. From the fact that Mrs. Guess never stated the time or manner in which she expected to pay her daughter for such voluntary comforts, it might for aught that appears have been her intention to compensate her otherwise than by the mere payment of money, had she survived her illness. Such an inference, if the court did so infer, might flow from the defendant's remark when asked to loan her daughter \$75, as testified by the latter, that "she didn't have it," although she had a bank account of considerable size. Presuming, as we must, that pecuniary compensation was not intended under the circumstances, it follows that a finding in favor of the defendant was not improper, but was imperative.

[3, 4] During the trial appellant was asked by her counsel as to the meaning of her answer upon another trial that her mother was under no "expense" when with her, to which an objection that it had already been answered or covered was sustained. The witness had previously testified that by this she meant that her mother was under no expense for board and personal care, but that in other respects she paid her own expenses. Objections were also sustained to the question as

to whether the appellant intended to donate her services or to waive the right to compensation. In sustaining the objection in this instance, the trial court remarked that it was within its province to decide what was meant. As we have heretofore observed, there was no agreement between the parties sufficiently shown to render it binding, and an attempt to prove an undisclosed intent of one of the parties was properly precluded by timely objection. It is further complained that reference to the plaintiff's testimony in another case for the purposes of impeachment was allowed without sufficient foundation having been laid therefor. Objection to this evidence is first made at this time, and cannot be considered. There appears to be somewhat conflicting testimony in the two cases, but in this, as in the other instances of asserted error, appellant fails to point out wherein any prejudicial rulings of the trial court could have so affected the final determination of the issues as to require a reversal. Since, as observed, in the absence of express agreement or other substantial evidence to the contrary, a willing and gratuitous filial duty will be presumed to have been performed, and it appearing that the testatrix in her lifetime relieved appellants of any expense for doctors, medicines, or clothing, the record before us does not tend to establish the existence of a greater burden upon the daughter than the term "filial duty" implies.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

DE WEES v. KUNTZ. (Civ. 6807.)★

District Court of Appeal, First District, Division 2, California. Sept. 17, 1929.

Rehearing Granted Oct. 16, 1929.

1. Automobiles ⇨181(1)—As regards passenger's injury, driver familiar with road had no right to assume there was sufficient room to pass automobile opposite parked car (California Vehicle Act, § 136).

Automobile driver familiar with road, and having a full view at time of passing automobile where another car was parked, was not relieved from liability for injury to passenger on theory that driver had a right to assume that there was sufficient room for passing of both cars opposite the parked car in accordance with California Vehicle Act, § 136 (St. 1923, p. 561), forbidding parking of automobile on public highway unattended unless there is clear and unobstructed width of not less than 15 feet on main traveled portion of highway.

2. Automobiles ⇨201(8)—Negligence of automobile driver need not have alone caused injury to passenger to impose liability.

In order to impose liability on automobile driver for injury to passenger, it is not neces-

sary that her negligence alone should have been cause of accident.

3. Negligence ⇨61(1)—Recovery may be had against either or both of responsible persons, where injury results from two separate and distinct acts of negligence.

Where injury results from two separate and distinct acts of negligence by different persons operating and concurring simultaneously and concurrently, both are the proximate cause, and recovery may be had against either or both responsible persons.

4. Automobiles ⇨245(87)—Passenger in automobile held not contributively negligent as matter of law in not refusing to ride at time atmosphere was filled with dust.

Passenger in automobile held not guilty of contributory negligence as a matter of law because of failure to refuse to ride in car at time atmosphere was filled with dust, in view of evidence establishing that at time of accident view of road was not obstructed.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Nora De Wees against Dorothy Kuntz, also known as Dorothy Nell De Wees. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, and Lasher B. Gallagher, of San Francisco, for appellant. M. F. McCormick, of Fresno, for respondent.

BURROUGHS, Justice pro tem. This is an action for damages for personal injuries alleged to have been suffered by the plaintiff in an automobile accident while riding as the invited guest of her daughter, who is the defendant. The cause was tried by the court without a jury, and judgment was rendered in favor of the plaintiff in the sum of \$2,070, and the defendant appeals therefrom.

Appellant specifies two grounds of alleged error, either one of which, it is contended, calls for a reversal of the judgment.

It is first claimed that the evidence is insufficient to support the court's finding that the injuries suffered by plaintiff were caused by the negligence of the appellant. The second claim is that even though it is held that the defendant was guilty of negligence, the plaintiff was guilty of contributory negligence, and the court's finding to the contrary does not find support in the evidence.

The evidence discloses that both parties to the action were returning from a rodeo being held near a place called Squaw Valley, to their home in the city of Fresno. The defendant was the owner of and operating the automobile, a Chrysler roadster. The plaintiff occupied the seat to the right of the defendant. The road was an ordinary, unpaved, mountain road, and where the accident occurred the traveled portion thereof was 12

feet wide. The defendant was familiar with the road, having traveled over it many times. The only account of the accident given at the trial was the testimony of the defendant. This showed that she was traveling down-grade, and on rounding a curve in the road she saw, at a distance of about 25 or 30 feet from her, an automobile which was parked on the inner side of the road and was facing up hill. She was on the outer and right-hand side of the road descending and proceeding at about 10 or 15 miles an hour. She had ample room to pass the parked car. Almost immediately on rounding the curve she saw another car, behind the parked car, which was approaching on its right-hand side of the road. It turned to pass the parked car and thereby entered the defendant's side of the road. The defendant did not stop her car, which in one part of her testimony she said she could have done, but turned to her right to allow the approaching car to pass between her car and the parked car, with the result that the wheels on the right side of her car went off the road and the car tipped over on its side and inflicted serious injuries on the person of the plaintiff.

As illuminative of the frame of mind of the defendant upon the subject of her ability to pass the two cars, her answer to the following question is pertinent: "Q. Isn't this about the situation there as it existed when you saw these two cars, the one coming up passing the standing car? You thought that by turning to the right the other car could pass you on your left? A. Yes."

It thus appears that the defendant made no effort to stop her car before reaching the on-coming car. Had she done so, it appears that she could have avoided the accident.

[1] It is claimed by appellant that because section 136 of the California Vehicle Act (St. 1923, p. 561) forbids the parking of an automobile upon a public highway unattended, unless there is a clear and unobstructed width of not less than 15 feet upon the main traveled portion of the highway between the car and the unoccupied portion of the highway, this defendant had a right to assume there was sufficient room for the passing of both cars opposite the parked car, and that under the rule in *Medlin v. Spazier*, 23 Cal. App. 245, 137 P. 1078, a person has a right to presume that every other person has obeyed the law, and that therefore the defendant had a right to believe that there was 15 feet between the parked car and the outer edge of the highway. Upon this subject we deem it sufficient to say that defendant was familiar with the road, having traveled it many times, and according to her own testimony she had a full view of the road, and she also believed she

had plenty of room to pass. We therefore consider the point is without merit.

[2, 3] It is also claimed by appellant that the proximate cause of the accident was the fault of the driver of the parked car in leaving it parked at a point where there was not the required space between it and the outer edge of the highway, and that it was also the fault of the driver of the approaching car in not waiting for the defendant to pass the parked car. However, it has been held that to impose liability upon the defendant it is not necessary that her negligence alone should have been the cause of the accident. *Griffith v. Oak Ridge Oil Co.*, 190 Cal. 389, 212 P. 913; *Merrill v. Los Angeles, etc., Co.*, 158 Cal. 499, 111 P. 534, 139 Am. St. Rep. 134; *Smith v. San Joaquin Light & Power Co.*, 59 Cal. App. 647, 211 P. 843. It has also been held, and is the law of this state, that where an injury results from two separate and distinct acts of negligence by different persons operating and concurring simultaneously and concurrently, both are the proximate cause and recovery may be had against either or both of the responsible persons. *Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 121 P. 379; *Merrill v. Los Angeles Gas & Elec. Co.*, supra.

[4] It is the next contention of appellant that plaintiff was guilty of contributory negligence, in this, that the evidence shows that the atmosphere was so filled with dust as to render it impossible to see for any great distance ahead of the car, and that it was the duty of the plaintiff to have refused to ride with the defendant under the circumstances, and that as a matter of law it was contributory negligence for the plaintiff to ride in the car under such circumstances. It appears that on the day of the accident a rodeo was being held at Squaw Valley, and many other persons had attended, and there was an unusual number of cars passing back and forth over the road, and that it was dusty. However, it appears from the evidence of the defendant herself that immediately upon rounding the curve, she saw the other cars and that she believed that she had plenty of room to turn to the right and let the approaching car pass her, and there is no claim made by her that the dust obstructed her view of the road to such an extent that she could not see the car and the road ahead of her.

This evidence refutes defendant's claims that plaintiff was, as a matter of law, guilty of contributory negligence. We are of opinion that the evidence is sufficient to sustain the findings.

The judgment is affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

100 Cal. App. 556

RATLIFF v. RATLIFF. (Civ. 6574.)

District Court of Appeal, Second District, Division 1, California. Sept. 12, 1929.

1. Appeal and error ☞113(3)—Order denying motion to vacate default judgment on cross-complaint was appealable; "appealable order" (Code Civ. Proc. §§ 473, 963).

Order denying a motion to vacate judgment of default on the cross-complaint under Code Civ. Proc. § 473, constituted an appealable order within the meaning of section 963.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Appealable Order.]

2. Appeal and error ☞801(3)—Objection that appellant in opening brief had failed to point out error could not be raised on motion to dismiss appeal.

Objection that appellant in opening brief had failed to point out any error in any ruling of trial court, or in any order appealed from, was one that could not be raised on motion to dismiss appeal.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Robert E. Ratliff against Christina D. Ratliff. From an order denying a motion to vacate the judgment, plaintiff appeals. On motion to dismiss appeal. Motion denied.

Koenig & Brunton, V. H. Koenig, and A. W. Brunton, all of Los Angeles, for appellant.

C. L. Belt and E. S. Green, both of Los Angeles, for respondent.

YORK, J. Respondent moves the court to dismiss the appeal in the above-entitled cause for the reasons: First, that the judgment appealed from is not an appealable order within the meaning of section 963 of the Code of Civil Procedure; second, that the order appealed from is not subject to review; and, third, that the appellant in his opening brief has failed to point out any error in any ruling of the trial court or in any order appealed from.

[1] In *Re Yoder*, 199 Cal. 699, 251 P. 205, it is held that an order denying an application to set aside an order of the superior court on the ground of fraud is an appealable order, as the same is a special order made after final judgment, within the meaning of subdivision 2 of section 963 of the Code of Civil Procedure, and it is held there in effect that although the general rule is that an appeal does not lie from an order denying a motion to vacate a judgment where the motion merely called upon the court to repeal or overrule the former ruling on the same facts, there are certain well-defined exceptions to said rule, and such an order is appealable where the circumstances are such that an appeal from the first order would

be vain for lack of a record showing the rights of the aggrieved party.

Appellant in this case had made motion for relief under section 473 of the Code of Civil Procedure to set aside a judgment of default entered on the cross-complaint.

[2] The third objection as to the matters contained in the opening brief is one that cannot be raised on a motion to dismiss an appeal.

The motion to dismiss the appeal is therefore denied.

We concur: CONREY, P. J.; HOUSER, J.

100 Cal. App. 605

PEOPLE v. ROWE. (Cr. 1865.)

District Court of Appeal, Second District, Division 2, California. Sept. 17, 1929.

Criminal law ☞1120(3)—Exclusion of purported information could not be held prejudicial, where record did not contain document or evidence of its contents.

Where defendant assigned as error exclusion from evidence of purported information, but record did not contain tendered document or any evidence as to offense which was therein charged, District Court of Appeal could not say that exclusion was not proper or that defendant was prejudiced thereby.

Appeal from Superior Court, Riverside County; F. A. Leonard, Judge.

C. F. Rowe was convicted of robbery, and he appeals. Affirmed.

W. E. Balcom, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, J. The district attorney of Riverside county on May 10, 1929, charged the appellant by information with having committed the crime of robbery on or about August 5, 1928, to which a plea of not guilty was entered. When the case was called for trial appellant's counsel requested permission to enter an additional plea of previous acquittal of the offense so charged, which was granted. After the people had closed and the defendant had testified, his counsel offered in evidence a purported "information in the case of the State of California v. C. F. Rowe, presented by the district attorney in open court, of the county of Riverside, State of California, and filed as a record in said court on the 13th day of October, 1928." An objection thereto by the district attorney was sustained upon the ground that the offered information did not charge the same offense as that for which the defendant was on trial, and that it was

not material. This ruling is assigned as a ground for reversal, but the record does not contain the tendered document nor any evidence as to the offense which was therein charged. It is impossible to say that the objection and ruling mentioned were not well founded, or that appellant was prejudiced thereby; hence there is no merit in his contention. *People v. Bray*, 42 Cal. App. 465, 183 P. 712. No other question is presented for our consideration upon this appeal.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

100 Cal. App. 550

PEOPLE v. JONES et al. (Cr. 1785.)★

District Court of Appeal, Second District, Division 1, California. Sept. 12, 1929.

Rehearing Denied Sept. 24, 1929. Hearing Denied by Supreme Court Oct. 7, 1929.

1. Criminal law ⇨779—Instruction on conspiracy and effect of conspirator's acts held properly given in forgery prosecution.

Where defendant, in prosecution for forgery, was jointly charged with two other defendants with the commission of crime, instruction defining conspiracy, and stating just how far the acts of each conspirator bound the remaining conspirators, held not erroneous, in view of fact that defendant was not charged with conspiracy to commit crime, and was not found guilty of crime of conspiracy.

2. Forgery ⇨7(1)—Escrow instructions, actually acted on, were contracts susceptible of being forged (Pen. Code, § 470).

Escrow instructions, constituting a contract actually acted on, with consummation of deals in accordance therewith, were contracts susceptible of being forged, within Pen. Code, § 470.

3. Forgery ⇨10—Insertion of changes in escrow instructions after signature made such instructions forged instruments (Pen. Code, § 470).

Insertion of changes in escrow instructions without knowledge of parties defrauded, and after signature had been attached thereto, was such as to make instructions, as altered, forged instruments, within Pen. Code, § 470.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

E. Gertrude Jones, indicted with others, was convicted of forgery, and she appeals. Affirmed.

Max Schleimer and Cooper & Collings, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

YORK, J. As summed up in the supplemental opening brief of defendant and ap-

pellant, E. Gertrude Jones, in what she calls conclusions, the questions raised by appellant, particularly when they are closely analyzed, amount to not much more than a contention that an escrow agreement is not a document subject to forgery. At least that is the interpretation that we put upon the so-called conclusions, which are set forth in one paragraph, as follows:

"Conclusions: It is respectfully submitted that the indictment does not state a public offense, for the reason that escrow instructions is not enumerated in section 470 of the Penal Code, and is not one of the documents which is subject to forgery; that escrow instructions is not a contract within the meaning and purview of that section; that each act enumerated in that section constitutes a separate and distinct offense; that each count in the indictment contains five separate and distinct offenses, and should have been pleaded in separate counts, and it was therefore illegal to try and convict appellant for five separate and distinct felonies contained in each count; that the indictment charged that appellant's entire escrow instructions was false, forged, altered and counterfeited, whereas, the proof tended to show that a clause was added therein, and, therefore, there was a material variance between the allegations of the indictment and the proof, which affected appellant's substantial right; that there is no proof that appellant typed in the clause in her escrow instructions after she signed them, and that constituted a total failure of proof of the offenses charged, and appellant was entitled to the instruction advising the jury to acquit her on that ground; that the inclusion of the clause in appellant's escrow instructions, without previous express oral agreement with the sellers and the latter's failure to notice the clause therein did not constitute forgery on the merits, and for that reason the court should have advised the jury to acquit appellant; that the instruction given that if the jury believed that defendants uttered, published or passed as true and genuine the escrow instructions in any count, they should find such defendant guilty upon that ground, was erroneous, because the alleged offenses were improperly pleaded and the instructions given did not include the essential elements; that the instruction given that if the jury believed that defendants aided and abetted in uttering, publishing, or passing as true and genuine the escrow instructions in any count, they should find such defendant guilty upon that ground, should not have been given, for the reason the indictment did not charge the appellant with the commission of that offense; that instructions 22, 23, 24, 25, and 27 regarding conspiracy should not have been given, because the indictment did not charge appellant with that offense, and

there was no evidence that appellant conspired to commit the offense charged in the indictment; that the instruction that a set of escrow instructions is considered and construed together as a contract was erroneous, for the reason that section 470 of the Penal Code does not enumerate escrow instructions, and such instruction is not a contract within the meaning and purview of that section; that instruction 33, to the effect that if the defendant Ruline inserted the clause at appellant's instigation, without the knowledge of the seller, constituted forgery, should not have been given, because that would at most constitute a false clause, which does not constitute forgery as a matter of law; that the judgment is contrary to law, because the undisputed physical facts show that appellant did not forge any of the escrow instructions, and for that reason the court should have advised the jury to acquit appellant upon the merits, and the rulings of the trial court were inconsistent. The judgment and order appealed from should be reversed, the indictment dismissed, and appellant discharged from imprisonment."

[1] The instructions complained of, which defined conspiracy, and which stated just how far the acts of each conspirator bind the remaining conspirators, and the instruction that states how far their declarations are admissible against the rest of the conspirators, are, we think, correct, and were properly given in this case, for the reason that the defendant Jones is jointly charged with two other defendants with the commission of the crimes alleged to have been committed, although she is the sole appellant before this court. She was not charged with conspiracy to commit a crime, and she was not found guilty of the crime of conspiracy.

[2, 3] From appellant's opening brief, and from said supplemental brief of defendant and appellant, and from the appellant's reply brief, we glean no more objections to the judgment of conviction than set forth in the foregoing "Conclusions." In this case, the evidence clearly shows that the appellant, E. Gertrude Jones, took advantage of each of the persons defrauded or sought to be defrauded in each of the matters set forth in the counts of the indictment, upon which she was convicted, except possibly on the five counts 2, 5, 8, 10, and 11, upon which the court granted her a new trial. The court sentenced her on seven counts, namely, 3, 4, 6, 7, 9, 12, and 13, and judgment was entered on said counts that she be imprisoned in San Quentin as prescribed by law. The court at the time of sentence dismissed counts 2, 5, 8, 10, and 11, and this appeal is taken by her from such judgment of conviction, and from the order denying her motion for a new trial. If all of the evidence connecting defendant Jones with the charges against her was set forth in the supplemental opening brief of defendant and appellant,

E. Gertrude Jones, it would require a much more elaborate discussion of the points involved. However, that is not the fact. There are only certain parts and portions of the evidence alleged to be against said defendant set forth in said supplemental brief, but we have had to take all of the evidence as shown by the transcripts in order to determine what the evidence really was.

The contention of appellant (which seems to be the main contention, in that it is more or less interwoven with all of her objections), that the escrow instructions are not contracts, and that such an instrument is not one of the instruments susceptible of being forged, is not worthy of any further discussion, as it was a contract actually acted upon, and the deals each were consummated in accordance with the altered escrow instructions. However, objection is also made by appellant that the insertion of certain changes in the escrow instructions would not make such escrow instructions, as altered, a forged instrument. The cases cited by appellant have no bearing whatsoever upon a case of this kind. The entire object of the appellant was apparently centered around, and her fraud was entirely perpetrated by the insertion of, the particular clauses inserted in the escrow instructions or contracts, without the knowledge and after the signature of each of the parties defrauded had been obtained to each of the escrow instructions. All the damage done to the innocent parties to the transaction was caused by the insertion of this portion of the escrow instructions, and the completion of the deals or escrows and the transactions therein provided for, as set out in the escrow in its altered state. The entire instrument, as so altered, was not an instrument that would have been signed by any of the persons defrauded, if they had been in their right minds, unless they had been entirely uninformed as to business matters, and did not know the difference between first and second incumbrances or liens on property.

The contention of appellant that these parts and portions of the contract claimed to have been inserted were as a matter of fact in the contracts or escrows at the time the escrows were made is not borne out by the evidence taken as a whole, and can only be read into the evidence by taking isolated and fragmentary portions of the evidence by itself, which the jury evidently did not do.

We can see no merit in any point raised by appellant.

The judgment and order appealed from are affirmed.

I concur in the judgment: HOUSER, J.

CONREY, P. J. (concurring). I concur in the judgment. It may be that a single escrow instruction, made by one party, is not a contract. But where such instruction is ac-

companied by another instruction given by the other party, and the two documents are intended to and do contain the complete terms of a single transaction, they constitute a written contract, and a contract so written is capable of forgery.

The instructions concerning the law of conspiracy were appropriate in this case, in order to make clear the principle that, although appellant did not actually commit, with her own hand, the act of forging the instruments, she was responsible as a principal, if the forgeries were committed by another person with whom appellant had conspired for the accomplishment of the felonious acts described in the indictment.

100 Cal. App. 545

SUNDBERG v. RINGEL. (Civ. 6960.) *

District Court of Appeal, First District, Division 2, California. Sept. 11, 1929.

As Modified on Denial of Rehearing Oct. 10, 1929. Hearing Denied by Supreme Court Nov. 4, 1929.

1. Automobiles ⇨234—Insurance carrier was properly joined as defendant, if policy, or ordinance pursuant to which policy was issued, provided it should inure to benefit of public.

Where policy insuring jitney bus driver was issued pursuant to city and county ordinance, insurance carrier was properly joined as party defendant, in action for injuries from operation of jitney, provided insurance policy or ordinance provided that it should inure to the benefit of the public.

2. Appeal and error ⇨1053(7)—Where court instructed that insurance carrier was no longer in case, admission of records bearing on bus driver's insurance was not prejudicial to him in action for injuries.

In action for injuries against driver of automobile jitney bus and insurance carrier, admission in evidence of records, policies, and papers bearing on question of defendant's insurance held not prejudicial to individual defendant, where court instructed jury that insurance company was not interested in the case and had ceased to be in the case any longer.

3. Damages ⇨96—New trial ⇨74—Damages for injuries are matter for jury's discretion, and subsequently for discretion of trial judge on motion for new trial.

Amount of damages to be awarded in action for injuries are matter first for sound discretion of jury, and next committed to discretion of trial judge, who may consider evidence anew in ruling on motion for new trial.

4. Appeal and error ⇨1004(3)—Verdict approved by trial court cannot be set aside, unless so plainly excessive as to suggest passion or corruption (Code Civ. Proc. § 657, subd. 5).

Decision of jury as to damages for injuries, where upheld by trial court, cannot be set aside on appeal as excessive, under Code Civ. Proc. § 657, subd. 5, unless verdict is so plainly and

outrageously excessive as to suggest at first blush passion, prejudice, or corruption of jury.

5. Damages ⇨132(3)—\$10,000 for permanent injuries, weakening back and leg, causing pain and preventing hard labor, held not excessive.

\$10,000 damages to 39 year old man for permanent injuries, causing weakness in back and leg and severe pains in back, and preventing him from doing hard labor and compelling him to wear brace, held not excessive.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Ernest E. Sundberg against Isidor Ringel. Judgment for plaintiff, and defendant appeals. Affirmed.

B. P. Gibbs, of Los Angeles, and Barry J. Colding and Theodore Hale, both of San Francisco (Carroll B. Crawford, of San Francisco, of counsel), for appellant.

Hugh K. McKeivitt and Bronson, Bronson & Slaven, all of San Francisco, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendant, Isidor Ringel, from a judgment entered against him upon a verdict of a jury in the sum of \$10,000.

Plaintiff, Ernest E. Sundberg, brought this action to recover damages for personal injuries suffered by him in an automobile collision. On February 6, 1926, plaintiff was driving and operating a Ford truck on the westerly side of the Embarcadero, near its intersection with Sansome street, in the city and county of San Francisco when his truck was struck by an "automobile jitney bus" driven by defendant Isidor Ringel throwing plaintiff from his truck and rupturing the ligaments in his back, and inflicting other injuries to his back and body.

The only defendant in the original complaint was Isidor Ringel, but an amended complaint was filed, in which "the California Highway Indemnity Exchange" was also joined as a defendant, by reason of a policy of insurance issued by it to its codefendant Isidor Ringel, under the terms of an ordinance of the city and county of San Francisco. Both defendants interposed general and special demurrers to the amended complaint, setting up, among other grounds, the misjoinder of parties and actions. Both demurrers were overruled, and defendants in due time filed separate answers, denying negligence on the part of defendant Isidor Ringel, and denying other allegations of the complaint, and for a further, separate, and distinct answer defendants alleged that plaintiff's injuries, if any, were the proximate result of his own negligence and carelessness. The case was tried before the court sitting with a jury, and at the conclusion of plaintiff's case a nonsuit was granted to "the California High-

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied. Hearing denied by Supreme Court.

way Indemnity Exchange," and the case was continued as to defendant Isidor Ringel, resulting in a verdict for plaintiff in the sum of \$10,000. No question is raised regarding the sufficiency of the evidence to support the verdict and judgment.

[1] Appellant first contends: "The court erred in overruling the respective demurrers of the defendant Exchange and defendant Isidor Ringel, upon the question of misjoinder of actions and parties defendant, for the reason that by so doing the fact that the defendant Isidor Ringel carried a policy of insurance was repeatedly and improperly called to the attention of the jury, to the prejudice of the substantial rights of appellant." There is no merit in this contention. This precise point was urged in the case of *Fraher v. Eisenmann* (Cal. App.) 270 P. 704, 705, by the same attorneys who represent the appellant in the case at bar, and there this court said: "The appellant complains that the trial court erred in permitting the jury to learn that he was insured against loss by his codefendant. The insurance carrier was joined as a party defendant on the theory that the policy of insurance inured directly to the public under the rule of *Gugliemetti v. Graham*, 50 Cal. App. 268, 270, 195 P. 64, and *Malachowski v. Varro*, 76 Cal. App. 207, 213, 244 P. 936. The policy having been issued pursuant to an ordinance of the city and county of San Francisco, the insurance carrier was properly joined as a party defendant, if the policy itself or the ordinance provided that it should inure to the benefit of the public. See cases just cited, and *Milliron v. Dittman*, 180 Cal. 443, 445, 181 P. 779; *Kruger v. California Highway Indemnity Exchange*, 201 Cal. 672, 678, 258 P. 602. The point was raised upon separate demurrers interposed by the appellant and the insurance carrier. Both demurrers were overruled, and this is now assigned as error. The appellant's demurrer on the ground of the misjoinder of his codefendant was properly overruled, unless it appeared from the face of the complaint that he was prejudiced thereby. *Gardner v. Samuels*, 116 Cal. 84, 90, 47 P. 935, 58 Am. St. Rep. 135; *O'Connell v. Rogers*, 72 Cal. App. 539, 542, 237 P. 775. But the demurrers were to be determined upon what appeared upon the face of the complaint, and not upon what might be developed during the trial of the case. As the complaint alleged that this policy inured to the benefit of the public, the case came squarely within the rule of the cases above cited, and the demurrers were properly overruled."

[2] Appellant next contends that the court erred in admitting in evidence "certain records, policies, and papers bearing upon the question of jitney bus insurance alleged to be carried by the defendant Isidor Ringel for the reason that the admission of such evidence was unwarranted, improper and prejudicial to the substantial rights of the defendant." This contention was likewise made

in *Fraher v. Eisenmann*, supra, and held to be without merit.

Furthermore, in the case at bar, the court instructed the jury that the "insurance company" was not interested in the case, using this language: "At the outset, in this case, I might say to you, ladies and gentlemen of the jury, that perhaps you don't understand that this case is now between the plaintiff on the one side, Ernest E. Sundberg, and the defendant on the other side, Isidor Ringel. The California Highway Indemnity Exchange is out of the case, so in your deliberation upon the case you just consider the fact that they are not interested and that they are not in the case any longer."

[3, 4] The next and last contention made is that the verdict is excessive. A motion for a new trial upon several grounds, among them being "Excessive damages, appearing to have been given under the influence of * * * prejudice," and "Excessive damages appearing to have been given under the influence of passion," was made. Section 657, subd. 5, Code Civ. Proc. The motion for a new trial was denied.

The rule is well established that the amount of damages in this kind of an action is committed first to the sound discretion of the jury and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict, if it is not just. Upon appeal the decision of the trial court and the jury on the subject cannot be set aside, unless the verdict is "so plainly, and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on the part of the jury." *Reneau v. Hirsch*, 88 Cal. App. 1, 262 P. 1100, 1102, and cases there cited.

We have carefully examined the entire record, including the evidence, and there is nothing in the record to show or suggest that the verdict was not the result of the fair and honest judgment of the jury.

[5] At the time of the collision respondent was a man thirty-nine years of age in good health. It cannot be doubted that respondent received severe and permanent injuries and suffered great pain and anguish. Dr. Howard Fleming, who examined respondent on six or seven occasions after the accident, testified regarding respondent's injuries and disability, as follows:

"Q. What is the condition of his spine and back? A. (by Dr. Fleming): Mr. Sundberg has suffered a strain of his lumbar sacral bone and has sacra iliac joint and has an injury to the lumbar sacral plexus or nerve to his left leg.

"Q. What effect does that injury have on him? A. That causes him severe pain in his back and pelvis and marked weakness of his left leg.

"Q. And the doctors you mentioned, in conjunction with yourself, have been treating

him in an effort to restore him to his normal condition? A. Yes.

"Q. What has been the result of the treatment? A. There has been very little improvement.

"Q. Will these injuries be permanent in your opinion? A. I don't know; I imagine he will have some permanent disability.

"Q. How will that affect him? A. Cause a marked weakness of his back. He will not be able to do hard labor.

"Q. Is he compelled to wear a steel corset? A. He is compelled to wear a brace.

"Q. Will he be compelled to continue with the brace? A. He probably will be. * * *

We think, when the extent and character of the injuries received by respondent are all considered, the award of damages made by the jury and sustained by the trial court, is not at all disproportionate to the compensation reasonably warranted by the facts. We find no prejudicial error in the record.

The judgment should be affirmed; and it is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

ELCONIN v. YALEN et al. (Civ. 5543.)★

District Court of Appeal, Second District,
Division 2, California. Sept. 17,
1929.

Hearing Granted by Supreme Court Nov. 14,
1929.

1. Attorney and client ⇨166(3)—Finding that there was no agreement for specific compensation of attorney held without support (Civ. Code, §§ 1619-1621).

Finding of court that there was no agreement, either express or implied, as defined by Civ. Code, §§ 1619-1621, for specific compensation of attorney, held without support in evidence.

2. Appeal and error ⇨1071(3)—Unsupported finding that there was no agreement for compensation of attorney held not prejudicial, in view of undisputed finding as to discharge.

Finding of court that there was no agreement for specific compensation of attorney, though without support in evidence, held not prejudicial, in view of undisputed finding that discharge of attorney was with good cause and reason.

3. Attorney and client ⇨134(1)—Measure of recovery by attorney wrongfully discharged is reasonable value of services rendered to time of discharge.

Where an attorney is wrongfully discharged by his client prior to completion of services, the measure of his recovery is reasonable value of services rendered up to time of discharge.

4. Attorney and client ⇨165—Allegation of indebtedness in reasonable sum for professional

services of attorney, with denial thereof, presented issue as to quantum meruit.

Allegation in attorney's action to recover fees as to indebtedness for professional services claimed as reasonable charge, together with specific denial of such allegations, squarely presented issue as to quantum meruit.

5. Attorney and client ⇨167(1)—Trial judge, having evidence of nature and extent of attorney's services, could determine reasonable value thereof, with or without aid of testimony.

Where court, in attorney's action to recover fees, had before it evidence of nature and extent of services, trial judge was empowered to use his own experience and judgment as to reasonable value of services, with or without the aid of testimony of witnesses as to value.

6. Appeal and error ⇨1071(6)—Failure to find as to agreed attorney fee was not prejudicial error, where recovery could only be had on quantum meruit.

Failure of court to make any finding as to agreed fee as compensation for attorney was not prejudicial error where recovery could only be had on quantum meruit, since prejudicial error cannot be predicated, either on finding on an immaterial issue, or on failure to find on an issue, when such finding would not, if made, necessitate any change in judgment.

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

Action by Benjamin Elconin against William Yalen and another. From the judgment, plaintiff appeals. Affirmed.

George D. Higgins, of Los Angeles, for appellant.

V. H. Koenig and J. S. Garnett, both of Los Angeles, for respondents.

BURNELL, Justice pro tem. Appellant, an attorney, brought this action to recover fees claimed to be due him for his services in connection with a claim for damages for personal injuries and the litigation in the superior court arising therefrom. He also sought recovery for legal services in a justice's court action, and for costs and expenses advanced by him in both matters; but these items, totaling \$46.90, were not disputed, and appellant recovered judgment therefor. The portion of the judgment with which appellant is dissatisfied is that wherein the court below awarded him \$300 for his services in the matter of the damage claim, and his contention with respect thereto is that neither the judgment nor the findings upon which it is based are supported by or consistent with the evidence.

The amended complaint set up, in the first count, an oral contract between appellant and respondents, whereby appellant was to render all necessary legal services "in the matter of negotiating for settlement or the institution and prosecution of a suit" on account of respondents' injuries, and alleged "that said de-

defendants agreed to pay to the plaintiff one-third of any sum accepted by them by way of settlement, or for which a judgment might be obtained and collected." It was further alleged—and as to this there is no dispute in the evidence—that appellant, after attempting to effect a settlement, filed suit on behalf of the respondents, and that, after he had caused the action to be set for trial, he was discharged by respondents, and that a judgment was subsequently obtained in the sum of \$5,000, which was compromised by respondents for \$4,500, which sum was paid to them. The amount asked for by appellant was one-third of the sum thus received by respondents, or \$1,500.

The second cause of action was on a common count, merely alleging an indebtedness of \$1,500 for services rendered, and alleging that sum to be a reasonable charge therefor.

The answer denied the existence of any contract, and of any agreement to pay a fee of one-third the amount recovered, "or any sum or at all," and denied any and all indebtedness to appellant.

The fact of appellant's employment was not disputed by respondents in their testimony. There was, however, a sharp conflict as to the terms of that employment. Appellant testified that one-third of the amount recovered was the fee asked by him at the very outset, and that respondents agreed thereto. Respondents, on the other hand, swore that no such agreement as to fees was made, and that appellant offered to handle the matter for 10 per cent. in event of a settlement, and 20 per cent. if the matter went to suit, which offer they accepted.

The court found that the parties had entered into an oral contract for appellant's legal services, but that they had not agreed to pay him a one-third fee, and that there was no specific agreement as to compensation. It is this finding which is the subject of appellant's attack on this appeal.

"An express contract is one the terms of which are stated in words" (Civ. Code, § 1620), while "an implied contract is one the existence and terms of which are manifested by conduct" (Civ. Code, § 1621). "A contract is *either* express or implied" (Civ. Code, § 1619). (Italics ours.) Manifestly it cannot be both. By the testimony of both appellant and respondents, there was an express contract for the employment of appellant and for payment for his services on a contingent fee basis; the only variance in their respective versions was as to the percentage of the amount recovered which he was to receive if successful. It would, of course, have been entirely possible for the parties to have mutually agreed upon the employment of appellant, the nature and scope of the services which he was to render, but to have left the question of the amount or percentage of his remuneration in abeyance; in other words, there might have been an express contract of

employment and an *implied* contract for payment. In this event the implied contract would have been to pay him the reasonable value of his services. *Gage v. Atwater*, 136 Cal. 170, 68 P. 581; *Buck v. City of Eureka*, 124 Cal. 61, 56 P. 612. No witness, however, testified to any such arrangement; all agreed that there was an express contract which included terms of compensation.

[1, 2] The court might have accepted appellant's version of the oral agreement and rejected that of respondents, or vice versa. There was, however, no basis in the evidence before it to justify or support its finding that " * * * there was no agreement by or between said parties for *any* specific sum or compensation. * * *" (Italics ours.)

While we are thus in accord with appellant's contention that the finding above referred to is not supported by the evidence—indeed, is in direct conflict therewith—we are unable to discover in what manner appellant has been prejudiced thereby. The court found that the discharge of appellant by his clients, the respondents, "was with good cause and reason," and neither the correctness of this finding nor the sufficiency of the evidence to support it is disputed by appellant.

[3] While some of the earlier California decisions in cases involving attorney's fees indicated a different rule (*Countryman v. California Trona Co.*, 35 Cal. App. 728, 170 P. 1069, and *Webb v. Trescony*, 76 Cal. 621, 18 P. 796), the later cases all hold that even where an attorney is *wrongfully* discharged by his client prior to the completion of his services, the measure of his recovery is the reasonable value of his services rendered up to the time of his discharge (*Hall v. Orloff*, 49 Cal. App. 745, 194 P. 296; *Ayres v. Lipschutz*, 68 Cal. App. 134, 228 P. 720, and *Boardman v. Christin*, 65 Cal. App. 413, 224 P. 97).

[4, 5] The issue as to quantum meruit was squarely presented in the instant case by appellant's second cause of action wherein he alleged an indebtedness to himself of \$1,500 (plus certain incidental and undisputed amounts) for professional services as attorney, which sum he further alleged to be "a reasonable charge" therefor, and by respondents' specific denial of these allegations. This issue the court below determined by finding in accordance with the averments of the second cause of action, except as to the reasonable value of the services, which it found to be \$300. True, there was no testimony offered or received as to the value of appellant's services up to the time of his discharge, but in cases of this nature none is required. The court had before it evidence of the nature and extent of appellant's services, and found in detail with respect thereto, and its findings on this subject are not attacked by appellant. The learned trial judge was empowered to use his own experience and judgment as to the reasonable value of these services, with or without the aid of the testimony,

of witnesses as to value. *Estate of Duffill*, 188 Cal. 536, 552, 206 P. 42; *Estate of Straus*, 144 Cal. 553, 77 P. 1122; *Spencer v. Collins*, 156 Cal. 298, 104 P. 320, 20 Ann. Cas. 49; *Freese v. Pennie*, 110 Cal. 467, 42 P. 978; *Kendrick v. Gould*, 51 Cal. App. 712, 197 P. 681.

[6] Since the appellant could not have recovered, except upon a quantum meruit, it follows that any finding as to the agreed fee would have been immaterial, and prejudicial error cannot be predicated either upon a finding upon an immaterial issue (*Hill v. Morrison*, 88 Cal. App. 405, 263 P. 573; *Wells v. Zenz*, 83 Cal. App. 137, 256 P. 484; *Woodhead v. Wilkinson*, 181 Cal. 599, 185 P. 851, 10 A. L. R. 291), or upon a failure to find upon an issue when such finding would not, if made, necessitate any change in the judgment (*Chester R. Pyle Co. v. Fossler*, 200 Cal. 204, 252 P. 599, 601). The finding upon the issue of the reasonable value of appellant's services was determinative of the case, and "if findings are made upon issues which determine the case, other issues become immaterial, and a failure to find thereon does not constitute prejudicial error." *Id.*

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

100 Cal. App. 615

MEILINK v. GIANELLI et al. (Civ. 3803.)★

District Court of Appeal, Third District, California. Sept. 17, 1929.

Rehearing Denied Oct. 17, 1929. Hearing Denied by Supreme Court Nov. 14, 1929.

1. Courts $\S$ 472(4)—Superior court had no jurisdiction to determine liability of heirs and beneficiaries as stockholders before distribution of estate (Code Civ. Proc. $\S\S$ 1664, 1666).

Superior court had no jurisdiction, in action to enforce stockholders' liability, to determine liability as to heirs or beneficiaries under will, while estate was in course of administration and undistributed, since the court sitting in probate had exclusive jurisdiction of estate, in accordance with Code Civ. Proc. $\S\S$ 1664, 1666.

2. Descent and distribution $\S$ 119(2)—Instrument executed by beneficiaries under will, waiving objections to assignment of corporate assets, did not create liability as stockholders before distribution.

Instrument whereby heirs of deceased stockholder consented to assignment of corporation and all its property and assets in trust for benefit of creditors did not operate, so as to create liability of beneficiaries as stockholders of corporation before distribution of estate, since there can be no effective acceptance of stock until determination by court sitting in probate as to those entitled to have stock distributed to them on final settlement of estate.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by H. F. Meilink against Louisa Gianelli, as executrix of the last will of Giuseppe Gianelli, and others. From the judgment, plaintiff appeals. Affirmed.

Ernest J. Torregano, of San Francisco, Levisky & Jones, of Stockton, and Torregano & Stark, of San Francisco, for appellant.

Jacobs & Jacobs, Warren H. Atherton, and R. L. Gianelli, all of Stockton, for respondents.

FINCH, P. J. The facts stated herein are alleged in the complaint. The Joe Gianelli Company is a corporation with a capital stock of 1,000 shares. At all times since the organization defendant Joe Gianelli, Jr., has owned 25 shares, B. R. Gianelli 25 shares, and Louisa Gianelli 50 shares. Guiseppe Gianelli, now deceased, owned 900 shares from the organization of the corporation to the time of his death. He left a last will, by which he gave his wife, Louisa Gianelli, one half of his property, and the other half to his children in equal shares. There is some uncertainty in the complaint as to whether the stock was specifically bequeathed, but in his closing brief appellant admits that it was not. The will was admitted to probate, and Louisa Gianelli was appointed executrix thereof. As such executrix, she has possession of the 900 shares of the stock. The estate is in course of administration and undistributed. It does not appear that any proceeding has been had to determine who are the heirs of the deceased, or who are entitled to distribution of the estate.

The plaintiff, as assignee of many creditors of the corporation, brought this action to recover from the defendants on their liability as alleged stockholders for debts incurred by the corporation since the death of the deceased. The defendants demurred to the complaint. The demurrers of Joe Gianelli, Jr., B. R. Gianelli, Louisa Gianelli, and Louisa Gianelli, as executrix, were overruled. The demurrers of the defendants who have no interest in the stock of the corporation, except as heirs or beneficiaries under the will, were sustained, without leave to amend, and judgment was thereupon entered in favor of such defendants. The plaintiff has appealed from the judgment.

[1] It clearly appears that the demurrers of the beneficiaries were properly sustained. The court is without jurisdiction to determine in this action who are entitled to distribution of the estate, but the court sitting in probate has exclusive jurisdiction to determine that question. *Schade v. Stewart* (Cal. Sup.) 272 P. 567; 12 Cal. Jur. 125 and 165; Code Civ. Proc. $\S\S$ 1664 and 1666. It would be a singular rule which would hold the beneficiaries liable as stockholders when subsequently, in the probate proceeding, it may be conclusive-

ly determined that they are not entitled to have any of the stock distributed to them.

Appellant relies on *Western Pac. Ry. Co. v. Godfrey*, 166 Cal. 346, 349, 136 P. 284, 285, Ann. Cas. 1915B, 825, where it is said that "a legatee who does not renounce a legacy of shares of stock in a corporation but upon distribution receives and accepts the same, must be held to have been the owner of said stock from the time of the death of the decedent, and, in consequence, liable as such for his proportion of the corporate debts contracted after the death of the decedent." Not only does the language quoted show that the legatee's right to distribution had been determined in the probate proceeding, and that the shares of stock had been distributed to him, but the court further said: "Of course, until distribution, it cannot be certainly known that any shares of stock would ever be distributed in kind to the heirs or legatees." The decision relied on in no manner supports appellant's contention.

[2] The complaint further alleges that the beneficiaries under the will executed and filed in the probate proceeding an instrument reading as follows:

"We, the undersigned, adult children and heirs of Guiseppe Gianelli, deceased, and legatees and devisees under his will, do hereby give our consent and waive all objection to the assignment by the Joe Gianelli Company, a corporation, of all its property and assets, in trust, for the benefit of all its creditors, and we hereby consent and waive all objection to the executrix of said estate voting, as such executrix, the stock of said corporation that belonged to said deceased in his lifetime, in favor of such assignment for the benefit of said creditors, and if so voted, we hereby consent that the superior court in which said estate is pending may ratify, authorize or affirm said act of said executrix in voting said stock and in making such assignment insofar as said estate is concerned or interested in said corporation."

It is not perceived in what manner this instrument can be given the effect of making the beneficiaries liable as stockholders of the corporation. If a decree had been entered in the probate proceeding distributing the stock to them, then the instrument would tend to show

their acceptance of the stock; but there can be no effective acceptance until it has been determined that they are at least entitled to have the stock distributed to them on the final settlement of the estate, a determination which, as stated, cannot be made in this case.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

100 Cal. App. 799

ROTHSCHILD v. GIANELLI et al.★
(Civ. 3804.)

District Court of Appeal, Third District, California. Sept. 17, 1929.

Rehearing Denied Oct. 17, 1929.

Appeal by plaintiff from a judgment of the Superior Court of San Joaquin County, C. W. Miller, Judge, in an action upon stockholder's liability. Affirmed.

Ernest J. Torregano, of San Francisco, Levinsky & Jones, of Stockton, and Torregano & Stark, of San Francisco, for appellant.

Jacobs & Jacobs, Warren H. Atherton, and R. L. Gianelli, all of Stockton, for respondents.

PER CURIAM. This is an action to recover from the defendants on their alleged liability as stockholders of the Joe Gianelli Company, a corporation, for debts incurred by the corporation since the death of Guiseppe Gianelli, who owned 900 shares of the capital stock of the corporation. The demurrers of the defendants Joe Gianelli, Jr., B. R. Gianelli, Louiga Gianelli, and Louisa Gianelli, as executrix of the last will of Guiseppe Gianelli, deceased, were overruled. The demurrers of the other defendants were sustained, without leave to amend, and judgment was thereupon entered in favor of such defendants. The plaintiff has appealed from the judgment.

The facts relating to the liability of the defendants are in all respects the same as those in the case of *Mellink* against the same defendants (Civ. No. 3803), 90 Cal. App. —, 280 P. 561, this day decided by this court.

On the authority of that case, the judgment is affirmed.

★Rehearing denied.

208 Cal. 159

**SOUTHERN CALIFORNIA EDISON CO. v.
INDUSTRIAL ACCIDENT COM-
MISSION et al. (S. F. 13471.)★**

Supreme Court of California. Sept. 17, 1929.

Rehearing Denied Oct. 17, 1929.

- 1. Master and servant ⇨405(6)—Testimony as to refusal of employer's physician to give employee further treatment held sufficient to give commission jurisdiction to enter award for reasonable medical expenses (Workmen's Compensation Act, § 9(a) as amended).**

In proceedings under Workmen's Compensation Act, § 9(a), St. 1917, p. 836, as amended by St. 1919, p. 913, § 4, and St. 1925, p. 640, evidence of refusal of employer's physician to furnish employee treatment and of treatment received by employee from another physician *held* sufficient to give Industrial Accident Commission jurisdiction to make award for reasonable medical expenses, under section 9(a), though showing was supported merely by testimony of claimant and his physician.

- 2. Master and servant ⇨417(3)—Jurisdiction of commission was sole question presented in certiorari by employer to review order allowing claimant reasonable medical expenses (Workmen's Compensation Act, § 9(a), as amended).**

On certiorari by employer to review award of Industrial Accident Commission under Workmen's Compensation Act, § 9(a), St. 1917, p. 836, as amended by St. 1919, p. 913, § 4, and St. 1925, p. 640, allowing reasonable medical expenses, sole question presented was one of commission's jurisdiction.

In Bank.

Proceedings under the Workmen's Compensation Act by James W. Williamson, opposed by the Southern California Edison Company. An award was entered by the Industrial Accident Commission in claimant's favor, and the employer brings certiorari. Award affirmed.

Superseding opinion in 275 P. 958.

Roy V. Reppy and El. W. Cunningham, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

^a RICHARDS, J. This is an application for a writ of review made originally to the District Court of Appeal in and for the Second District, Division 2, but finally transferred to this court for hearing and determination. The petitioner was the employer of one James W. Williamson, who on November 26, 1927, sustained an injury arising out of and in the course of his employment. Upon receiving notice of its employee's said injury, the petitioner herein furnished to said Williamson medical treatment through Dr. A. C. Coffey, its regular physician, and who treated the injured employee for some time for the aforesaid injuries. On December 12, 1927, Dr. Coffey advised Williamson that he would be able to return to work in a few days, and he in fact returned to work on December 19th, remaining at work until January 3, 1928, but complaining of his condition, and actually being confined to his bed for several days intervening and prior to January 5, 1928. On the latter date he returned to the physician requesting further treatment, but said physician was of the opinion that Williamson had so far recovered from the effects of his injury as to resume work, notwithstanding the fact that the latter was still complaining of his nervous and worn out feeling, and refused him further treatment. Williamson then went to Dr. Wm. F. Rey of Oxnard for treatment, and was examined and treated by the latter for several days, during which he claimed to have discovered further and as yet unrelieved conditions resulting from his aforesaid injuries. On January 8, 1928, Dr. Rey informed the petitioner herein and its insurer that he was treating Williamson for the condition resultant upon his injury, but received no reply from either until about three months later, and which replies when received were unsatisfactory. On April 23, 1928, Williamson filed with the Industrial Accident Commission an application for adjustment of his claim that the petitioner was under obligation to pay for the treatments he had received from Dr. Rey under the provisions of section 9(a) of the Workmen's Compensation Act (St. 1917, p. 836, as amended by St. 1919, p. 913, § 4, and St. 1925, p. 640), which provides that the employer shall furnish "(a) such medical * * * treatment * * * as may reasonably be required to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same." On the hearing upon said application the com-

mission took considerable testimony touching the single question presented by such application, viz., as to whether the employee brought himself within the foregoing provision of the Workmen's Compensation Act, at the conclusion of which the commission made its findings of fact supporting the applicant's claim, holding that the proceedings upon said hearing sufficiently disclosed that "the employer refused and neglected to furnish further medical treatment required to cure and relieve from the effects of said injury and said employee is entitled to his reasonable medical expenses to be fixed by the commission * * * in case the parties are unable to agree out of court." The commission subsequently, and in accord with its said findings, made the award which the petitioner herein seeks to have reviewed and annulled.

[1, 2] The sole question presented upon the present application is as to whether the commission had sufficient facts before it to give it jurisdiction to make said award. It is the contention of the petitioner herein that the showing made by the employee was insufficient to justify the aforesaid finding of the commission as to the employer's failure and refusal to furnish the employee with such further medical treatment as his condition as shown to exist on January 5, 1928, required, and what further treatment was refused him by the regularly employed physician of the employer theretofore in charge of his case. We do not deem it necessary to indulge in a further review of the facts of the case than as are hereinbefore set forth, for the reason that so to do would merely result in disclosing that the evidence produced before the commission upon this identical issue was in sharp and substantial conflict. If the commission believed the testimony of the applicant Williamson and of his selected physician, Dr. Rey, regardless of the counter showing made by the employer and its insurer, such testimony would, in our opinion, be sufficient not only to support its award but to give to the commission jurisdiction to make the same, and since the only question before us is one of jurisdiction, we would under the foregoing condition have no constitutional power to review or annul the commission's said award. It is needless to cite authorities upon so thoroughly settled a proposition of constitutional law. The award is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J., LANGDON, J.; CURTIS, J.; PRESTON, J.

208 Cal. 142

PEOPLE v. CLEMETT. (Cr. 3199.)

Supreme Court of California. Sept. 14, 1929.

1. Indictment and information $\S$ 125(31)—Information containing two counts, one charging possession and another operation of still, held to charge but one offense, namely, that of operation of still (St. 1927, p. 497, $\S$ 1).

Information under St. 1927, p. 497, $\S$ 1, containing two counts, one count charging defendant with willful, unlawful, and felonious possession and control of still, and second count charging defendant with willfully, unlawfully, and feloniously operating and causing to be operated a still, held to charge but one offense, namely, that of operating still, since defendant may have still in his possession or under his control without operating same, but could not have operated it without having it under his control and in his constructive possession, and since it was not intention of Legislature that several acts named should be split into several separate offenses, for purpose of imposing penalty for violation of each singly.

2. Criminal law $\S$ 200(1)—Person tried and convicted of crime including various incidents cannot thereafter be tried and punished for offense consisting of one or more of such incidents.

Where person is tried and convicted of crime which has various incidents included in it, he cannot thereafter be tried and punished for an offense consisting of one or more of such incidents.

3. Intoxicating liquors $\S$ 236(19)—Evidence in prosecution for operating still held sufficient to sustain conviction (St. 1927, p. 497, $\S$ 1).

In prosecution for operation of still, under St. 1927, p. 497, $\S$ 1, evidence held sufficient to sustain conviction.

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

F. E. Clemett was convicted of the unlawful possession and the unlawful operation of a still, and he appeals. Reversed in part, and affirmed in part.

Superseding opinion (Cal. App.) 271 P. 112.

Raymond E. Hodge, of San Bernardino, and Henry C. Huntington, H. William Hess, and Huntington & Hess, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and George H. Johnson, Dist. Atty., and James L. King, Deputy Dist. Atty., both of San Bernardino, for the People.

SEAWELL, J. Appeal from judgment of conviction and order denying motion for a new trial.

The defendants F. E. Clemett, Jessie Clemett, Frank Rathburn, and G. W. Poppett, were jointly charged by an information, containing two counts, filed against them in the superior court of the county of San Ber-

nardino, with the violation of the provisions of an act entitled "An act relating to stills and other devices for the manufacture or production of intoxicating liquor for beverage purposes, and providing a penalty therefor." The defendants F. E. Clemett and Frank Rathburn being brought to trial, the jury found Clemett guilty on both counts of the information, and acquitted Rathburn of both charges upon the advice of the court to do so, given at the conclusion of the case. The defendant Clemett neither demurred to the information nor moved in arrest of judgment.

The case was taken over after decision by the District Court of Appeal, Second District, Division 1, not because we questioned the sufficiency of the evidence to sustain the conviction upon either of said counts, nor because reversible error was pointed out by the petition for hearing upon any ruling made or instruction given or refused by the trial court, but solely for the reason that we entertained grave doubt as to whether two separate crimes had been committed by the defendant, within the purview of the act as above entitled (Stats. and Amends. 1927, p. 497, c. 277), the body of which is in the following words:

"Any person whether acting in his own behalf or as the agent, servant, officer or employee of any person, firm, association or corporation, who shall be the owner of or have any interest in or who shall operate or cause to be operated or knowingly have in his possession or control, any still, still worm, still cap, still condenser or stilling device of any kind, designed, used or intended for use in the manufacture or production of intoxicating liquor for beverage purposes, shall be guilty of a felony and upon conviction thereof shall be punished by a fine of not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000), and by imprisonment in the state prison for not less than one year nor more than five years." Section 1.

It is apparent from the act that it was adopted to prevent the illicit manufacture and production of intoxicating liquor for beverage purposes by the use of stilling devices of any kind, designed or intended to be used in the manufacture or production of intoxicating liquor for beverage purposes. In other words, its enactment was intended as an aid to a more complete enforcement of the national and state prohibition acts.

As early as *People v. Shotwell*, 27 Cal. 394, and *People v. Frank*, 28 Cal. 507, it was held that co-operative acts constituting but one offense, when committed by the same person at the same time, when combined, charge but one crime, and but one punishment can be inflicted as one offense. "Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled

they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table, and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same person, at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted." Wharton, Criminal Law, approved in *People v. Shotwell*, 27 Cal. 394.

Again, in *People v. Frank*, 28 Cal. 507, it was said: "The indictment is good, whether it be regarded as containing two counts or but one. Where, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense."

This court, in *People v. Thompson*, 111 Cal. 242, 43 P. 748, 751, quotes approvingly the following excerpt from the court's disquisition in *State v. Cooster*, 10 Iowa, 454, in holding that an indictment did not state two offenses because it charged the defendant with keeping a gambling house and permitting other persons in a place under the control of defendant to play for money and other things: "The objection has its origin in the idea that there is such a difference in the essential qualities of these two acts as to make them separate offenses. But is this true? They are found in the disjunctive clause of the same section of the Code, visited with the same penalty, and it is the better opinion that in their essence they are one and the same offense, the guilt of which may be incurred in one or other of these methods."

That the rule announced in said earlier decisions is the settled law of this state is confirmed by many subsequent cases. *People v. De La Guerra*, 31 Cal. 460; *Ex parte McCarthy*, 72 Cal. 384, 14 P. 96; *People v. Harrold*, 84 Cal. 567, 24 P. 106; *People v. Gosset*, 93 Cal. 641, 29 P. 246; *People v. Thompson*, 111 Cal. 242, 43 P. 748; *People v. Gusti*, 113 Cal. 177, 45 P. 263; *People v. Kuder et al.* (Cal. App.) 269 P. 193; *People v. Barnovich*, 16 Cal. App. 427, 117 P. 572.

[1] All of the acts set out in the statute before us for construction are coupled with the disjunctive "or," one of which or all of which joined constitute but one offense. By count 1 it is alleged that the defendants on or about the 3d day of January, 1928, and *prior thereto* (not stating whether it was one day or more prior to January 3, 1928), did willfully, unlawfully, and feloniously have in their possession and under their control one still, etc. By the second count it is charged that said defendants on or about the 3d day of January, 1928, and for a period of *about five months*

continuously next prior thereto, did willfully, etc., operate and cause to be operated one certain still, etc. If he operated and caused to be operated said still, it was indisputably in his possession and under his control. The operation of the still includes a longer period than is included within the averment that the still was under his control. It is alleged that he operated it for about five months prior to January 3, 1928, a definite fixed period, while it is alleged in the other count that he had it in his possession and under his control on or about January 3, 1928, and prior thereto. Under the rule of pleading, the possession and control clause may be limited to one day prior to January 3, 1928, or at most a reasonable time prior thereto, and could under no rule of construction be extended backward beyond the period of five months, during which time it is alleged the defendant was operating the same still. Clearly the possession and control period is covered by the period during which the defendant operated said still. The defendant may have had a still in his possession or under his control without operating the same, but he could not have operated it without having it under his control and in his constructive possession. The possession and control period is included in the period of operation, inasmuch as possession and control were incidental to operation. We have read all of the evidence adduced in the case and this conclusion is fully confirmed by the fact. The same principles applied and reasoning adopted by courts generally in distinguishing the two offenses of possession and transportation are applicable to the instant case.

[2] In *Schroeder v. United States* (C. C. A.) 7 F.(2d) 60, 65, the rule is well stated: "Possession for a substantial time, and followed by transportation, might constitute two distinct offenses, just as possession for a substantial time, followed by a sale, might amount to two distinct offenses. But, where the only possession shown is that which is necessarily incidental to the transportation, the offense is single, and not double. *Miller v. United States* (C. C. A.) 300 F. 529, 534; *Morgan v. United States* (C. C. A.) 294 F. 82, 84; *Rossman v. United States* (C. C. A.) 280 F. 950, 953; *Reynolds v. United States* (C. C. A.) 280 F. 1. And the law is settled that, where a person is tried and convicted of a crime which has various incidents included in it, he cannot thereafter be tried and punished for an offense consisting of one or more of such incidents. To do so would be to inflict double punishment. *In re Nielsen*, 131 U. S. 176, 185, 9 S. Ct. 672, 33 L. Ed. 118; *United States v. Hampden* (D. C.) 294 F. 345, 348."

The severity of the penalty for the violation of the provisions of the act, the maximum being five years' confinement in the state prison, and a fine of \$5,000, is in confirmation of our construction. It was not the intent of the Legislature that the several acts named

In the statute before us should be split into several separate offenses for the purpose of imposing a penalty for the violation of each singly. There are cases in which a person may be guilty of both transportation and possession of intoxicating liquor, as shown by the circumstances of the particular case. Such cases are discussed in *Ex parte Chaus* (Cal. App.) 268 P. 422.

We are of the view, upon the authority heretofore cited, that the Legislature prescribed but one punishment for a violation of said act, the punishment therefor to be meted out as the facts of the case might warrant.

[3] The guilt of the defendant cannot, upon any reasonable grounds, be doubted. Roy Bearden and wife, who resided with their family in the city of Los Angeles, had an interest and were in possession of an orange orchard containing approximately $2\frac{1}{2}$ acres situate near Fontana, San Bernardino county. It was somewhat remote from other residences, and there was very little general highway travel near said orange orchard. The orange trees were large, and they and other trees shielded the inner premises from public view. Mr. Bearden had constructed upon said premises a building 100 feet in length, 16 feet wide, and $5\frac{1}{2}$ feet in height on the north side, and 11 feet in height on the south side, with the intention of engaging in raising chickens. The place was unoccupied until possession was taken by appellant and his confederates. Appellant, whose name appears to be Clemett, lived at San Diego before coming to San Bernardino. On May 29, 1927, he and a man whose name has not been satisfactorily established, arrived at the residence of the Beardens in Los Angeles, and, the Beardens not being at home, appellant wrote a note and affixed it to the doorknob, stating the business he wished to see Mr. Bearden on and that he would return. Between 11 and 12 o'clock that night he did return, and introduced himself as Mr. G. L. Johnson, and the man who accompanied him as his brother. He stated that he was in the poultry raising business in San Diego, and that he wished to transfer his business to San Bernardino county; that he had 750 chickens which he wished to transport to said San Bernardino county. After talking over the terms of lease of the Bearden place for some time, the two men, left with the understanding that appellant would meet Bearden at his ranch on the following day. Bearden, with his family, consisting of his wife, two daughters, and son, met the appellant and his supposed brother, agreeable to said appointment, and appellant permitted himself to be introduced to Mrs. Bearden and the daughters and son as Mr. Johnson, and the other man was introduced as Johnson's brother. An agreement was finally reached whereby defendant Clemett, under the name

of G. L. Johnson, executed with Bearden a one-year lease at the rate of \$25 per month. He said that he might want to buy the property later. Appellant paid down \$50, and thereafter paid personally other rentals until about December, when he entered into negotiations to buy said property through the intermediary of a woman, who was represented to be Mrs. Lenora Fredrickson, the daughter of a Mr. Winters, but who in fact was the Jessie Clemett, jointly charged with the appellant. Positive evidence was adduced to the effect that she was the wife of appellant Clemett. The man represented to be Winters, reputed father of Lenora Fredrickson, was really G. W. Poppett, also jointly charged by the information herein with appellant and Lenora Fredrickson.

The lease was executed by appellant in the name of "G. L. Johnson" and upon delivery of the escrow papers he requested that the old lease, which had served its purpose, be delivered to him, which request Mrs. Bearden granted. Appellant furnished the purchase money, and the escrow papers were executed by Mrs. Lenora Fredrickson. G. W. Poppett, who assumed the name Winters, went into possession immediately upon execution of the lease, and remained in possession until the premises were raided by the undersheriff and two deputy sheriffs of the county. A section of the chicken house had been converted into a place for the manufacture and distillation of intoxicating liquors on a large scale. Poppett, alias Winters, was found to be in charge. The property seized consisted of a 250-gallon still; 23 barrels of mash, of 50 gallons' capacity each; 6 30-gallon barrels of mash; 70 gallons of alcohol; one electric ager; 30 empty 30-gallon barrels, besides jugs and bottles. The still was warm, and was designed and fully equipped in every way for use, and was intended to be used and was in use in the manufacture and production of intoxicating liquor for beverage purposes, as it had no doubt been used for several months. The criminal participation of the defendant in the violation of the provisions of said act was established by such a number of incriminating facts and circumstances as to leave no doubt of his guilt.

It was the desperate effort of the appellant at the trial to separate himself from his alter ego G. L. Johnson, and in attempting to do so, in the face of the positive and convincing testimony of four or five witnesses to the effect that he represented himself to be G. L. Johnson, and executed papers in the name of Johnson, and even went so far as to draw a check on a bank for \$1,000, which was paid on the purchase of said premises against funds which he had previously deposited in the name of G. L. Johnson, and paid and caused to be paid demands against Johnson on account of the ownership of said premises, he denied that he held himself out as John-

son, and made the absurd claim that, when he called upon Mr. Bearden, with whom he had had no previous acquaintance, to negotiate the leasing of his premises, in introducing himself to him he did not refer to himself by any name, but merely introduced the man who was with him as "brother Johnson," and the several witnesses were mistaken in understanding him to introduce the unidentified man as his brother. His account of his first meeting with the man who was with him, and concerning whom he would give the impression was the real G. L. Johnson, is as absurd as the other explanations he made in absolving himself of any connection with operating said still. His testimony was that he went from San Bernardino to Tia Juana on a pleasure trip alone, and while there, by chance, he met the genuine G. L. Johnson and Mrs. Fredrickson, both strangers to him, in a saloon where the three were casually thrown together; that the three spent the day together drinking and enjoying a social day, and Johnson then told him that he was interested in the chicken raising business, and that he had a flock of 750 chickens in San Diego; that he desired to locate at San Bernardino, and made an agreement with appellant to pay him \$500, if he would find a place there which he might lease that was suitable for his business; that Johnson afterwards came to San Bernardino and sought him out, and that he called his attention to the Bearden place; that, the lease being consummated for a term of one year at a rental of \$25 per month, Johnson afterwards concluded to buy the property, and paid him \$500 for negotiating the lease, in accordance with his promise made at Tia Juana, and in addition thereto placed \$1,000 in his hands to pay the Beardens for their equity in said property. He deposited this sum in a bank in the name of G. L. Johnson, and drew a check against it in concluding the transaction, by signing Johnson's name to the check, and passed the money to Mrs. Fredrickson, who applied it to the purchase of said property. The mysterious Johnson for whom he was acting did not disclose his personnel in any of the transactions of lease, purchase, or control of the property other than through Clemett, the appellant. Appellant took the witness stand, and his testimony was most completely discredited by the many contradictory statements made in his testimony, as well as by the inherent improbability of its truthfulness in many material respects, and by the testimony of witnesses, whose testimony, sounding in reason, was doubtless credited by the jury.

The jury's verdicts were rendered on the counts separately, and the judgments were correspondingly pronounced. For the reason herein stated, the judgment pronounced upon count 1, which charged control and posses-

sion of said still, etc., is reversed. The judgment rendered upon count 2, which charged the willful, unlawful, and felonious operation of a certain still or device designated for use in the manufacture of intoxicating liquor for beverage purposes, etc., and the order denying a new trial upon said issues, are each affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LANGDON, J.; PRESTON, J.

208 Cal. 162

McNEAR v. PETROLEUM EXPORT CORPORATION. (L. A. 10048.)

Supreme Court of California. Sept. 18, 1929.

1. Frauds, statute of §116(1, 2) — Broker's signature to telegram not purporting to have been signed as seller's agent held not to satisfy requirement of Statute of Frauds (Civ. Code, § 1624, subd. 4, § 2309).

Where broker did not purport to sign telegram as agent of seller, broker's signature at bottom of telegram was not signature by party to be charged or by his agent sufficient to satisfy requirements of Statute of Frauds, Civ. Code, § 1624, subd. 4, especially where there was no offer of proof that broker had written authority to do so as required by section 2309, providing that authority to enter into contract required by law to be in writing can only be conferred by instrument in writing.

2. Frauds, statute of §116(1, 2)—Contention that placing of name in telegram by broker not acting in representative capacity was sufficient signature to satisfy Statute of Frauds held without merit (Civ. Code, § 1624, subd. 4).

Where telegram was not signed by seller nor by any one purporting to act for it in representative capacity, contention that broker by inserting name of manager of seller at beginning of telegram was acting as amanuensis of manager, and, when name was so placed at his direction, insertion thereof became manager's signature sufficient to satisfy requirements of Statute of Frauds, Civ. Code, § 1624, subd. 4, held without merit.

3. Frauds, statute of §115(5)—Insertion of name of seller's manager in telegram at instance of seller's representative held not sufficient signature within body of instrument (Statute of Frauds, Civ. Code, § 1624, subd. 4).

Fact that broker inserted name of manager of seller in body of telegram at instance and request of representative of seller held not to bring case within rule that seller's signature to satisfy Statute of Frauds, Civ. Code, § 1624, subd. 4, may appear within body of writing and need not appear at end thereof.

4. **Frauds, statute of** $\S$ 115(5)—**Seller's signature, to be sufficient if appearing within body of instrument, must be placed there with intention of authenticating writing** (Statute of Frauds, Civ. Code, $\S$ 1624, subd. 4).

Under Statute of Frauds, Civ. Code, $\S$ 1624, subd. 4, seller's signature, to be sufficient if appearing within body of instrument, must be placed there with intention of authenticating writing.

5. **Frauds, statute of** $\S$ 115(5)—**Placing signature in body of telegram merely for purposes of identification, and not for authentication, held insufficient to satisfy Statute of Frauds** (Civ. Code, $\S$ 1624, subd. 4).

Where it appeared beyond question that broker signing telegram acted individually and not in any representative capacity whatever, and placing of manager of seller's signature in body thereof was not at instance and request of manager and without intention to authenticate telegram, signature of manager of seller appearing in body of telegram was not sufficient to satisfy Statute of Frauds, Civ. Code, $\S$ 1624, subd. 4, requiring signature by party to be charged or by his agent.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by G. W. McNear against the Petroleum Export Corporation. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Lorrin Andrews, of Los Angeles, and Ira S. Lillick, of San Francisco, for appellants.

Black, Hammack & Black and Carey McWilliams, all of Los Angeles, for respondent.

SHENK, J. This is an appeal from a judgment of nonsuit granted on the motion of the defendant made at the close of the plaintiff's opening statement to the jury.

The plaintiff brought the action to recover the sum of \$68,637.60 as damages for breach of an alleged contract to sell two cargoes, or some six million gallons, of gasoline. The action came on for trial before a jury and during his opening statement plaintiff's counsel read the following two documents to the jury:

"October 14th, 1925.

"As broker I confirm the sale of the following goods at the price and terms mentioned below.

"This is subject to acceptance by both seller and buyer and their acceptance makes this contract binding.

"Seller: Petroleum Export Corp., Los Angeles, Calif., U. S. A.

"Buyer: G. W. McNear, 423 California St., San Francisco, Calif., U. S. A.

"Goods: Gasoline, 61 to 63 degrees Beaume gravity, 40% distilling below 212 degree F., end point not over 400 degrees F. See detailed specifications below.

"Quantity: Two cargoes, each about 7,500 tons 10% more or less or the full capacity of

the vessels. Tons referred to are 2240 lbs. each.

"Price: 11¢ per American measured gallon delivered F. O. B. buyer's tank vessels at Port of Los Angeles, Calif., U. S. A.

"Terms: Net cash against shipping documents and petroleum inspector's certificate of quantity and quality in San Francisco.

"Shipment: One cargo during the month of December, 1925, and the other cargo between December 15th, 1925, and January 15th, 1926.

"Specifications: Gravity 61 to 63 degrees Beaume. 40% distilling below 212 degrees F. End point not over 400 degrees F. Sweet to Doctor test and must stand corrosion test. Color not darker than 25 Saybolt. Sulphur not over .10%.

"All tests to be made according to methods for testing contained in U. S. Government Technical Paper 323A, part two.

"Inspection: Each cargo is to be inspected by Charles Martin & Co. for quality and quantity and they are to issue their certificates for same and settlement made thereon. Cost of said inspection to be equally divided between buyer and seller.

"Other conditions: Seller guarantees not less than 30' of water at the loading dock and that the vessels can always lie safely afloat.

"Seller is to load buyer's vessels at a rate of not less than 1800 tons per day. Should the loading rate be less than this seller is to pay demurrage at the rate of 36¢ per net registered ton of the vessel. Time to count from the time the captain notifies seller that he is ready to load.

"Sampling of cargoes to be sealed in presence of captains of the vessels and one set given to the captain.

"Respectfully submitted

"Accepted

Broker.

"Accepted

"Seller

Buyer."

"Los Angeles, Calif., Oct. 16, 1925.

"Mr. G. W. McNear, San Francisco, Calif., 423 California St. Collect. Smith of Petroleum Export says will fill order for two cargoes gasoline. Will sign contracts when contracts for tanks etc. are closed probably today. Making arrangements for General Petroleum to load first vessel in case of need.

"W. K. Thompson."

The plaintiff offered to prove that W. K. Thompson, named as the signer of the telegram, was a broker; that the Mr. Smith mentioned at the beginning of the telegraphic message was general manager of the defendant, Petroleum Export Corporation, and had authority to close any contract for the sale of gasoline on behalf of the defendant; that said Smith approached W. K. Thompson for the purpose of effecting a sale of two shiploads of gasoline of the grade and quality specified in the document dated October 14, 1925, and which is termed by the parties an

"order," at the price of 11 cents a gallon, delivered at the port of Los Angeles; that Thompson successfully negotiated with the plaintiff in San Francisco to buy the gasoline at the price stated and that the plaintiff asked Thompson, the broker, to prepare an order, which the broker did in the words of the document herein quoted dated October 14, 1925, but which, as is shown, was unsigned; that two days later Mr. Smith went to Mr. Thompson's office and dictated the telegram dated October 16, 1925, hereinabove quoted, and which Mr. Thompson wrote and sent in the presence of Smith; that the plaintiff received the telegram and thereupon telephoned to Mr. Thompson at Los Angeles that the matter was satisfactory; but that, though the plaintiff was ready, able, and willing to receive and pay for the two cargoes of gasoline, the defendant has refused to deliver them. The complaint alleged a contract for the purchase and sale of gasoline of the same quantity, grade, and specifications and for the same price as set out in the so-termed "order" of October 14th.

The trial court granted the motion for a nonsuit on the ground that the alleged contract was invalid because there was no note or memorandum thereof in writing subscribed by the party to be charged or by his duly authorized agent. Civ. Code, § 1624, subd. 4. As grounds for his appeal from that judgment the plaintiff contends that the terms of the contract relied upon need not all be embodied within the signed writing, but may be incorporated therein by a reference in the signed writing to a writing which is not signed; that the signature need not be at the bottom of the instrument, but may be found at the top, middle, or elsewhere therein; that the words "Smith of Petroleum," in the telegram of October 16th, written at the request and in the presence of Smith, is a sufficient signature of the party to be charged by his agent, within the meaning of the rule; and that the act of Thompson in writing Smith's name was the act of Smith. On the defendant's part it is contended that, even conceding the contentions of the plaintiff, still there is no completed or concluded contract between the parties; that more remained to be done before the minds of the parties could meet on a complete acceptance than merely the reduction of their agreement to a formal writing.

[1] It must be concluded that the signature "W. K. Thompson" at the bottom of the telegram is not a signature by the party to be charged or by his agent sufficient to satisfy the requirements of the statute. Thompson did not purport to sign as the agent of the defendant, and even if he had done so there was no offer of proof that he had written authority so to do. Section 2309, Civ. Code.

[2-4] It is, however, argued that by inserting the name "Smith" at the beginning of the telegram Thompson was acting as the amanu-

ensis of Smith, and when that name was so placed at the direction of Smith the insertion thereof became the signature of Smith sufficient to bind the defendant. The contention is without merit, and the authorities cited by the plaintiff are not applicable to the facts here presented. In each of the cases relied upon the document was purported to be signed by the party to be charged. Here the telegram relied upon as binding the defendant is not signed by the defendant nor by any one purporting to act for the defendant in a representative capacity. The fact that Thompson inserted the name "Smith" in the body of the telegram at the instance and request of a representative of the defendant company cannot bring the case within the rule that the signature need not be at the end of the document but may be elsewhere. Something further is required. The rule requires that the signature necessary to satisfy the requirements of the statute, wherever placed or adopted or appropriated, must be so placed with the intention of authenticating the writing. 27 Cor. Jur. 288. That the intention to sign and authenticate the document is an indispensable factor is established in other jurisdictions, as shown in the cases cited in Corpus Juris, and the rule is well illustrated by cases in this state involving the sufficiency of signatures to holographic wills, wherein it has been held that wherever the signature to a will may be placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself (Estate of Manchester, 174 Cal. 417, 163 P. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227; Estate of Morgan, 200 Cal. 400, 253 P. 702), and that proof of such intention may not rest in parol (Estate of McMahon, 174 Cal. 423, 163 P. 669, L. R. A. 1917D, 778).

We see no good reason why this rule of evidence should not apply generally to instruments claimed to have been signed, contrary to the universal custom (Estate of Manchester, *supra*), at some place other than at the end thereof. In no other way may the integrity of the statute requiring the writing be preserved.

[5] We come then to the consideration of whether the telegram in question shows on its face that it was the intention of Smith to execute the document either personally or on behalf of the defendant corporation. It appears beyond cavil that it was signed at the usual place for signing by W. K. Thompson individually, and not in any representative capacity whatever. If Thompson had signed Smith's name at the end of the telegram at the latter's instance and request, or if the telegram had been formulated at Smith's direction and transmitted unsigned at the bottom, a different question might arise. But admittedly such is not the case. The argument of the plaintiff is, in effect, that the telegram was signed twice, once by Thomp-

son at the usual place for the signature on such a document, to wit, at the end thereof, and also by Smith in the body of the instrument. To approve the contention would be an undue extension to the rule. It seems more reasonable to conclude that the intent of inserting the words "Smith of Petroleum Export" at the beginning of the telegram was for the purpose of identification and not authentication. In such a case the statute of frauds is not satisfied. *Sutherland v. Munsey*, 119 Va. 791, 798, 89 S. E. 882.

There is also merit in the defendant's contentions that the terms of the telegram are too indefinite and do not contain all of the elements of a contract as to price, terms, etc., and that in any event there was no reference in the telegram sufficient to incorporate therein the terms of the first but unsigned document, even assuming that the first document could be so incorporated; but these contentions become of no importance in view of our conclusion that the telegram was not signed by the party to be charged nor by his authorized agent.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

208 Cal. 151

ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited, v. STADELMAN et al. (S. F. 13187.)

Supreme Court of California. Sept. 17, 1929.

1. Insurance §133(2)—Workmen's compensation policy, excluding employer's family, except those named in declaration, held not "limited compensation policy," required to be so designated (Pol. Code, § 602b et seq.; Workmen's Compensation Act, § 31(a)).

Workmen's compensation policy, providing that it should not apply to members of employer's family, except those named in declarations, with disclosures of amounts of wages, as required by insurance commissioner, under Pol. Code, § 602b et seq., held not "limited compensation policy," under Workmen's Compensation Act, § 31(a), St. 1917, p. 831, requiring limitation of compensation payable by policy to be printed in bold-faced type, with words "Limited Compensation Policy" at top of policy.

2. Insurance §435—Workmen's compensation policy, excluding employer's family, did not limit compensation payable, and precluded award to employer's son, not complying with policy (Workmen's Compensation Act, § 31(a), as amended by St. 1929, c. 679).

Workmen's compensation policy, providing that it should not apply to members of employer's family, except those named in declaration, with disclosures of amounts of wages, etc., held not to limit compensation payable to any one, under Workmen's Compensation Act, § 31(a),

St. 1917, p. 831, but involved exclusion of certain persons from field of coverage, because employment and wages were not disclosed as required, and son of insurer, whose employment and wages were not disclosed, was excluded from all benefits arising under policy, in view of St. 1929, c. 679, amending section 31(a).

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Pete Stadelman to recover compensation for injuries, opposed by P. C. Stadelman, employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurer. From an order of the Industrial Commission, awarding compensation, the assuer brings certiorari. Award annulled.

Superseding opinion in 276 P. 407.

J. Hampton Hoge, of San Francisco (Bronson, Bronson & Slaven, of San Francisco, amici curiæ), for petitioner.

G. C. Faulkner, of San Francisco (Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ), for respondents.

WASTE, C. J. The petitioner in this matter is the insurance carrier under a policy of workmen's compensation insurance issued to Peter C. Stadelman, one of the respondents. The policy contained the following provision:

"(d) It is agreed upon the delivery and acceptance of this policy, that if the employer is an individual and has a family (meaning husband, wife, son, daughter, brother, sister or parent residing within this employer's household), this policy shall not apply to any member or members of such family except those named in the declarations with disclosures of the annual amounts of wages, salaries, emoluments, or profits of each, but not less than \$2,700.00 for each. The amounts so stated shall be considered the remuneration of such members of the family subject to audit as respects any increase thereof as in the policy provided. The proper premium rate for the hazard to which such member of the family is exposed shall apply to this remuneration."

Pete Stadelman, also one of the respondents, a son of Peter C. Stadelman, was employed by his father, and was injured during the life of the policy, and in the course of his employment. On application for compensation due proceedings were had before the respondent Industrial Accident Commission, during which evidence was introduced establishing, and the commission found, that Pete Stadelman was a member of the assured's family and was residing within the employer's household at the time of the injury. The evidence also showed that Pete Stadelman was not named in any declaration incorporated in the policy of insurance, with a disclosure

of his annual wages. Over the objection of the insurance carrier that, by reason of the findings and the terms of the policy, any claim of Pete Stadelman for compensation was excluded, the commission made an award to Pete on the basis of a permanent disability rating. It held the insurance carrier liable, and dismissed the assured from the proceeding. Petitioner renews here the contention urged before the commission that, on the facts found, Peter Stadelman, as a son and member of the household of the employer, was excluded from any claim to benefits accruing under the policy.

The position of the respondents, in support of the award, is that the insurance carrier attempted in this case to issue a policy containing a limitation as to the compensation payable—in other words, a “limited policy”—but that failure by the insurer to observe the requirement contained in section 31(a) of the Workmen's Compensation Act (Stats. 1917, p. 831) rendered the policy unlimited, and that any and all employees of Peter C. Stadelman were covered by it. Section 31(a), prior to its amendment during the 1929 session of the Legislature, provided:

“If any insurance policy shall be issued covering liability for compensation, which policy shall contain any limitation as to the compensation payable, such limitation shall be printed in the body of such policy in bold-face type and in addition thereto the words ‘limited compensation policy’ shall be printed on the top of the policy in bold-face type not less than eighteen point in size. Failure to observe the foregoing requirement shall render such policy unlimited.”

[1] There are policies in use in this state which are called “deductible average” policies, whereby the assured agrees to pay up to a certain amount and the insurer the balance. “Ex-medical” policies are also issued, which exclude payment for all medical attention. Such policies, by common usage and acceptance have been regarded as “limited compensation policies,” and have been required to conform to the provisions of section 31(a), supra. The policy here in question does not fall within the classes of policies just referred to. The form of indorsement and disclosure of wages included in the terms of the policy issued by petitioner here is one approved by the insurance commissioner of the state, and by him required to be part of every policy covering workmen's compensation written for an individual, it being the plain intent of such requirement to exclude members of the assured's family (as defined in the indorsement) unless specifically named in the policy declaration. When they are included, the rate of premium paid in, we understand is determined, in part at least, by the disclosure made by the insured. Authority for the action of the insurance commissioner is found

in section 602b et seq. of the Political Code relating to the classification of risks and premium rates to be filed by insurance carriers licensed to transact workmen's compensation business in this state.

[2] Petitioner argues that the instant policy does not limit the compensation payable to any one rightfully claiming under it, but merely involves an exclusion of certain persons from the field of coverage, for the reason that their employment and the amount of wages paid were not disclosed as required by the terms of the insurance contract. We are of the view that the construction of the petitioner is the correct one to place upon the policy. We do not find that such interpretation has ever before been questioned by those in charge of the administration of the Workmen's Compensation Act. It appears to have been a common practice to approve the issuance of policies providing for the exclusion of designated prohibited risks. The present claim of the respondent Industrial Accident Commission is directly in conflict with its own contention in other cases, with some of which this court is very familiar.

In 1923, several claims for compensation, arising out of injuries suffered by employees of the Williams Bros. Aircraft Corporation, which had furnished two airplanes with pilots to the Famous Players Lasky Corporation, were submitted to the Industrial Accident Commission for adjustment. The policy of compensation insurance issued to the Aircraft Corporation excluded liability for aviation risks, except for a named pilot. Compensation was claimed by an employee, who was injured in the course of his employment, but who was not named in the declaration, and it was contended by the injured person there, as here, that such a policy was “limited” in the sense used in section 31(a) of the Workmen's Compensation Act, supra, and that since the policy did not have printed in proper type the words “limited compensation policy” it became unlimited, and all employees of the insured were covered, rendering the insurer liable for the injury to the particular applicant. The commission held that the limitations referred to in section 31(a) applied to the extent of liability, and that the policy in question, as it merely limited liability to certain classes of work being performed and to certain specific cases of aviation, did not limit the liability as to the classes of employees covered, was not a “limited” policy within the meaning of the section, and that the liability of the insurance carrier did not extend to the injury occurring to the applicant then before it. It therefore discharged the insurance carrier from liability. *Pugh v. Famous Players Lasky Corporation et al.*, 10 Dec. of Ind. Acc. Com. 224.

The employer filed a petition in the Supreme Court for a review upon the ground

that its insurance carrier had been unlawfully exempted from liability, for the reason that the policy in question was a limited compensation policy, and was rendered unlimited through the failure of the insurance company to comply with section 31(a), *supra*. The commission resisted the application, and the writ was refused. We see no material difference in the application of the two cases. The decision and rulings in the Pugh Case seem exactly applicable here. See, also, *Worswick Street, etc., Co. v. Ind. Acc. Comm.*, 181 Cal. 550, 185 P. 953, and *State, etc., Fund v. Ind. Acc. Comm.*, 70 Cal. App. 650, 234 P. 116.

We do not deem it necessary to discuss the various general and special contentions made by the respondents. We have examined all of them, and we have read the authorities cited. Section 31(a), was first enacted in 1913 (St. 1913, p. 279). It was re-enacted, verbatim, in 1917. Not until this year and after the present case and others of like import arose in this court, was it sought to amend the section. We will refer to the amendment presently. To adopt any other interpretation of the clause at this time than that now contended for by petitioner would result in confusion in the matter of rates and classifications in policies already written and in other matters closely related to existing workmen's compensation insurance in this state. This view was at one time, if it is not now, held by the respondent commission, which a long time ago advanced it to the industrial world and to the insurance carriers. In its brief, filed in this court in opposition to the application for review made by the employer in the Pugh Case, *supra*, it said, in support of its construction of the policy there in question (that which we are now adopting), "the practice of the insurance world is in ac-

cordance with this distinction and any change in construction would necessitate drastic revision of all workmen's compensation policies in force in this state." Happily no change in construction is required.

The Legislature, at its last session, amended section 31(a) of the Workmen's Compensation Act to definitely provide that "policies of compensation insurance may be issued insuring either the whole or any part of the liability of any employer for compensation and any such policy may restrict or limit such insurance in respect to locations, employees, operations or risks, or restrict or limit the amount or kind of compensation to be furnished or paid or limit or restrict such insurance in any other manner whatsoever." Stats. 1929, c. 679. Such policies must be approved by the insurance commissioner as to substance and form, and failure to observe the requirements of the section renders any policy, not complying therewith, unlimited. The practice now so clearly permitted under the section as amended appears to be in complete accord with what seems to have been the practice and understanding approved and followed under the old section. The new section lists the kind of policies which have been issued in the past in accord with the generally accepted theory of section 31(a), and removes all doubt as to the issuance of such policies in the future.

The claimant in this case, having been by the express terms of the policy and the failure of the insured to disclose his employment and wages, excluded from all benefits arising under the policy, the award is annulled.

We concur: RICHARDS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.

MARYLAND CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(S. F. 13213.)★

Supreme Court of California. Sept. 17, 1929.

Rehearing Granted Oct. 17, 1929.

1. Insurance $\S$ 435—Workmen's compensation policy, covering injuries to employees legally employed, held binding on assured and claimants.

Workmen's compensation insurance policy, covering injuries sustained by employees legally employed by employer, held binding on assured and those claiming under him.

2. Insurance $\S$ 133(2)—Workmen's compensation policy, covering employees legally employed, held not "limited policy," requiring special printing of limitation (Workmen's Compensation Act, $\S$ 31(a)).

Workmen's compensation insurance policy, limiting liability to employees legally employed, held not "limited policy," requiring compliance with Workmen's Compensation Act, $\S$ 31(a), St. 1917, p. 831, providing that limitation be printed in bold-faced type, in order that limitation might apply.

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Tony Mazzina, a minor, claimant, by William Mazzina, his guardian ad litem, to recover compensation for injuries, opposed by Alfred Michelotti, employer, and the Maryland Casualty Company, insurer. From an order of the Industrial Accident Commission, awarding compensation, insurer brings certiorari. Award annulled.

Superseding opinion in 276 P. 410.

R. P. Wisecarver and W. G. McKean, both of San Francisco (Daniel W. Burbank and C. F. Laumeister, both of San Francisco, amici curiæ), for petitioner.

G. C. Faulkner, of San Francisco (Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ), for respondents.

WASTE, C. J. Proceeding in review. The petitioner was the insurance carrier of the respondent Michelotti, who employed the respondent Tony Mazzina, a 12 year old boy, in his meat shop. The policy issued to Michelotti contained the provision: "This policy shall cover such injuries, including death resulting therefrom, sustained by any employee or employees *legally* [italics added] employed by this employer." In operating a meat grinder, Mazzina cut off some of his fingers. It was not disputed, and the respondent commission, on application for an adjustment of compensation, found, that Mazzina was illegally employed, but, nevertheless, made an award in favor of Mazzina and against this petitioner, as the insurance carrier of the employer.

[1, 2] This court has already construed, and held binding on an assured and those claiming under him, a provision in a workmen's compensation insurance policy that it covers "such injuries, including death, sustained by any employee legally employed." Maryland Casualty Co. v. Ind. Acc. Comm., 179 Cal. 716, 178 P. 858, 859. But respondents here make a new contention in support of the order making the award, and that is that by the insertion of the proviso in the policy issued to Michelotti, restricting its application to those "legally employed" by him, an effort was made to issue a "limited" policy, and, the provisions of section 31(a) of the Workmen's Compensation Act (St. 1917, p. 831) not having been complied with, the policy became an unlimited policy, applying to each and all of Michelotti's employees, whether legally or illegally employed. The exact question of the effect of so-called limited policies, and of the failure of an insurer to comply with section 31(a), supra, has had recent consideration by this court, and is decided in direct opposition to the contention of the respondents in an opinion filed this day. Zurich, etc., Ins. Co. v. Stadelman et al., 280 P. 687.

On the authority of the cases cited, the award in this case is annulled.

We concur: RICHARDS, J.; SEAWELL, J.; SIENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.

208 Cal. 157

OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 13235.)

Supreme Court of California. Sept. 17, 1929.

Insurance $\S$ 133(2)—Workmen's compensation policy, covering employees at particular mine only, held not "limited policy," within act requiring special printing of limitation (Workmen's Compensation Act $\S$ 31(a)).

Workmen's compensation policy, limited to cover liability to employees at particular mine, and to exclude from field of coverage any operations carried on by assured in any other place, held not limited compensation policy, within Workmen's Compensation Act, $\S$ 31(a), St. 1917, p. 831, requiring limitation to be printed in bold-faced type in policy, and failure to print limitation in bold-face did not make policy an unlimited policy, so as to cover employee not working at place specified.

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under Workmen's Compensation Act by William Jones and another, claimants, to recover compensation for injuries opposed by the American Mercury Corporation

and another, employers, and the Ocean Accident & Guarantee Corporation, Limited, insurer. From an order of the Industrial Accident Commission, awarding compensation, the insurer brings certiorari. Award annulled.

Superseding opinion in 276 P. 412.

R. P. Wisecarver and Redman & Alexander, all of San Francisco (Daniel W. Burbank, C. F. Laumeister, and Orrick, Palmer & Dahlquist, all of San Francisco, amici curiæ), for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

WASTE, C. J. Proceeding in review to annul an award made by the respondent Industrial Accident Commission for injuries received by an employee of the American Mercury Corporation, who was injured during the course of his employment. The legal question to be decided is so far identical with that considered and to-day decided by this court in Zurich, etc., Ins. Co. v. Stadelman, 280 P. 687, and Maryland Casualty Co. v. Ind. Acc. Comm., 280 P. 690, as to be governed by what was said in those cases, and the decision must be the same.

The American Mercury Corporation applied for, and there was issued to it by the petitioner here, a standard workmen's compensation policy, covering the corporation's workmen's compensation liability at its Oceanic mine, near Columbia, in San Luis Obispo county, in this state. While the policy was in force, William Jones, an employee of the assured, was injured during the course of his employment at a mine claimed to be operated by the assured at Keene, in Kern county. Upon his application for compensation, an award was made in his favor and against the insurance carrier, which is here sought to be annulled. It is the contention of the petitioner that the Industrial Accident Commission exceeded its jurisdiction in making the award, for the reason that the policy of insurance issued by it did not cover the operations, if any there were, of the assured in Kern county.

The two stipulations in the policy material to this discussion are:

"Item 3. Location of all factories, shops, yards, buildings, premises or other work places of this employer by town or city with street and number: Oceanic mine, 3 miles from Columbia, San Luis Obispo county, California."

"Item 5. This employer is conducting no other business operations at this or any other location not herein disclosed—except as herein stated: There may be, but not covered hereunder."

It seems very apparent that it was the intention of the insurer and assured in this case to exclude from the field of coverage of the policy any operations, if such there were,

carried on by the assured at any point other than at its Oceanic mine. This case differs from the Zurich and Maryland Casualty Cases, supra, only in that the employees concerned in those cases belonged to classes of employees excepted by the provisions of the policies, while in this case the injury was incurred at operations not covered by the policy, but directly excluded. The contention that the policy here became an unlimited policy through failure of the insurer to print on it "Limited Compensation Policy," and to print the exclusion provision in bold-faced type, all as required by section 31(a) of the Workmen's Compensation Act (St. 1917, p. 831), is no more tenable than it was in the two cases, supra, just decided. The directly contrary interpretation of the section has been accepted by the courts, by the respondent Industrial Accident Commission itself, and by the insurance world in this state, ever since the section was first enacted. The state compensation fund, an activity of the state, created by it the better to carry out the beneficent objects of the Workmen's Compensation Act, has marked as "limited" policies, to conform with section 31(a), only those policies containing limitations on amounts of compensation payable, as, for instance, when the employer assumes medical expenses, or all over or under a designated sum. Contemporaneous and long-continued construction of section 31(a) has definitely and conclusively established and declared the intent of the Legislature in enacting it, and what clearly appears to be its meaning. Such interpretation seems to be eminently fair and just, and we have no hesitation in accepting and acting on it.

The award in this case is annulled.

We concur: RICHARDS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.

100 Cal. App. 600

PEOPLE v. SPINATO et al. (Cr. 1825.)

District Court of Appeal, Second District, Division 2, California. Sept. 17, 1929.

I. Jury $\S$ 29(6)—Failure of defendants to personally expressly waive jury required reversal, regardless of stipulation between counsel and district attorney (Const. art. 1, $\S$ 7).

Under Const. art. 1, $\S$ 7, relative to waiver of jury in criminal cases by consent of both parties expressed in open court, the failure of defendants to personally expressly waive jury required a reversal, regardless of stipulation between counsel and district attorney that trial without a jury be had, since, where the Constitution prescribes the method and form of such waiver, it cannot be otherwise accomplished.

2. Jury ☞29(6)—Implied consent to waiver of jury trial is insufficient under constitutional provision requiring express consent thereto (Const. art. 1, § 7).

Implied consent to waiver of jury trial is insufficient under Const. art. 1, § 7, requiring express consent thereto irrespective of counsel, and that defendant must be joined in such waiver by his counsel; the mandate of the Constitution not authorizing a delegation of privilege nor being satisfied by assertion that defendant did not by objection or otherwise express his dissent.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Joe Spinato and others were convicted of a felony, and they appeal. Reversed and remanded for a new trial.

Leo Youngworth, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howe, Deputy Atty. Gen., for the People.

CRAIG, J. The appellants were charged with having committed felonies in the county of San Bernardino, and were convicted. They appeal from the judgments, and, having assigned as a ground for reversal the fact that neither of them personally expressly waived a jury, and contending that they were thus deprived of their constitutional rights, we shall first consider this point. It appears that their counsel and the district attorney stipulated in open court that a trial before the court without a jury be had, but the defendants were not asked, nor did they state, whether or not they desired a jury. In *People v. Garcia* (Cal. App.) 277 P. 747, 748, upon an appeal by the people from an order granting a new trial, this court held that an attempted waiver of a jury by counsel without an expression to that effect by the defendant was not sufficient under our statute. It is here insisted on behalf of the people that the point is raised by the defendants, upon appeal only, and that under the decisions of federal and other state courts an express waiver of this constitutional right by counsel in the presence of the defendants should be held an implied waiver by them, and sufficient to satisfy the constitutional and statutory provisions. Section 7, article 1, of the Constitution, as amended in 1927 (see St. 1927, p. 2367), provides as follows: "The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court."

As was said in *People v. Garcia*, supra, prior to the amendment the right of trial by jury in felony cases could not be waived, and under the decisions of this state a waiver in misdemeanor cases by consent of "both parties," as provided for by section 684 of the Penal Code, did not include the defendant's counsel. It was concluded in that case that the expression in the section of the Constitution above mentioned, "consent of both parties, expressed in open court by the defendant and his counsel," required the expression in open court not only by the defendant's counsel, but by the defendant in person. In this regard it was further said: "The Legislature may prescribe the methods of procedure in this respect in civil cases, but in criminal actions involving charges of felony, the sovereignty represented by one of its regularly designated members as district attorney, and the defendant, may waive a trial by jury by expressing in open court their intention to that effect, and in this waiver the defendant's counsel must join. From previous rulings and the express language of the Constitution, it is at once obvious that this inviolate constitutional right may not be taken away in disregard of the fundamental legal privilege and power of election guaranteed to the party charged, by attempting to vest in his representative the dual capacity and authority of counsel and accused. Not only is the Constitution explicit as to the parties who may consent to waive a trial by jury, but it is equally definite as to the form in which the consent must be given, for the provision is that it must be 'expressed in open court.' Nothing could be more clear than this language. To say that a mere failure to object to the trial proceeding without a jury is sufficient is to ignore the plain mandate of the Constitution in its use of the phrase last above quoted."

Of *Kearney v. Case*, 12 Wall. 275, 20 L. Ed. 395, and *United States v. Harris*, 106 U. S. 631, 1 S. Ct. 601, 606, 27 L. Ed. 290, cited by the respondent, it is sufficient to observe that neither of them suggests that the constitutional right to a jury trial may be waived in a felony case in a federal court. In the first, a civil case, the question presented was as to whether or not a waiver of jury sufficiently appeared as required by the statutes to enable the Supreme Court of the United States to review the rulings of the lower court. In *United States v. Harris*, supra, the constitutionality of a statute attempting to denounce certain acts a public offense was involved, and the question arose as to whether or not the certificate of division of opinion was sufficient to enable the Supreme Court to consider the matter. By way of illustration, *Kearney v. Case*, supra, and other decisions were cited, as to the proper method of presenting the record, but this was merely incidental to the discussion of the merits. The court concluded:

"We are, therefore, of opinion that the request by counsel of the United States for a certificate of division is sufficiently shown by the record in this case, and that our jurisdiction is clear." In this regard section 649 of the Revised Statutes (Barnes' Federal Code, § 1329 [28 USCA § 773]) is mentioned, but said section relates exclusively to civil cases, and requires that the waiver of a jury must be stipulated in writing. The same may be said of *Wayne County v. Kennicott*, 103 U. S. 554, 26 L. Ed. 486. Other authorities cited by the respondent hold that immunity from second jeopardy may be expressly or impliedly waived, that one may waive a jury in civil and misdemeanor cases, and one charged even with murder may waive a trial and plead guilty. In the instance last mentioned it was said that the right of trial "is not so sacred but that it may be waived by legislative consent." *Oborn v. State*, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966. In *Hurtado v. California*, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232, it was held that if a defendant be presented by information rather than by indictment, other proceedings being regular, he is not deprived of any constitutional guaranty. Other rulings to the effect that in misdemeanor cases, if counsel plead not guilty for the defendant it will be presumed that the latter was present (*People v. Cline*, 83 Cal. 374, 23 P. 391), and that if no objection be made to a trial without a jury, it will be held upon appeal that the jury was waived when the question is then raised for the first time (*State v. Graves*, 161 Minn. 422, 201 N. W. 933). We think, however, that these authorities are all beside the issue. It is not contended, nor are we aware of any rule, that a person charged with a felony may not waive counsel, or venue, or the right to a trial by jury, or even the trial itself by pleading guilty. Nevertheless, in none of the foregoing cases has it been said that a sacred constitutional guaranty will be presumed to have been renounced in a felony case when the Constitution prescribes the only method by which one standing charged may be tried, and it is admitted that he was not advised by court or counsel and did not comply with such provisions.

[1, 2] The issue here presented, and one which was necessarily involved and finally determined in the *Garcia* Case, is not whether a jury may be waived, but how it may be waived. We repeat what was said in that decision, that where, as in this instance, the Constitution has prescribed the method and form of such waiver, it cannot be otherwise accomplished. Where, as here, an express consent is required, no implied consent will suffice. The provision of our Constitution now in question expressly requires that the "parties" shall, irrespective of counsel, state their willingness to be tried without a jury,

and the defendant must be joined in such waiver by his counsel. Hence we hold that an expression to that effect by counsel is not sufficient. The mandate of the Constitution that a defendant shall express in open court his consent does not authorize a delegation of that privilege, nor is it satisfied by the assertion that he did not by objection or otherwise express his dissent.

The judgment is reversed, and the cause remanded for a new trial.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

100 Cal. App. 584

CRUDO v. CRUDO. (Civ. 6810.)

District Court of Appeal, First District, Division 2, California. Sept. 17, 1929.

1. Divorce $\S$ 184(4)—Appellate court must presume, where evidence is not before it, that finding in divorce action was supported by evidence.

Where evidence in action for divorce was not before appellate court, presumption exists that finding that agreement settling property rights between husband and wife before divorce has not been vacated, annulled, or set aside, and is in full force and effect, is supported by evidence.

2. Husband and wife $\S$ 278(1)—Provision in agreement settling property rights between husband and wife releasing parties from various claims, if void, held severable and not to affect remainder.

Provision in agreement between husband and wife before divorce settling property rights, releasing parties from all claims and demands whatsoever for support, maintenance, alimony, counsel fees, and costs in any action pending or which may be brought by either party, if void, as being against public policy, held severable from other provisions of agreement and not to affect balance thereof.

3. Husband and wife $\S$ 281—Findings showing continuous separation since separation agreement held not to support contention that agreement was annulled by subsequent reconciliation.

Contention that agreement settling property rights between husband and wife before divorce was annulled by subsequent reconciliation of parties held without merit, where evidence in action for divorce was not before appellate court, and findings showed separation took place before agreement and that there had been no reconciliation since date of separation and that parties were still living separate and apart and unreconciled.

4. Divorce $\S$ 171—Particular instance of cruelty, part of continuous course, alleged in former action where divorce was denied, held available in subsequent action.

Where alleged acts of cruelty as ground for divorce have been continuous, particular in-

stance of cruelty included within continuous course, though made ground for divorce in previous action in which a divorce was denied, *held* available in subsequent action, especially where one particular instance of cruelty included within continuous course occurred after former decree.

Appeal from Superior Court, Alameda County; H. A. Alvarado, Judge.

Action for divorce by Joseph Crudo against Alice Crudo. Judgment for plaintiff, and defendant appeals. Affirmed.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for appellant.

J. J. Dunne and M. H. Farrar, both of San Francisco, for respondent.

BURROUGHS, Justice pro tem. This is an appeal by defendant from an interlocutory decree of divorce in favor of the plaintiff. The appeal is upon the judgment roll alone.

[1] It is claimed on behalf of appellant that the court erred in not ordering a division of the community property. The court found as a fact that there was no community property. The only evidence of any such property is an agreement of settlement of the property rights of the parties to this action, made and executed by them on April 17, 1922, wherein it recited: "That whereas an immediate separation has become necessary between the parties hereto, man and wife; now, therefore, in order to finally adjust and settle all property disputes and mutual rights and maintenance and support, the parties hereto do hereby covenant and agree one with the other." Further provisions of the agreement conveyed to the defendant herein certain parcels of real property and specific articles of personal property, including some cash "to be taken and received by her as her own separate property." There is a further provision of the agreement by the terms of which real and personal property is conveyed to the plaintiff "to be taken and received by him as his separate property." The agreement was filed and acknowledged by the parties so as to entitle it to record, and on April 21, 1922, it was recorded at the request of the appellant. The court finds that said agreement has never been vacated, annulled, or set aside, and the same is now in full force and effect. The evidence not being before this court, it must be presumed that the findings are supported by the evidence.

[2] Appellant contends, however, that the agreement is void as against public policy, in that it contains a clause releasing the parties "from all claims and demands whatsoever for support, maintenance, alimony and counsel fees and costs in any action pending or which may hereafter be brought by either one of the parties hereto against the other, all future claims or demands for alimony, support or

maintenance by either party against the other being hereby expressly waived." In answer to this claim, we deem it sufficient to say that even if the above clause of the contract is subject to counsel's criticisms, it is separable from the other provisions of the agreement and does not affect the balance thereof. *McCahan v. McCahan*, 47 Cal. App. 176, 190 P. 460; *Estate of Sloan*, 179 Cal. 393, 177 P. 150.

[3] It is next claimed that the agreement was annulled by a subsequent reconciliation of the parties. This contention is based upon the eighth finding of fact herein. It is claimed by appellant that by reference to paragraph H of an exhibit attached to the defendant's answer herein the court found that the parties became reconciled in the early part of 1923. As we construe this finding, it is to the effect that the allegations of extreme cruelty alleged in said paragraph H are true, that being the subject-matter of said paragraph, the reference to the reconciliation being incidental only. Further, the court in finding VI specifically found that the date of separation of the parties was February 17, 1922. Again, in finding XIII, the court found that since February 17, 1922, "no reconciliation has ever taken place between the above-named parties, but, on the contrary, they have been and are now living separate and apart and unreconciled." We therefore hold that the findings do not support appellant's claim that the parties were ever reconciled.

The further claim of appellant that the findings of fact are contradictory is covered by what we have heretofore said concerning the allegation that the parties to this action had, after making the agreement above referred to, become reconciled. The point is without merit.

[4] Appellant claims that the findings of cruelty do not support the decree. The former action pleaded in bar to this action was commenced on January 10, 1924, and the decree therein denying a divorce to either party was entered on September 16, 1924. The present action was commenced May 12, 1926, and the decree therein entered November 2, 1927. It is claimed that the acts of cruelty occurring prior to the entry of the decree in the former action are not available to this plaintiff in the present action, but the court finds that the alleged acts of cruelty have been continuous during the four years immediately preceding the commencement of the present action and one particular instance as of date September 23, 1925, and other acts of cruelty occurring during the same month are found by the court to be true. The findings are therefore not subject to the criticism. We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

100 Cal. App. 578

NELSON v. MARSH et al. (Civ. 6808.)

District Court of Appeal, First District, Division 2, California. Sept. 17, 1929.

1. Corporations ⇨503(1)—Joinder of cause of action against corporation with one on stockholders' statutory liability did not waive right to trial in county of corporation's residence (Code Civ. Proc. § 395).

Plaintiff, by joinder of cause of action against corporation on its contractual liability with cause of action against individual stockholders on their statutory liability, did not waive right to have action tried in county of corporation's residence under Code Civ. Proc. § 395, where action was commenced, since plaintiff had right to bring action there irrespective of whether one of defendants was a corporation or an individual defendant.

2. Corporations ⇨503(1)—That corporate defendant was suspended from doing business until payment of corporation tax did not affect right to trial in county of corporation's residence (Deering's Gen. Laws 1923, Act 1743, § 11; Code Civ. Proc. § 395).

Under Deering's Gen. Laws 1923, Act 1743, § 11, fact that corporate defendant was suspended from doing business in state until payment of its corporation tax did not affect plaintiff's right, under Code Civ. Proc. § 395, to have action tried in county of corporation's residence, notwithstanding individual stockholders, joined as defendants to enforce their statutory liability as stockholders, resided in other counties.

3. Action ⇨50(9)—Contract cause of action against corporation held properly joined with one on stockholders' statutory liability.

Cause of action against corporation on its contractual liability held properly joined with cause of action against individual stockholders on their statutory liability, in view of Code Civ. Proc. §§ 379a (as added by St. 1927, p. 477), 379b (as added by St. 1927, p. 478), and 379c (as added by St. 1927, p. 631), making such joinder proper and which were adopted after action was commenced.

4. Corporations ⇨503(3)—Joinder of corporate defendant and individual stockholders as defendants held prima facie in good faith, and motion for change of venue was properly denied (Code Civ. Proc. § 395).

Joinder of cause of action against corporation on its contractual liability with cause of action against individual stockholders on their statutory liability held prima facie made in good faith, since action grew out of debt contracted by corporation, and not for sole purpose of retaining case for trial in county of corporation's residence under Code Civ. Proc. § 395, and individual defendants' motion for change of venue to county of their residence was properly denied, in view of section 379a as added by St. 1927, p. 477, after commencement of action.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by G. Nelson against Robert Marsh, F. L. Marsh, and others. From an order denying their motion for a change of venue, named defendants appeal. Affirmed.

Clyde C. Shoemaker, of Los Angeles, for appellants.

Hiadsell, Sweet & Ingalls, of San Francisco, for respondent.

BURROUGHS, Justice pro tem. The defendants Robert Marsh and F. L. Marsh appeal from an order of the court denying their motion for a change of the place of trial of the action from the city and county of San Francisco to the county of Los Angeles, their place of residence. The complaint was filed in the superior court of the city and county of San Francisco. The defendants are Robert Marsh, F. L. Marsh, S. L. Steele, and Venice Island Land Company. The action is brought to recover upon a debt contracted by the defendant corporation. There were two causes of action stated in the complaint, an action against the corporation on its contractual liability, and an action against the stockholders on their stockholders' liability.

The complaint alleges that at all the times therein mentioned the corporation defendant was organized and existing under the laws of California, and having its principal place of business in the city and county of San Francisco. The defendants Robert Marsh and F. L. Marsh filed a demand for a change of venue to the county of Los Angeles, and in support of such demand an affidavit of merits and of residence, signed by Robert Marsh. It is alleged in said affidavit: First, that none of the defendants named in the complaint resided in the city and county of San Francisco at the time of the commencement of the action; second, that defendants Robert Marsh and F. L. Marsh then resided, and now reside, in the county of Los Angeles, and the defendant S. L. Steele then and now resides in the city of Stockton, San Joaquin county; third, that at the time of the commencement of the action the defendant corporation did not operate or maintain any office or place of business in the city and county of San Francisco, and that none of the officers or directors of said corporation resided in the city and county of San Francisco at the time of the commencement of the action, nor do they reside therein at the present time; fourth, that on or about the 28th day of February, 1926, said corporation forfeited its charter, and all its rights to do business in the state of California were suspended because of its failure to pay the state license tax. That there has been no revival of said corporation, and that for a long time prior to the commencement of the action said corporation was not doing or carrying on any business in the state of California, nor has it at any time since its right to do business was suspended, as afore-

said, been doing or carrying on any business in the state of California. It is also alleged in said affidavit that said corporation is neither a necessary nor a proper party defendant, and it is further alleged, on information and belief, that said corporation has been joined as a party defendant solely for the purpose and with the intention of attempting to retain the venue of said action in the city and county of San Francisco.

[1] Appellant contends that by the joinder of a cause of action against the corporation on its contractual liability, with a cause of action against the individual stockholders on their statutory liability as such stockholders, the plaintiff waived his right to have the action tried in the county of the corporation's residence, and he cites in support thereof *Griffin & Skelly Co. v. Magnolia & Healdsburg Fruit Cannery Co.*, 107 Cal. 378, 40 P. 495; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 P. 209; and *Nelson v. East Side Grocery Co.*, 26 Cal. App. 344, 146 P. 1055. All three of these cases are discussed in *McClung v. Watt*, 190 Cal. 155, 211 P. 17, 18, and we believe the distinction there drawn between the cited cases and *McClung v. Watt*, supra, applies with equal force to the case at bar. In speaking of the cases above cited, the court says: "It will be noted that in none of these cases cited by the defendant in support of his contention in this behalf was the action brought, as in the instant case, in the county where the principal place of business of the corporation defendant was located. They were all cases in which the action was brought against the corporation defendant under the authority of the first two provisions of article 12, § 16, of the state Constitution, which provides that a corporation may be sued 'where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs'. In other words, the actions were brought in counties in which they could not have been maintained except for the fact that one of the defendants was a corporation, and this court held that the fact that one of the defendants was a corporation should not deprive an individual defendant of his right to have the action tried in the county of his residence. In the instant case, however, the action was commenced in the principal place of business of the corporation—the county of its residence. *Jenkins v. California Stage Co.*, 22 Cal. 538; *Buck v. City of Eureka*, 97 Cal. 135, 31 P. 845; *Trezevant v. Strong*, 102 Cal. 47, 36 P. 395; *Gallup v. Sacramento & San Joaquin Drainage District*, 171 Cal. 71, 151 P. 1142. The plaintiff had a right to bring the action there, irrespective of whether or not one of the defendants was a corporation or an individual defendant. That is to say, the right of the individual defendant in the instant case is not affected by the fact that the defendant joined is a corporation rather than an individual. The rule annunciated in the cases cited and relied

upon by the individual defendant, *Watt*, has therefore no application to a situation where the action was instituted in the county of the principal place of business of a corporation defendant properly joined with other defendants in the action."

[2] In the case at bar the action was commenced in the county of the residence of the corporation. Code Civ. Proc. § 395. Nor do we believe that the fact that the corporation defendant has been suspended from doing business in the state of California until the payment of its corporation tax affects the statutory right of the plaintiff to have the cause of action tried in the place of the corporation's residence. The act providing for the suspension of the corporation's right to do business until the payment of the taxes provides an exception, in that, the corporation has a right to execute and deliver deeds to real property in pursuance of contracts therefor, made prior to such time, and to defend in court any actions brought against such corporation. *Deering's Gen. Laws 1923*, vol. 1, p. 554, Act 1743, § 11. It thus appearing that the corporation has a right to defend actions, it logically follows that all the rights and privileges accrued to both parties to an action may be pursued as though there had never been any suspension of the corporation's right to do business.

[3] It is further claimed by the appellants that the corporation is not a proper party defendant. That the two causes of action are unnecessarily joined. That there is no Code rule authorizing their joinder, and he cites in support thereof the case of *Avery v. Chucawalla Development Co.*, 175 Cal. 644, 166 P. 1002, 1003, wherein it is held that such joinder may be made because "to permit this to be done, however, makes manifestly for the expeditious disposition of litigation, without working hardship to any party defendant and for this reason it should be countenanced if not forbidden. Nothing in our law forbids it." The practice of our courts has upheld such joinder as proper. *Kiefhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 37, 113 P. 691. And since the commencement of this action there have been added to the Code of Civil Procedure sections 379a (as added by St. 1927, p. 477), 379b (as added by St. 1927, p. 478), and 379c (as added by St. 1927, p. 631), making such a joinder proper. It has been held that such changes in procedural rules apply to pending cases. *Maguire v. Cunningham*, 64 Cal. App. 536, 222 P. 838.

[4] Appellant also complains that the joinder of the corporation defendant was made for the sole purpose of retaining the case for trial in the city and county of San Francisco, but it is said in *McClung v. Watt*, 190 Cal. 159, 211 P. 17, 19, that: "The motion for a change of place of trial to the county of the party's residence must be made by the moving party and determined by the court in advance of any other judicial action in the

case." (Citing *Brady v. Times-Mirror Co.*, supra, and other cases.) "Hence the right to a change of place of trial to the residence of a defendant must necessarily be determined by the status of the parties joined as defendants in the action as revealed by the pleadings existing at the time the party claiming the right first appeared in the action." (Citing *Brady v. Times-Mirror Co.*, supra; *Donohoe v. Wooster*, 163 Cal. 114, 124 P. 730, and other cases.) "If the complaint in the instant case attempts, in apparent good faith, to state a cause of action against the corporation defendant, the individual defendant, Watt, did not have the right to have the place of trial changed to the county of his residence. The sufficiency of the complaint and the good faith of the pleader are not to be denied, upon a motion for a change of venue, unless, at first blush, it can be clearly seen and said that the allegations of fact concerning the corporation defendant are in nowise related to the facts alleged and relied upon as a cause of action against the defendant, Watt. * * *

We are of the opinion that the complaint in the case at bar, in so far as the joinder of action against the corporation and the individual stockholders is in question, is prima facie made in good faith. The action grew out of a debt contracted by the corporation and falls within the class of cases covered by the decisions in *Avery v. Chucawalla Development Co.*, supra; *Kiefhaber Lumber Co. v. Newport Lumber Co.*, supra; and is also within the provisions of section 379a of the Code of Civil Procedure.

The order is therefore affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

100 Cal. App. 572

Petition of JARDINE, MATHESON & CO., Limited.★

Appeal of PACIFIC ORIENT CO.

(Civ. 6971.)

District Court of Appeal, First District, Division 1, California. Sept. 17, 1929.

Rehearing Denied Oct. 17, 1929. Hearing Denied by Supreme Court Nov. 14, 1929.

I. Contracts §292½—Order directing parties to proceed to arbitration in accordance with agreement to arbitrate held not appealable (Code Civ. Proc. § 1280, as added by St. 1927, p. 404, § 1; §§ 1281-1290, as amended by St. 1927, pp. 404-407, §§ 2-11; §§ 1291-1293, as added by St. 1927, pp. 407, 408, §§ 12-14).

Order directing parties to proceed with arbitration of controversy in accordance with terms of agreement for submission to arbitration of dispute under contract for sale held not an appealable order, under Code Civ. Proc. §§ 1280 (as added by St. 1927, p. 404, § 1), 1281-1290 (as amended by St. 1927, pp. 404-407, §§

2-11), and 1291-1293 (as added by St. 1927, pp. 407, 408, §§ 12-14), providing for application to require arbitration proceedings under arbitration agreement and for proceedings on arbitration, and providing in section 1293 that appeal may be taken from order confirming, modifying, correcting, or vacating an award, or from judgment entered thereon.

2. Appeal and error §83—Order directing parties to arbitrate controversy in accordance with arbitration agreement held not appealable, as final order in special proceeding (Code Civ. Proc. §§ 963, 1280, 1292, 1293).

Order directing parties to proceed to arbitration in accordance with application to require arbitration under written agreement, pursuant to Code Civ. Proc. § 1280, held not appealable under section 963, as final order in special proceeding of civil nature, since adequate remedy by appeal is afforded under section 1293, providing for appeals from orders confirming, modifying, or vacating arbitration award, or from judgment thereon, and section 1292 provides that judgment in arbitration proceeding is subject to all provisions of law relating to judgment in an action, and section 1285 provides that application to require arbitration shall be heard in summary manner.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Petition of Jardine, Matheson & Co., Limited, for an order directing the Pacific Orient Company to proceed to arbitration. From an order directing arbitration, defendant appeals. Appeal dismissed.

Joseph E. Bien and Werner Olds, both of San Francisco, for appellant.

McCutchen, Olney, Mammon & Greene, of San Francisco, for respondent.

KNIGHT, J. Respondent moves to dismiss the appeal herein upon the ground that the order from which it was taken is not appealable. The determination of the motion involves the construction of section 1293 of the Code of Civil Procedure, which is one of several Code sections enacted by the Legislature in 1927 relating to the enforcement of agreements to arbitrate controversies growing out of written contracts. Code Civ. Proc. §§ 1280 (as added by St. 1927, p. 404, § 1), 1281-1290 (as amended by St. 1927, pp. 404-407, §§ 2-11), 1291-1293 (as added by St. 1927, pp. 407, 408, §§ 12-14), inclusive.

The essential portions of those sections are as follows:

Section 1280 declares that "a provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or any part thereof, or an agreement in writing to submit an existing controversy to arbitration * * * shall be valid, enforceable and irrevocable, save upon such grounds as exists at law or in equity for the revocation

of any contract: Provided, however, the provisions of this act shall not apply to contracts pertaining to labor."

Section 1281 sets forth the nature of the controversies which may be arbitrated, and section 1282 prescribes the legal procedure to be invoked by an aggrieved party when the other party to the contract has failed, neglected, or refused to proceed with the arbitration as agreed, and in the latter section it is provided that if at the conclusion of the hearing before the court, "the finding be that a written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made *summarily* directing the parties to proceed with the arbitration in accordance with the terms thereof."

Sections 1283 and 1284 provide that under the conditions therein stated the court may appoint the arbitrators or some of them, and order stayed any civil actions pending the termination of the arbitration proceedings.

Section 1285 reads as follows: "Any application (to the court) made under the authority of this act *shall be heard in a summary way* in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." (All italics ours.)

Section 1286 prescribes the procedure to be followed by the arbitrators in hearing and determining the controversy, and sections 1287 to 1290, inclusive, set forth when and under what circumstances the court may confirm, vacate, modify, or correct the award. The next two sections, 1291 and 1292 deal with the matter of the entry of judgment and the force and effect to be given thereto. They are as follows:

"Upon the granting of an order confirming, modifying or correcting an award, judgment may be entered in conformity therewith in the court wherein said application was filed. * * * The judgment when rendered by the court shall be docketed as if it were rendered in an action."

"The judgment so entered has the same force and effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered."

Section 1293 enumerates the particular orders and judgment from which appeals may be taken, and reads as follows: "An appeal may be taken from an order confirming, modifying, correcting or vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action."

[1] In the present case the record discloses that appellant entered into a written contract with respondent to sell and deliver to the latter a certain quantity of wood oil, which contract provided, among other things, that any dispute arising thereunder should be submitted to arbitration immediately in the

manner therein set forth. Thereafter and under the authority of section 1282 of said Code respondent petitioned the superior court in and for the city and county of San Francisco for an order for the enforcement of the arbitration agreement, alleging that appellant had breached the contract to deliver said oil. Appellant demurred to the petition and moved for its dismissal, and the demurrer being overruled and the motion being denied, appellant answered, and afterwards amended its answer; and later certain portions of the answer were stricken out on motion of the respondent. A hearing was then had before the court sitting without a jury, and as a result thereof the court entered written findings, and in conformity with the findings granted an order directing the parties "to proceed with the arbitration of the controversy or dispute set out in said application, in accordance with the terms of said agreement. * * *". Thereupon appellant appealed from said order.

Respondent contends that section 1293 was intended by the Legislature to be all-embracing and restrictive in its effect, and that consequently, since the order from which the appeal herein was taken is not one of those enumerated in said section, the appeal based thereon should be dismissed. We are of the opinion that this contention must be sustained.

Upon reading the text of the foregoing sections it becomes evident that the purpose of adding them to the Code was to adopt for this state a complete scheme for the expeditious and summary enforcement of agreements to arbitrate, and to provide a judicial review of the proceedings taken pursuant thereto, after the matter of arbitration has been completed and the award has been made, and the fact that the Legislature saw fit to specify in one code section the different orders and judgment from which appeals may be taken clearly indicates, in our opinion, an intention to restrict the appeals in such proceeding to the orders and judgment therein specified, and the obvious reason for not including among such appealable orders the one which directs the parties to proceed with the arbitration was that if at the very threshold of the proceeding the defaulting party could appeal and thereby indefinitely delay the matter of arbitration, the object of the law and the purpose of the written agreement of the parties would be entirely defeated.

[2] Appellant contends that regardless of the right of appeal given by section 1293, the legal proceeding authorized by said Code sections constitutes a special proceeding of a civil nature, and that therefore under section 963 of the Code of Civil Procedure an appeal may be taken from any final order made therein, and in this connection it is claimed that the order complained of, directing the parties to proceed with the arbitration, is in its nature final. In support of such conten-

tion the case of *People v. Bank of San Luis Obispo*, 152 Cal. 261, 92 P. 481, is cited. The language of the decision in that case must be interpreted, however, in the light of the situation there existing, which, upon analysis, is shown to be entirely different from the one presented here. There the proceeding was brought in the name of the people against the bank and its directors pursuant to the provisions of the former Bank Commissioners' Act (St. 1903, p. 368) to force the bank into liquidation. A judgment to that effect was obtained, which, besides enjoining the bank from transacting any further business, appointed a receiver and directed the bank commissioners to turn over to a receiver all of the assets of the corporation for the purpose of liquidating its affairs. The act nowhere provided for an appeal from any of the proceedings authorized to be taken thereunder. Nevertheless, the substantial rights of the bank being materially affected by the judgment, the bank took an appeal therefrom, which the people sought to have dismissed on motion. In ruling adversely upon the motion, the Supreme Court first pointed out that the right of appeal is remedial, and that in doubtful cases, where the substantial rights of a party are affected, the doubt should be resolved in favor of such right, and it was therefore held in effect that since the act contained no express declaration denying the right of appeal, "such as making any judgment final or final and conclusive," etc., it would be assumed that the Legislature intended that such right of appeal existed the same as from a judgment entered in any other kind of special proceeding affecting the substantial rights of the appealing party.

In the present situation, however, adequate remedy by appeal is afforded; two appeals being allowed from orders in their nature interlocutory, namely, the order confirming the award and the order modifying or correcting the award, and two from orders in their nature final, namely, the order vacating the award, and the judgment. Therefore it is not unreasonable to believe that the Legislature intended to restrict the right of appeal to such orders and judgment.

Appellant asserts that the appeals thus granted are nevertheless inadequate to review the trial court's various rulings upon the sufficiency of the pleadings, and its findings and conclusions relating to the validity of the contract and appellant's alleged default thereunder. As will be noted, however, from reading the Code sections above referred to, the court proceeding authorized to be taken thereunder is expressly declared to be of a summary character, and there is nothing contained in the provisions of said sections indicating that a defaulting party may interpose all or any of the dilatory pleas or file the same character of pleadings permitted to be interposed and filed in civil actions gener-

ally. On the contrary, section 1285 expressly provides that the "application * * * shall be heard in a summary way in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided" (emphasis ours); and while, of course, a motion is subject to dismissal for legal insufficiency, or may be defeated on the merits by the introduction of legal evidence in opposition thereto, including affidavits, the issues of law and fact to be determined thereunder are not raised by demurrer and answer as in civil actions. And in any event, in view of section 1292, which provides that the judgment which shall be entered in an arbitration proceeding shall have "the same force and effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in an action, * * *" it would seem that any court ruling made in pursuance of such proceeding affecting the substantial rights of the parties may be reviewed on appeal from the judgment, as on appeal from a judgment in a civil action.

The New York cases cited by appellant are not controlling here, because the provision of the arbitration act of that state granting the right of appeal is entirely different from the one embodied in our Code section 1293. It is there expressly provided that said act is subject to the general laws governing appeals in that state, while here the Legislature has particularized the orders and the judgment from which appeals may be taken.

From the foregoing, we conclude that the appeal herein is based upon an order which is not appealable, and that accordingly respondent's motion must be granted, and the appeal dismissed. It is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

100 Cal. App. 598

HALMINSKA v. KOBLER. (Civ. 6245.)

District Court of Appeal, Second District, Division 2, California. Sept. 17, 1929.

Animals §74(5)—Evidence of dog's vicious proclivities, or knowledge thereof by owner, held insufficient to render owner liable to child bitten by dog.

In action for damages to child resulting when bitten by small dog, evidence not showing dog had previously bitten any one or showing signs of viciousness held not to show dog was vicious or that the defendant owner was aware of vicious proclivities, if any, so as to render owner liable.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Edward Halminska, by Agatha Halminska, his guardian ad litem, against J.

F. Kobler. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Charles R. McCarty, of Los Angeles, for appellant.

Willard G. Cram, of Los Angeles, for respondent.

CRAIG, J. The appellant, a minor child of the age of about three years, while playing with several other children, alleged by his guardian ad litem that he was bitten by a dog, of which the respondent was the owner. Evidence having been presented on behalf of the plaintiff, a nonsuit was asked, which was granted, and he appeals.

The respondent was a contractor, and at the time of the occurrence in controversy had driven to a schoolhouse which was in process of construction. Respondent's dog, a Boston terrier about nine months old and weighing about twelve pounds, mingled with the boys while respondent was about the premises. Plaintiff's witnesses, consisting of boys ranging in ages up to fifteen years, differed as to whether or not the children played with the dog, but all were unanimous in the statement that the puppy bit the plaintiff in the hand. It appears that this caused a small laceration about one-fourth of an inch in width on the web of the left palm, between the second and third fingers. Some of the witnesses swore that they saw the dog follow the child and bite him, but did not see any one playing with it. Others testified that they were playing with the dog, that they would run back and forth, and that it would run after them. There is no evidence tending to show that the animal had previously bitten any one, or that it had shown signs of viciousness. In the opening brief appellant states: "The plaintiff is mindful of the rule that in order for him to recover in this character of action, it must appear that the defendant owner was aware of the vicious proclivities of the animal."

The only evidence upon this subject consisted of statements by playmates of the plaintiff that when the defendant arrived the dog was placed in a shed, which the defendant thereafter opened, and that the dog came out and began chasing them as they ran about at play, and the statements of defendant on examination by plaintiff's counsel. In this latter respect it appears that the defendant lived in an apartment, where the dog remained at night and part of the daytime; that "he was simply a pup, and playful"; that he was affectionate, any one could pick him up; and that he had been stolen upon

one occasion. The defendant swore that it was "just a play dog," and that at times he was placed on a leash to prevent him from running away or being injured by traffic, but that aside from that it was permitted to be at large. Upon the occasion in question, he testified that he did not put the dog in a shed; that he "stood in front of the little shed there we had for an office about 15 minutes, the dog staying there until the children got hold of him, got to playing with him"; and that he saw them playing with him. Appellant stressed the remark of defendant that there were signs on the new building indicating danger, to which he explained: "We naturally put up a sign over the door, to protect ourselves from people coming in, from falling material and so forth. * * * We do on all jobs."

It will thus be observed that not alone is there an absence of evidence tending to show knowledge of vicious proclivities, but a lack of evidence which might lead to the belief that such traits existed in fact. A photograph of the animal introduced on behalf of the plaintiff showed the puppy in the arms of a small child, and the defendant appears to have knowingly and willingly permitted it to play with the children on the morning of the occurrence in question. He testified that he did not know that it would annoy or injure any one, and did not believe the plaintiff was injured as alleged, for the reason that when he called the dog to him later, it came immediately, and the children were all then at play. We think the plaintiff's proof upon the principal issue raised was fatally deficient. In addition to authorities treating generally of the principles involved in such cases where the victims of dangerous animals are shown to have established a prima facie case reliance is sought to be placed upon *Davis v. Mene*, 52 Cal. App. 368, 193 P. 840. It there appeared that the plaintiff had been bitten by a bulldog which the defendant chained at home, muzzled when at large, and kept as a watch dog because of thieves in the neighborhood. In opposition to such evidence of the proclivities of the animal, none appears to have been offered tending to show that the defendant was aware that it would bite. It is unnecessary to consider authorities cited, since the legal principles are too well settled for serious controversy; but we think the evidence before the trial court was insufficient to establish a case against the defendant.

The judgment is affirmed.

We concur: **WORKS, P. J.; IRA F. THOMPSON, J.**

GORDON v. HARBOLT et al. (Civ. 5419.) * the United States Fidelity & Guaranty Company to answer, plaintiff appeals. Reversed.

District Court of Appeal, Second District, Division 2, California. Sept. 17, 1929.

Rehearing Denied Oct. 17, 1929. Hearing Granted by Supreme Court Nov. 14, 1929.

1. Judgment ⇨155—Notice of motion to vacate default, stating motion would be made on affidavit and proposed answer, held sufficient to confer jurisdiction to pass on merits of motion (Code Civ. Proc. § 473).

Where notice of motion to vacate default judgment did not state grounds on which motion was to be made, but stated motion would be made on affidavit of defendant and proposed answer, copies of which were served with notice, and affidavit set up facts and circumstances of service of summons and reasons for defendant's failure to appear, court had jurisdiction, under Code Civ. Proc. § 473, to hear and pass on merits of application, especially where there was no question but that proposed answer set up good defense on merits.

2. Appeal and error ⇨945—Appellate court, in reviewing action of trial court, favors adjudication of legal controversies on merits.

Appellate courts are favorably disposed towards such action on part of trial courts as will permit, rather than prevent, adjudication of legal controversies on their merits.

3. Judgment ⇨139—Applications for vacating default judgments are within sound discretion of trial court.

Applications for relief from default judgment are vested within sound discretion of trial court; that is, not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles.

4. Judgment ⇨143(3)—Vacating default judgment against corporation, where summons and copies of amended complaint were served on manager, without showing excusable neglect in failing to answer, held abuse of discretion (Code Civ. Proc. § 473).

Where summons, together with two copies of amended complaint, were served on manager of defendant corporation, and manager in affidavit supporting motion to vacate default judgment, did not deny such fact, but merely stated there was nothing in records of company indicating time, place, or manner of service, that copy of complaint came to affiant's attention on day default judgment was entered, without explaining why papers escaped attention for over a month, nor alleging that any promise to set aside default was made or intimated, and that affiant, in reliance thereon, took no immediate action to set aside default, vacating default judgment, under Code Civ. Proc. § 473, on ground of excusable neglect, held abuse of discretion, since courts will not relieve litigants from effects of mere carelessness.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by G. W. Gordon against G. C. Harbolt and others. From an order vacating a default judgment, and permitting defendant

Thomas A. Wood and O. B. De Camp, both of Los Angeles (F. Britton McConnell, of Los Angeles, of counsel), for appellant.

Lawler & Degnan, of Los Angeles, for respondent.

BURNELL, Justice pro tem. This appeal is from an order vacating a default and permitting the respondent corporation to file a verified answer. Two points are urged by appellant: First, that the court below was without jurisdiction to consider the motion for vacation of the default, by reason of the failure of the notice to state the grounds upon which the motion was to be made; and, second, that there was no showing of excusable neglect and that the court abused its discretion in granting the motion.

[1] The first of these contentions is without merit. While it is true that the notice itself failed to state the grounds upon which the motion would be based, it did state it would be "upon the affidavit of Ernest R. Robbins, manager of defendant United States Fidelity & Guaranty Company, and the proposed answer," copies of which were served together with the notice. The affidavit of Mr. Robbins, after setting up the facts and circumstances of the service of summons upon respondent corporation and the reasons for its failure to appear, proceeds: "That the facts of this case in this cause have been fully and fairly stated to Lawler & Degnan, counsel for defendant herein, and after such statement affiant is advised by them that defendant herein has a good and substantial defense on the merits of this action. Wherefore affiant prays that, if said amended complaint and the summons issued thereon are deemed to have been properly served on defendant, United States Fidelity & Guaranty Company, on the 8th day of March, 1926, it be held that an answer thereto was not interposed by said United States Fidelity & Guaranty Company through mistake, inadvertence, and excusable negligence, as disclosed by the facts and circumstances set out above; that said defendant be permitted to file its verified answer; and that the said default heretofore entered be set aside." There is no question but that the proposed answer, which the court permitted to be filed, set up a good defense on the merits. It has been frequently held that the failure of the moving party in a proceeding for relief under section 473 of the Code of Civil Procedure to state the grounds upon which he relies will not deprive the court of jurisdiction to hear and pass upon the merits of the application, where the grounds sufficiently appear from the accompanying affidavits.

In *Savage v. Smith*, 170 Cal. 472, 150 P. 353, the precise point relied on by appellant was thus decided: "When the motion came on to

be heard, the plaintiff objected to the hearing of the motion upon the grounds that there was no affidavit of merits on behalf of the defendant, and that the notice of motion did not state the ground upon which the motion would be made, as required by a rule of the superior court. The court continued the hearing to a later date. During the period intervening before the motion came on, the defendant filed further affidavits. The notice itself was not amended in any way. Upon the foregoing papers and other evidence, the court granted the motion to vacate the default. It is true that the notice of motion did not comply with the requirement of the rule, now embodied in section 1010 of the Code of Civil Procedure (amended in 1907), that the grounds of motion must be stated in the notice. It appears, however, that the notice of motion stated that it would be made upon the records and papers on file and upon the affidavit of which a copy was served with the notice. The records referred to showed that no answer had been filed until default had been entered and the affidavit of Mr. Hengstler made it perfectly plain that he was seeking therein to establish a showing that the failure to file the answer within time had been caused by excusable neglect. The notice, together with the records and affidavits therein referred to, were sufficient to apprise the plaintiff of the fact that the purpose of the proposed motion was to seek relief under section 473 of the Code of Civil Procedure, and that the ground of the motion necessarily was the defendant's excusable neglect, which would justify relief under that section. The objection that the grounds of the motion were not stated in the notice was therefore properly disregarded. *Reher v. Reed*, 166 Cal. 525, 137 P. 263, Ann. Cas. 1915C, 737." Other decisions which have reaffirmed the rule as above stated are those in *Fink & Schindler Co. v. Gavros*, 72 Cal. App. 688, 237 P. 1083, and *Hecq v. Conner*, 203 Cal. 504, 265 P. 180.

[2-3] As to the second of appellant's points, however, we are of the opinion that it is well taken. It is true that appellate courts have always been and are favorably disposed towards such action upon the part of trial courts as will permit, rather than prevent, the adjudication of legal controversies upon their merits. This attitude is clearly expressed in *Jones v. Title Guaranty & Trust Co.*, 178 Cal. 375, 173 P. 586, 587, where it is said: "This court has always looked with favor upon orders excusing defaults and permitting controversies to be heard upon their merits. Such orders are rarely reversed, and never unless it clearly appears that there has been a plain abuse of discretion"—as well as in *O'Brien v. Leach*, 139 Cal. 220, 72 P. 1004, 96 Am. St. Rep. 105; *Wolff & Co. v. Canadian Pacific Ry. Co.*, 89 Cal. 332, 26 P. 825, and many other cases. It is also true that a large amount of discretion is vested in the trial court in the matter of applications for relief

from defaults (*Gorman v. California Transit Co.*, 199 Cal. 246, 248 P. 923; *Hitchcock v. McElrath*, 69 Cal. 634, 11 P. 487), but, as is said in *Bailey v. Taafe*, 29 Cal. 423: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."

Quoting and applying this rule the court in *Redding v. National Surety Co.*, 18 Cal. App. 488, 123 P. 544, 545, said: "Cases do occur where the appellate court is obliged to say that the action of the trial court involves a plain abuse of discretion; and in such a case it is the duty of the appellate court to reverse the action of the trial court." We feel that this is such a case. "Where, as in this case, a default and judgment have been duly and regularly entered against a litigant, such default and judgment cannot be set aside and vacated, except upon a showing that they were taken against him through his mistake, inadvertence, surprise, or excusable neglect." *Redding, etc., Mining Co. v. National Surety Co.*, supra.

[4] Did respondent make such a showing? These are the circumstances upon which it relies: The summons, together with two copies of the amended complaint, was served upon E. A. Robbins, manager of the defendant corporation, on March 8, 1926. This is undisputed. In his affidavit in support of the motion to vacate the default Mr. Robbins does not deny this fact, but merely says that there is nothing in the records of his company "indicating the time, place, or manner of the service upon said defendant." He says "that a copy of the amended complaint came to affiant's attention, so far as affiant recalls, for the first time on April 13, 1926" (the day the default was entered). He does not say what he did with the papers when received, or why they escaped his attention until over a month had passed. "On the discovery of the copy of the amended complaint," April 13, defendant corporation attempted to locate the Western Pacific Securities Company, its principal on the bond sued on, but discovered that it had gone out of business. It thereupon informed a codefendant, one Harbolt, "of the existence of this action," who thereupon directed (with what authority is not stated) respondent to take up the question of defense with his (Harbolt's) attorney. The latter, applied to to take the case, declined to do so until he had conferred with Harbolt, and subsequently, on April 29th, informed respondent that he would not act for it. Meanwhile respondent was advised by this attorney "that a default was being taken against defendant," and this information was corroborated by one of the counsel for appellant. The affidavit is

silent as to the date of these conversations, although the context would indicate that they occurred on April 13th. Counsel for the plaintiff (appellant) told Mr. Robbins he would communicate with his client "with regard to setting aside said default." It is not alleged that any promise to set it aside was made, or even intimated; but Mr. Robbins states that "in reliance thereon," referring to the statement that plaintiff's counsel would communicate with his client, respondent "took no action to set aside such default." These are all of the facts upon which the moving party relied as a showing of mistake, inadvertence, surprise, or excusable neglect.

It certainly cannot be said that the facts above and in Mr. Robbins' affidavit set forth show that respondent was in "some condition or situation in which the party to a cause is *unexpectedly* placed, to his injury, *without any default or negligence of his own, which ordinary prudence could not have guarded against.*" McGuire v. Drew, 83 Cal. 225, 23 P. 312. (Italics ours.) Rather do they disclose a parallel with the facts relied on in Coleman v. Rankin, 37 Cal. 247, where the defendant's affidavit on motion to vacate a default recited that the summons had been served on him while he was in attendance at court as a witness, and that "upon receiving the same this deponent placed the same in his hat, and the same was lost therefrom," and that, like Mr. Robbins in the instant case, he had made no note of the date of service on himself. We think the remarks of the Supreme Court in that case are applicable here, namely: "The affidavit of the applicant, so far from disclosing a reasonable excuse for his neglect, tends rather to disclose a degree of negligence, carelessness, and lack of diligence hardly to be predicated of a prudent business man. * * *" As said in Gillingham v. Lawrence, 11 Cal. App. 231, 104 P. 584, 585: "The defendant could read, and the summons expressly told him the time within which he must appear and answer. He let the time pass, and never even consulted an attorney. He was guilty of such carelessness and lack of diligence as could not be imputed to a prudent business man in a matter of material concern to himself. While courts are liberal in relieving parties of defaults caused by inadvertence or excusable neglect, and while they much prefer that a case should be heard on its merits, yet they do not act as guardians for incompetent parties, or parties who are grossly careless as to their own affairs. There must be rules and regulations by which rights are determined and under which judgments become final. If this court should determine that the defendant, as matter of law, was entitled to relief in this case, there could scarcely be a default judgment that would not have to be set aside, provided the proper affidavits could be procured from the defendant. * * * Where a party willfully slumbers upon his rights when he should be alert, and makes no efforts to protect him-

self, courts cannot patiently listen to flimsy excuses and the claim of ignorance of the law. It was the duty of defendant to read the summons, and not only to read it, but to heed it."

Courts do not relieve litigants from the effects of mere carelessness. The rule is thus stated in Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863, 864: "Inadvertence in the abstract is no plea upon which to set aside a default. The court must be made acquainted with the reasons for the inadvertence, and, if satisfactory, will act upon them, and relieve from burdens caused by them; but, if the inadvertence is wholly inexcusable, as if it arises from gross negligence, the court will not look upon it kindly, and will have none of it." See also, Durbrow v. Chesley, 24 Cal. App. 416, 141 P. 631; Gill v. Peppin, 41 Cal. App. 487, 182 P. 815, and Ross v. San Diego, etc., Co., 50 Cal. App. 170, 194 P. 1059, all of which reaffirm the rule as laid down in Shearman v. Jorgensen, supra. Many instances of the application of this rule may be found in the books. The following are typical: Where defendant's attorney, on receiving the copy of summons and complaint, served on defendant April 9, erroneously marked them, "Answer due April 23d," and "the only reason presented for his not having filed the answer is 'his mistake in marking said papers as aforesaid, and owing to the fact that there were so many cases against said defendants.'" Williamson v. Cummings, etc., Co., 95 Cal. 652, 30 P. 762. Where the secretary of defendant corporation, who had been served with copy of summons and complaint, delivered them five days later to the president of the company, who held them, "thinking that his attorney would be in every day, and therefore waited until he should come." Shay v. Chicago Clock Co., 111 Cal. 549, 44 P. 237. Where defendant, expecting to be engaged in business out of town, gave the papers to his partner, instructing him "to attend to the matter and have the action defended," and, supposing his partner had done so, "dismissed the subject from his mind," while the partner placed the papers in a pigeonhole and forgot about them. Slater v. Selover, 25 Cal. App. 525, 144 P. 298.

The decision in Gorman v. California Transit Co., 199 Cal. 246, 248 P. 923, might at first blush seem to offer comfort to respondent. There the summons was served on the secretary of the corporation, who at once handed it to the manager of the traffic department, with directions to deliver both it and the file relating to the accident which was the subject of the action to the president immediately upon the latter's return from a business trip. The file was placed on the manager's desk to await the president's return, "but prior thereto was inadvertently taken by one of the employees of the corporation—probably a stenographer in the traffic department" and returned to the usual repository for such files, the summons and complaint being with it. As a result the attention of the manager, "who was daily occupied with many details in

connection with his immediate department, was withdrawn from said file, with the result that the matter was not called to the attention of the president upon his return, nor in fact until some days after the default of the corporation had been taken and judgment thereon entered against it for the full sum sought by the plaintiffs in the action."

In affirming an order granting a motion to vacate a default based upon these facts, the court thus pointed out the existence of intervening circumstances which rendered the inadvertence of the corporation officers excusable: "In the instant case, the inadvertence and forgetfulness of the secretary of the corporation was due to the fact that he had delivered said summons and complaint to the manager of the traffic department of said corporation with instruction to deliver the same to the president thereof immediately upon his return. The inadvertence of the manager of the traffic department in failing to carry out such instruction was attributable to the fact that the file containing such papers had been mistakenly removed from his desk by another employee of the defendant, and that his attention amid the engrossing details of his department was thus withdrawn from the same and from his duty to present the papers to the president of the corporation upon his return. It seems to us that these intervening facts furnish a sufficient basis to justify the conclusion of the trial court that the inadvertence of the officials of the defendant corporation was excusable, and justified the order from which this appeal has been taken."

Here there was no such intervening circumstance, but merely a lack of ordinary care and prudence, and as elsewhere said in the opinion from which we have just quoted: "It is true that the discretion thus to be exercised by the trial court is not capricious or arbitrary, but is an impartial discretion which must be guided and controlled in its exercise by fixed legal principles, and it should, therefore, appear that something more than mere inadvertence or neglect without reasonable excuse or justification existed, and that the inadvertence or neglect in question was not the result of mere forgetfulness on the part of the person or official charged with the duty of responding to the legal process in due time, but that such inadvertence or neglect was based upon other circumstances which would suffice to render the same excusable. Therein lies the distinction, we think, between the cases relied upon by the appellant in support of this appeal and the instant case."

We are constrained to hold that the learned trial court abused its discretion in granting the motion.

The order is reversed.

We concur: WORKS, P. J.; CRAIG, J.

100 Cal. App. 611

GLANTZ v. FREEDMAN. (Civ. 3742.)

District Court of Appeal, Third District, California. Sept. 17, 1929.

1. Factors ⇨1—Relation created by plaintiff appointing defendant his agent and delivering grapes to defendant to sell was that of principal and factor (Civ. Code, § 2026).

Where plaintiff appointed defendant as his exclusive agent for selling grapes, and agreed to deliver grapes to defendant at packing house, and promised to pay certain sum per crate as compensation, such contract created relation of principal and factor, under Civ. Code, § 2026.

2. Factors ⇨24—Factor, violating grape-selling contract as to place of sale, was liable for net market value of grapes at time of delivery.

Where contract between principal and factor required factor to sell grapes at shipping point, and factor shipped to Eastern market, as factor sold grapes in violation of contract, he was liable for net market value of grapes at shipping point at time of delivery.

3. Factors ⇨42—Where principal's complaint alleged sale to defendant, and proof showed defendant, as factor, had sold in violation of contract, held there was no variance.

Where complaint alleged sale of grapes by plaintiff to defendant and prayed for reasonable value thereof, and proof was that grapes had been delivered to defendant as factor, but that defendant had sold in violation of contract with plaintiff, held, that there was no variance, as one whose goods are wrongfully taken and used by another may sue for their value as for goods sold and delivered.

4. Evidence ⇨113(1)—Basis of witness' estimate of market value may include result of inquiries, relevant documents, or facts of relevant sales known to witness.

Basis of a witness' estimate of market value may include result of inquiries made of others, commercial circulars, correspondence, or telegrams, market quotations or reports, price lists, prices current, or facts of relevant sales known to the witness.

5. Factors ⇨43—Action for damages for breach of contract held not to furnish exclusive remedy for factor's breach of contract.

Where factor sold grapes at Eastern markets, instead of at shipping point, as required by contract with principal, though remedy of an action for damages for breach of contract was available to principal, it did not constitute the exclusive remedy.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by P. H. Glantz against Charles Freedman. Judgment for plaintiff, and defendant appeals. Affirmed.

T. B. Scott, of Modesto, for appellant.
Nutter, Hancock & Rutherford, of Stockton, for respondent.

FINCH, P. J. The plaintiff, as principal, and the defendant, as agent, entered into a contract for the sale of the former's grapes by the latter. The contract contains the following:

"It is therefore agreed that the said principal hereby appoints the said agent as his sole and exclusive agent for selling said grapes f. o. b. cars shipping point for the account of principal, unless written instructions are delivered to the said agent to consign same, and agrees to pay said agent the sum of 20 cents per lug or packed crate as his entire compensation for furnishing lugs, receiving, loading and for sale of said grapes. Boxes to be furnished by agent at Lodi, California, and principal agrees to pick and deliver grapes to agent at packing house or railroad cars, in compliance with federal, state and county rules."

At the time of the transactions between the parties, the defendant was engaged in the fruit business at Modesto, Lodi, and other places. He maintained an office at Modesto, but not at Lodi. His "representatives or agents" at Lodi were Fred Wall and John Wittmayer. Wittmayer executed the contract in question as the defendant's agent. When the contract was presented by Wittmayer to the plaintiff for execution, the latter refused to sign it. Wittmayer thereupon wrote the defendant, asking for an interpretation of the form of contract used. The defendant's bookkeeper wrote Wittmayer in reply that, "if immediate sale is not effected, we will take the stuff on ourselves at the market price and pay on that basis." This letter was signed, "Chas. Freedman, per O. J. J.," the bookkeeper's name being O. J. Jennings. Wittmayer showed the letter to the plaintiff, and he thereupon signed the contract. Respondent contends that the letter is a part of the contract between the parties. It is deemed unnecessary to decide this question; there being other sufficient grounds upon which to affirm the judgment.

The complaint alleges: "That within two years last past plaintiff sold and delivered to defendant at defendant's instance and request, 1,467 boxes of Tokay grapes at an agreed purchase price or value of the sum of \$1,834.40. That no part of said sum has been paid by defendant to plaintiff except the sum of \$829.46. * * * That the said price * * * was the reasonable value thereof, and the market value thereof at the dates when the same were sold and delivered."

The answer denies that the plaintiff sold any grapes to the defendant, and alleges that the plaintiff "consigned certain grapes to defendant; that defendant sold the same pursuant to agreement, and has fully accounted to plaintiff, and paid over to plaintiff all moneys due from defendant to plaintiff." The plaintiff was given judgment, and the defendant has appealed.

[1-3] Appellant contends that there is a fatal variance between the allegations of the complaint and the proof, in that the complaint sets up an express contract of sale, while the evidence shows that the grapes were consigned to the defendant to be sold by him as agent for the plaintiff. The relation between the parties created by the contract was that of principal and factor. Civ. Code, § 2026. Instead of selling the grapes at the shipping point, as required by the contract, the defendant shipped most of them to the Eastern markets, where they were sold for but a trifling sum above freight and other expenses. The plaintiff testified that he did not authorize the defendant, either in writing or orally, to sell the grapes at any place other than the shipping point. Having sold them in violation of the terms of the contract, the defendant became liable for their net market value at the shipping point at the time of their delivery. *Betts v. Southern California Fruit Exchange*, 144 Cal. 402, 77 P. 993. "In many cases * * * the principal may treat the unauthorized sale, not merely as a breach of contract, but as a conversion of the goods." *Mechem on Agency* (2d Ed.) § 2529; *Pugh v. Porter Brothers Co.*, 118 Cal. 628, 633, 50 P. 772. "It is well settled under the authorities that, when one's goods are wrongfully taken and used by another, he may waive the tort and sue in assumpsit for their value, as for goods sold and delivered." *Miller v. Murphy*, 186 Cal. 344, 349, 199 P. 525, 528; *Armstrong v. Kubo & Co.*, 88 Cal. App. 331, 334, 263 P. 365; 3 Cal. Jur. 377, 380. "In many jurisdictions this doctrine is limited to cases where the wrongdoer has sold the property or otherwise converted it into money, in which event the plaintiff may maintain an action for the proceeds. 4 Cyc. 332. In this state, however, as in a number of others, a broader rule enables one whose goods are wrongfully taken and used by another to sue in assumpsit for their value as for goods sold and delivered." *Bechtel v. Chase*, 156 Cal. 707, 711, 106 P. 81, 83. Tested by the foregoing authorities, there is no variance between the allegations of the complaint and the proof.

[4] It is next contended that "evidence on market value was admitted without the proper foundation having been laid." The basis of a witness' estimate "may include the result of inquiries made of others, commercial circulars, correspondence, or telegrams, market quotations or reports, price lists, prices current, or the facts of relevant sales known to the witness." 22 C. J. 575. In *Betts v. Southern California Fruit Exchange*, 144 Cal. 402, 409, 77 P. 993, 995, it is said: "The testimony of the plaintiff with reference to the market price of the lemons was not incompetent merely because his knowledge was derived from the information of others. * * * The market price of an article is often shown by reference to published statements of that

fact." Under the rules quoted, the evidence shows ample foundation for the estimates of the witnesses.

[5] Appellant contends that respondent's remedy was an action for damages for breach of contract. While such an action was doubtless available to the plaintiff, it is clear from the authorities cited herein that it was not the exclusive remedy.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

100 Cal. App. 567

CARTER v. CHEVALIER et al. (Civ. 6757.)*

District Court of Appeal, First District, Division 1, California. Sept. 16, 1929.

Rehearing Denied Oct. 16, 1929. Hearing Denied by Supreme Court Nov. 14, 1929.

1. Taxation $\S$ 788(1)—It nowhere appearing in tax deed that property was sold to grantee, deed is not primary evidence that grantee was purchaser at tax sale (Pol. Code, $\S\S$ 3785b, 3786).

Though, under Pol. Code, $\S$ 3786, a tax deed, in substance and form as set forth in section 3785b, is made primary evidence that "at a proper time and place the property was sold as prescribed by law, and by the proper officer," it nowhere appearing in deed that property was sold to grantee, execution of deed is not primary evidence that grantee in deed was purchaser at the sale.

2. Taxation $\S$ 788(3)—In absence of statute, one claiming under tax deed must affirmatively show that all legal requirements have been complied with.

At common law a tax deed does not ipso facto transfer title of owner, but its operative character depends on regularity of anterior proceedings, and no presumption arises on mere production of deed that facts on which it is based had any existence, but it is necessary that one claiming under such deed show affirmatively that all requirements of law have been complied with, and this rule is relaxed only to extent that statute relaxes it.

3. Statutes $\S$ 235—Statute divesting title to realty should be strictly construed and material requisites strictly complied with.

A statute which divests title to real estate ought to be strictly construed, and every requisite having a semblance of benefit to person whose title is sought to be divested should be strictly complied with.

4. Courts $\S$ 93(1)—Decisions that tax deeds omitting to recite any fact required by statute to be recited are void constitute rule of property (Pol. Code, $\S$ 3785b).

Court decisions holding tax deeds void, when they omit to recite any of facts required by Pol. Code, $\S$ 3785b, to be recited, constitute a rule of property, from which court should not depart.

5. Taxation $\S$ 761—Tax deed to purchaser other than state, not reciting property was sold to one named as grantee, is insufficient to transfer title (Pol. Code, $\S\S$ 3771a, 3785b).

Under Pol. Code, $\S$ 3785b, setting forth substance and form in which deed may be executed when property is sold at tax sale to purchaser other than state, and section 3771a, requiring as prerequisite to conveyance that property be sold by tax collector at public auction to highest bidder, tax deed, to be primary evidence, should recite the fact that property was sold to person named as grantee in such tax deed, and in absence of such recital is not legally sufficient to transfer title.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by W. T. Carter against John L. Chevalier and others. From an adverse judgment, plaintiff appeals. Affirmed.

Strother P. Walton, of Fresno, for appellant.

J. P. Bernhard and Frank Kauke, both of Fresno, for respondents.

PER CURIAM. This action was brought by plaintiff for the purpose of quieting his title to a certain tract of land situate in Fresno county; the title claimed by plaintiff being based on a deed from the tax collector of Fresno county, dated June 25, 1927. In the year 1896 the defendant Joseph L. Chevalier became the owner of the real property, in controversy, and each year thereafter paid the taxes assessed thereon, save and except the second installment of taxes for the fiscal year 1921-1922, which was overlooked and thereafter became delinquent. Had the defendants been permitted to redeem from such delinquent taxes at the time plaintiff brought this action, the amount required for such redemption would have been, or was, \$41.25, and that amount, or such other amount as the court might find to be the required sum, the defendants offered to pay to plaintiff. The plaintiff offered no proof of his title, other than the tax collector's deed, claiming that the deed was made pursuant to and in the form prescribed by section 3785b of the Political Code, and that no other proof was necessary to establish his title.

The deed from the tax collector to appellant recites: "This indenture, made the 25th day of June, 1927, between Ray W. Baker, tax collector of the county of Fresno, state of California, first party, and W. T. Carter, Fresno county, second party, witnesseth: That whereas, the real property hereinafter described was duly assessed for taxation in the year 1921, to J. L. Chevalier (stating name as on assessment roll) and was thereafter on the 19th day of June, 1922, duly sold to state of California by Ray W. Baker, tax collector of said county of Fresno, for nonpayment of delinquent taxes which had been le-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

gally levied in said year 1921, and were a lien on said real property, the total amount for which the same was sold being twenty-three and 01/100 dollars (\$23.01). And whereas, all taxes levied and assessed against said property prior to the year 1927 have been paid and discharged: Now, therefore, the said first party in consideration of the premises, and in pursuance of the statute in such case made and provided does hereby grant to said second party that certain real property in the county of Fresno, state of California, more particularly described as follows, to wit: National Col. E ½ of lot 30 (less 2 acs. for dry creek and roads), Sec. 23, Twp. 13, Rg. 20; 8 acres. In witness whereof," etc.

[1] Section 3771a of the Political Code provides that "all property which has not been redeemed from the sale to the state or the sale thereon cancelled shall be sold by the tax collector at public auction to the highest bidder for cash," and section 3785b provides: "When property has been sold to a purchaser at delinquent tax sale, other than the State of California, in pursuance of section 3771 of the code, the tax collector must forthwith execute a deed to such purchaser." In other words, when property has been sold to the state for delinquent taxes and has not been redeemed within the time prescribed, it shall, after the requisite notice has been given, be sold at public auction to the highest bidder, to whom a deed shall be made by the tax collector. From the deed in evidence and on which plaintiff relies solely to establish his title it appears that on June 19, 1922, the property was sold by the tax collector to the state of California for the delinquent taxes which had been legally levied in the year 1921, but it does not appear that ever at any time the property was sold by the tax collector at public auction to the plaintiff. While under section 3786 of the Political Code a deed in substance and form as set forth in section 3785b is made primary evidence that "at a proper time and place the property was sold as prescribed by law, and by the proper officer," it nowhere appearing in the deed that the property was sold to the plaintiff, the execution of the deed is not primary evidence that the plaintiff, as grantee in the deed, was the purchaser at the sale.

[2, 3] The deed form set out in section 3785b, in which section it is provided that the deed shall be in substance and may be in the form prescribed, is a form to be used "when property has been sold to a purchaser at delinquent tax sale, *other than the state of California*," and therefore should recite the fact, if it be a fact, that the property was "duly sold to" *the purchaser at the sale*, and not "duly sold to state of California," as is set forth in the deed here. At common law a tax deed does not ipso facto transfer the title of the owner as in grants from the government or in deeds between individuals, but its operative character depends upon the regularity of

the anterior proceedings, and no presumption arises upon the mere production of the deed that the facts upon which it is based had any existence. *Buck v. Canty*, 162 Cal. 226, 121 P. 924; *Miller v. Miller*, 96 Cal. 376, 31 P. 247, 31 Am. St. Rep. 229. In the absence of statute, it is necessary that one claiming under a tax deed show affirmatively that all the requirements of the law have been complied with (*Emeric v. Alvarado*, 90 Cal. 444, 27 P. 356), and this rule is relaxed only to the extent that the statute relaxes it. A statute which divests the title to real estate ought to be strictly construed and every requisite having a semblance of benefit to the person whose title is sought to be divested should be strictly complied with. *Atkins v. Kinnan*, 20 Wend. (N. Y.) 241, 32 Am. Dec. 534; *Grimm v. O'Connell*, 54 Cal. 522.

[4] In the case of *Bussenius v. Warden*, 71 Cal. App. 717, 236 P. 371, the respondent claimed that the tax deed was void on its face because it failed to state a fact required by the statute to be stated in a deed of the kind in question. Section 3785b of the Political Code then, as now, contained the recital among other things that the property "was duly assessed for taxation"; but the deed omitted the words "for taxation" and contained the following: "That whereas, the real property hereinafter described was duly assessed in the year 1914." In that case it is stated: "We think that the deed was not legally sufficient to transfer title. 'It has uniformly been held in this state that a tax deed which misrecites or omits to recite any one of the facts required by the statute to be recited has no effect at all as a conveyance, the theory being that it is competent for the legislature to prescribe the form of instrument which, as the result of a proceeding in invitum can alone divest the citizen of his title, and that where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued, and it is not for the courts to inquire whether the required recitals are of material facts or otherwise.' *Henderson v. De Turk*, 164 Cal. 296, 128 P. 747. While it is true that under section 3785b the 'form' need not be absolutely that prescribed in the statute, the prescribed facts must be stated in the deed. Property may be 'assessed' for purposes other than taxation. Therefore a recital that the property has been 'assessed' is not equivalent to a statement that it was assessed for taxation." There are numerous decisions holding tax deeds void when they omit to recite any one of the facts required to be recited, and there are no decisions laying down a different rule. These decisions constitute a rule of property from which the court should not depart. *Henderson v. De Turk*, 164 Cal. 296, 128 P. 747.

[5] Section 3785b, setting forth the substance and the form in which a deed may be executed, when property is sold, at tax sale

to a purchaser *other than the state*, and section 3771a requiring as a prerequisite to a conveyance that the property "shall be sold by the tax collector at public auction to the highest bidder for cash in lawful money of the United States," the tax deed, to be primary evidence, should recite the fact, if it be a fact, that the property was sold to the person named as grantee in such tax deed. Not having done so, under the authority of *Busenius v. Warden*, *supra*, which is analogous in principle to the question here presented, it must be held that the tax deed is not legally sufficient to transfer title.

The conclusion reached renders unnecessary discussion of the point raised as to the sufficiency of the "Addenda Notice" or reference to the authorities cited by appellant, as they do not deal with the question here considered.

The judgment is affirmed.

100 Cal. App. 587

PEOPLE v. SHERMAN. (Cr. 1842.)★

District Court of Appeal, Second District, Division 1, California. Sept. 17, 1929.

Rehearing Denied Sept. 27, 1929. Hearing Denied by Supreme Court Oct. 17, 1929.

- 1. False pretenses** $\S$ 49(3)—Evidence held to sustain conviction of issuing check without sufficient funds, although payee had suffered no loss (Pen. Code, $\S$ 476a).

Where defendant issued check in payment of goods with no funds to pay check, and merchant learning such to be the case relieved defendant of merchandise, evidence held sufficient to sustain conviction of issuing check without sufficient funds with intent to defraud, as under Pen. Code, $\S$ 476a, it is not necessary element to such crime that person receiving check shall have been defrauded or suffered loss.

- 2. Criminal law** $\S$ 721(5)—Statement of district attorney in argument that people's evidence was not controverted was not error as comment on defendant's failure to testify.

In prosecution for issuing checks without sufficient funds to pay same, statement of district attorney, in argument to jury, that evidence of the people was not controverted and had to be taken as true, and there was no denial that writing on check was not defendant's handwriting, and that there was no denial that defendant had issued check, was not error as comment on defendant's failure to testify.

- 3. Witnesses** $\S$ 269(2)—Cross-examination of defendant's father as to defendant's true name held germane to direct examination.

In prosecution for issuing checks without sufficient funds to pay same, overruling defendant's objection to question put to defendant's father on cross-examination, as to defendant's true name, was not error, where defendant had twice caused his name to be changed during proceedings and father had stated his name on direct examination.

- 4. Criminal law** $\S$ 656(2)—In prosecution for issuing check without sufficient funds, where defendant had no attorney, examination of certain witnesses by court was not misconduct.

In prosecution for issuing check without sufficient funds to pay same, where defendant had no attorney, examination of certain witnesses by court, although more extended than customary, was not error.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Robert C. Sherman was convicted of issuing checks without sufficient funds, and he appeals. Affirmed.

George D. Higgins, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. Defendant and appellant was charged by information filed by the district attorney of Los Angeles county, in each of three counts, with the crime of issuing checks without sufficient funds. Count III was dismissed by the court during the trial and a verdict of guilty was found against the defendant upon counts I and II. From this judgment of conviction and denial of his motion for a new trial, defendant prosecutes this appeal.

Appellant first urges that there is insufficient evidence to sustain the verdict as to the charge in count I. The evidence relating to this charge may be briefly summarized as follows: Defendant entered the store of the May Company in Los Angeles and purchased certain merchandise, the bill amounting to \$12.35. As the merchandise was being wrapped by the saleslady, the defendant made out a check drawn on the United States National Bank for the sum of \$12.35, which he tendered in payment for the merchandise. The saleslady before delivering the package to the defendant advised him that it was necessary for her to secure an O. K. on the check, whereupon the defendant stated that he would attend to some errand and return a few minutes later. The check was passed over to one Sabre, whose special duty in the May store was to examine and pass upon checks tendered in payment of purchases. The witness Sabre testified that when the check was handed him, he called up the United States National Bank and was informed by some clerk in the bank that he could find no record in the bank of an account in the name of Robert C. Sherman. Upon defendant's return, under instructions of Sabre, the saleslady handed the package of merchandise to him. Sabre then accosted defendant, asking him if he was Robert C. Sherman. Defendant answered that he was, and that he issued the check in question. Whereupon Sabre requested him to step to the office, where

Sabre informed him of the report he had received from the bank to the effect that they had no record of an account in the name of Robert C. Sherman. Defendant admitted that he had no account there, and added that he had issued several other checks without having funds to meet them. The defendant was relieved by Sabre of the package of merchandise and placed under arrest.

[1] Appellant urges, in view of the fact that the May Company was not defrauded out of any money or property, and particularly the fact that before the merchandise was delivered to the defendant, the May Company, through its agent Sabre, had been informed that defendant had no account in the United States National Bank, that no crime had been committed.

There is no merit in this contention. It is not a necessary element to constitute the crime of issuing a check without sufficient funds with intent to defraud, that the person receiving the check shall have been defrauded, or suffered any loss. Section 476a of the Penal Code denounces as a crime the act of one who makes, or draws, or utters, or delivers to another person a check for the payment of money, knowing at the time he makes, draws, utters, or delivers such check he has not sufficient funds in or credit with the bank to meet the check. In the instant case it is not disputed that the defendant issued and delivered the check for the purpose of securing the merchandise, and that at the time of so doing, he knew he had no funds in the bank to meet the check. All the necessary elements to constitute the crime are clearly shown. *People v. Williams*, 69 Cal. App. 169, 230 P. 667; *People v. Khan*, 41 Cal. App. 393, 182 P. 803; *People v. Bercovitz*, 163 Cal. 636, 126 P. 479, 43 L. R. A. (N. S.) 667.

The cases of *People v. Wilkins*, 67 Cal. App. 758, 228 P. 367, and *People v. Weaver* (Cal. App.) 274 P. 361, are not in conflict with the authorities above cited. In fact, they do not sustain appellant's contention on the point involved.

[2] The next point urged is the alleged misconduct of the district attorney in his argument to the jury in making the following statement: "The evidence of The People is not controverted here by any evidence. You have to take it as true. There is no denial here that this is the defendant's handwriting; no denial here that he issued these checks, not a bit in the world." It is appellant's contention that this language was equivalent to saying that the defendant had failed to take the stand to testify in his own behalf. We cannot agree with appellant's contention in this respect. While the statement complained of may have been susceptible of the interpretation placed upon it by appellant, we do not feel that the language carries with it the vice that has been held to be prejudicial error. Fairly interpreted, it is an assertion that there had been no evidence controverting

that presented by the state upon a vital issue in the case. Such a comment has been held to be within the right of the district attorney. *People v. Sutherland*, 59 Cal. App. 462, 210 P. 965; *People v. McNamara*, 65 Cal. App. 521, 224 P. 476. Furthermore, it appears that no objection was made by defendant to the statement of the district attorney complained of.

[3] The third point raised is that the court erred in overruling the objections of the defendant to a question asked in cross-examination of the defendant's father. The following excerpts from the record cover the episode referred to:

By Mr. McCartney (district attorney) in cross-examination:

"Q. Your name is Graham? A. Yes, sir.

"Q. You say you are the father of the defendant? A. Yes, sir.

"Q. What is his true name?"

Mr. Sherman (the defendant): "Just a minute, I object to that as incompetent, irrelevant and immaterial, not proper cross-examination. * * *

The court: "What was the question again?" (Question read.)

The court: "If you know you may answer the question. A. Alfred Graham."

It should be noted in considering the foregoing portion of the record that the defendant acted as his own attorney in the trial. The record shows that at the preliminary hearing, defendant gave his true name as Allison Lee Graham, instead of Robert C. Sherman, the name under which he was charged in the complaint. In the information the name Allison Lee Graham appeared. When arraigned he was asked as to his true name, and replied, "Robert C. Sherman," whereupon the court permitted the district attorney to amend the information by substituting the name of Robert C. Sherman for Allison Lee Graham. Inasmuch as the witness had upon direct examination stated that he was the father of the defendant, and that his name was Alfred L. Graham, it was within the right of the district attorney in cross-examination to inquire into the asserted relationship. The question complained of was germane to that inquiry. Nor can it be urged that the inquiry was not pertinent, for the reason that the name of the defendant is always a pertinent matter in a criminal prosecution. The fact that the defendant had caused his name to be changed twice during the proceedings would make even more pertinent the inquiry as to the real identity of the defendant.

Appellant attacks the ruling of the court on the ground that in permitting the question to be answered, it was equivalent to permitting the witness to give the alias names under which defendant may have been known, and which line of inquiry has been held to be prejudicial error. We cannot agree that the question complained of comes within the scope of the cases cited by appellant. In any event, we are satisfied that there was no prej-

udicial error in the ruling of the court on this point.

[4] The fourth and last point urged has to do with the examination by the court of certain witnesses, which examination the appellant characterizes as "misconduct of the court." We have carefully read the record of the testimony, and while it appears that the questioning of witnesses by the court was somewhat more extended than is customary, we do not believe that it can reasonably be said that either in the extent, or in the manner of the questioning, did the court exceed its power. The record shows that the defendant requested of the court that the public defender, who had been appointed to represent him, be relieved of the appointment, as he (the defendant) felt he was able to and desired to defend himself. The court reluctantly granted his request in this respect, and, as frequently happens under such circumstances, the trial was delayed and the proceedings interrupted, because of the unfamiliarity of the defendant with court proceedings and methods of presenting evidence. The questions asked by the court might very well have elicited information that would have been helpful to the defense. We are satisfied there was no prejudicial error in this examination.

The judgment and order denying defendant's motion for a new trial are affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

100 Cal. App. 618

LIPP et al. v. MOON. (Civ. 3827.)

District Court of Appeal, Third District, California. Sept. 17, 1929.

1. Automobiles §244(11,43)—In action for damages to automobile received in collision at street intersection, finding as to plaintiff's negligence and defendant's lack thereof held supported by evidence (Motor Vehicle Act, § 131, as amended by St. 1925, p. 412, § 15).

In action to recover damages to automobile received in collision at street intersection, evidence that defendant had the right of way under Motor Vehicle Act, § 131, as amended by St. 1925, p. 412, § 15, because first entering the intersection, and that plaintiff entered intersection at an unlawful speed, held to sustain finding that plaintiff was negligent and defendant was not.

2. Appeal and error §1011(1)—Findings of trial court based on conflicting evidence are conclusive on appeal.

Findings of trial court based on substantially conflicting evidence are conclusive on appeal.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Frank M. Lipp and another, co-partners doing business under the firm name

and style of Lipp & Sullivan, against Wesley A. Moon. From a judgment for the defendant, plaintiffs appeal. Affirmed.

Otis D. Babcock, Hugh B. Bradford, both of Sacramento, and J. J. Harrington, of San Francisco, for appellants.

Lawrence Schillig, of Yuba City, and Desmond A. Winship, of Berkeley, for respondent.

FINCH, P. J. The plaintiffs' Packard motor hearse and the defendant's Pontiac sedan collided at a street intersection in Sutter City, causing damage to both vehicles and personal injuries to the defendant. Both parties seek to recover damages in this action. Judgment was entered in favor of the defendant for damages, and the plaintiff has appealed. The only ground urged for a reversal is that the evidence is insufficient to warrant the findings and judgment.

[1, 2] The collision occurred at the intersection of Acacia and Nelson streets. Acacia street is 62 feet wide and a strip 14 feet in width along the middle thereof is paved. Nelson street is 97 feet wide, and the middle thereof is graveled to the width of 30 feet. At the time of the collision the hearse was going south along the paved part of Acacia street and the defendant was going west on Nelson street. The evidence shows that the two vehicles came together when the front wheels of the defendants' automobile were 4 feet west of the pavement and 2 feet north of the medial line of Nelson street. A witness for the defendant testified that the front part of the defendant's automobile was not "injured in any way"; that the injury to it was "on the running board and the side of the frame, on the right side of the car, the frame was sprung in and the body was caved in on the right-hand side of the automobile, the right-hand front fender was not broke"; that "the left-hand front fender" of the hearse "was smashed down onto the front wheel and the left-hand front axle was sprung" and the left-hand headlight was broke"; and that the hearse turned over on its left side, facing west, in a southwesterly direction from the point where the collision occurred, the rear end of the hearse being 32 feet from such point. The defendant testified that he was driving west along the gravel part of Nelson street at not "over 15 miles" an hour "and that he slackened just before" he "came to the intersection"; that when he reached the intersection he looked to the right, but "saw no car and proceeded to go across"; and that he "didn't know any more" until he found himself in a hospital. The driver of the hearse testified that he was going at the speed of about 20 miles an hour as he approached the intersection; that he first saw the defendant's automobile when it was 30 feet east of the intersection; that he applied

the brakes of the hearse when he came "into the intersection," about 30 feet from the point of the collision; and that he swung to the right in an effort to avoid the collision. A witness for the defendant testified that marks on the pavement showed that the left hind wheel of the hearse had slipped for a distance of about 45 feet north of the center of the intersection and the right-hand wheel for a distance of 12 feet less, indicating that the brakes of the hearse were applied before it entered the intersection. If the hearse moved so great a distance with the brakes applied and then went 32 feet or more further after striking the defendant's automobile with the force indicated by the evidence, it must have approached and entered the intersection at a speed greatly in excess of 20 miles an hour. If the defendant's testimony as to the speed at which he entered the intersection is true, then he was well within the boundary lines thereof before the hearse reached the north boundary line. Section 131 of the Motor Vehicle Act, as amended in 1925, provided: "When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed." St. 1925, p. 412, § 15. It cannot be held, under the evidence stated, either that the two vehicles approached the intersection at approximately the same time or that the plaintiffs' hearse was traveling at a lawful speed. The findings of the court, based upon substantially conflicting evidence, that the plaintiffs' driver was negligent and that the defendant was not, are conclusive on appeal.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

100 Cal. App. 608

LATTA v. DA ROZA et ux. (Civ. 3694.) ★

District Court of Appeal, Third District, California. Sept. 17, 1929.

Rehearing Denied Oct. 17, 1929.

1. Customs and usages ☞14—Express contract of parties controls general trade meaning of expressions.

General trade meaning of expressions is controlled by express contract of parties.

2. Customs and usages ☞12(1)—Local usage, confined to particular trade or occupation, is not binding on persons not engaged in the calling, without express or implied knowledge of its existence.

Where usage is local, and confined to particular trade or occupation, it is not binding on those not engaged in the calling, unless they have express or implied knowledge of its existence.

3. Customs and Usages ☞12(2)—Local trade customs are not presumed generally known.

Trade customs, limited to certain communities, are not presumed to be known to all persons.

4. Customs and usages ☞12(1)—To bind one not engaged in occupation which employs usage not commonly accepted, proof of actual knowledge of usage is necessary.

To bind one who is not engaged in trade or occupation which employs trade usage, proof of his actual knowledge of usage is necessary, unless usage is so commonly accepted that public is presumed to recognize its existence.

5. Customs and usages ☞15(1)—Evidence of applicable usage may be received to explain parties' intent, where contract is uncertain (Code Civ. Proc. § 1870, subd. 12).

When language of contract is uncertain or ambiguous, evidence of usage applicable to the transaction may be received to explain the intent of parties under Code Civ. Proc. § 1870, subd. 12.

6. Customs and usages ☞12(1)—Defendants, sued for balance due on contract to lay pipe, held not bound by trade custom, of which they were ignorant, to effect that charge for hauling pipes was not included.

In action for balance due on a written contract to lay 12-inch pipe on defendants' property, custom of trade to the effect that contract to lay pipe did not include charge for hauling the same held not binding on defendants, where it affirmatively appeared that they had no knowledge of the existence of such usage.

7. Appeal and error ☞931(6)—It must be assumed that trial court, in action on contract for laying pipe, disregarded insufficient evidence of trade usage, and rendered judgment on affirmative testimony of independent agreement to pay for hauling.

In action for balance due on contract to lay pipe on defendants' property, it must be assumed that trial court disregarded insufficient evidence of usage of trade custom to charge extra for hauling pipe, and rendered judgment for plaintiff on affirmative testimony of independent agreement to pay for hauling.

8. Contracts ☞349(2)—Oral testimony as to defendant's duty to pay extra for hauling pipe, under contract for laying pipe at specified price per foot, held competent.

In action for balance due on contract to lay 12-inch pipe on defendants' property at specified price per foot, oral testimony on question whether defendants were obliged to pay extra for hauling pipe was competent, in view of uncertainty of terms of contract.

9. Appeal and error ☞1011(1)—Evidence on which judgment was based, though contradicted, is controlling on appeal.

Evidence forming basis for trial court's judgment, though contradicted, is controlling on appeal.

10. Husband and wife ⇨138(2)—Evidence held to support finding that husband, owning ranch with wife, acted as her agent in entering into contract for laying pipe.

In action for balance due on contract to lay pipe on ranch property owned by husband and wife, evidence *held* sufficient to support finding that husband acted as wife's agent in entering into contract.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Burr Latta against Edw. L. Da Roza and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Walter F. Lynch and Ernest Spagnoli, both of San Francisco, for appellants.

Bradford, Cross & Prior, of Sacramento, for respondent.

ROLFE L. THOMPSON, J. This is an appeal from a judgment for a balance due on a written contract "to lay 12-inch pipe on the property of Edw. L. Da Roza at 45 cents per foot. * * *" There is a conflict of evidence regarding the number of feet of pipe which was actually laid. It is contended the evidence does not support the judgment against the defendant Roma V. Da Roza. The chief controversy, however, is concerning the admission of testimony affecting an alleged trade custom respecting the construction of the term "to lay," which is employed in the contract.

The written contract was silent regarding the hauling of the pipe. Without objection the plaintiff testified: "This written contract did not contain all the agreements had with Da Roza. Mr. Da Roza was to haul the pipe, but later, because he was so busy, hired me to haul the pipe and all materials on a tonnage basis." Over objection on the part of defendants, the witness Hartman was permitted to testify that he had been in the pipe business many years, and was familiar with the usages and customs of the trade, and that the term "to lay" did not include a hauling charge. In response to this testimony the defendant Edward Da Roza testified: "That said contract was the only contract entered into between the parties hereto; that under such contract plaintiff agreed to and was to haul and lay the pipe for 45 cents a foot; [that] I am not, and never was, familiar with the customs or usages of pipe dealers or pipe laying contractors." The record contains no further testimony respecting the defendants' knowledge of the alleged trade custom.

[1-4] The general trade meaning of expressions is controlled by the express contract of the parties. *Browning v. McNear*, 158 Cal. 525, 111 P. 541. In view of the conflict of evidence respecting the charge for hauling pipe, the judgment should be affirmed, unless the foregoing evidence as to the trade custom was

incompetent and prejudicial. Clearly, the challenged evidence in the present case affects a special trade usage, which is presumed to be known by and binding upon those who are engaged in that particular trade or calling. 25 Cal. Jur. 419, § 4; 27 R. C. L. 162, § 10. When a usage is not general in character, but, upon the contrary, is local and confined to a particular trade or occupation, it is binding upon those not engaged in the calling, only, who have either express or implied knowledge of its existence. 27 R. C. L. 163, § 11. Customs of special trades and local usages, which are limited to certain communities, are not presumed to be known to all persons. *Jones on Evidence* (3d Ed.) 714, § 464. To bind one who is not engaged in the trade or occupation which employs the usage relied upon, proof of his actual knowledge of the usage is necessary, unless it is so commonly accepted that the public is presumed to recognize its existence.

[5-7] When the language of a contract is uncertain or ambiguous, evidence of usage applicable to the transaction may be received to explain the intent of the parties. Section 1870, subd. 12, Code Civ. Proc.; 25 Cal. Jur. 425, § 10. In the present case, however, the alleged custom of the trade, to the effect that a contract to lay pipe does not include a charge for hauling the same, is not binding on the defendants, in the absence of an agreement to the contrary, for the reason that it appears affirmatively without contradiction that they had no knowledge of the existence of such usage. Nor does it appear this alleged usage is of such a character or general prevalence as to require a presumption of common knowledge of its existence. Since the evidence is uncontradicted that the defendants were ignorant of the usage of the trade in so construing the language of the contract, and since, under the circumstances of this case, knowledge on the part of the defendants was necessary in order to bind them to a mere custom, it must be assumed the trial court disregarded the insufficient evidence of usage, and rendered its judgment on the affirmative testimony of an independent agreement to pay for hauling the pipe. The court adopted no finding relative to usage.

[8, 9] The terms of the contract were uncertain with respect to the obligation to pay for hauling the pipe, and oral testimony upon this subject was therefore competent. There is substantial evidence, independent of the alleged usage, to the effect that defendants hired the plaintiff "to haul the pipe and all materials on a tonnage basis," apart from the contract to lay the pipe. While this evidence was contradicted by the defendants, it is nevertheless controlling upon this court on appeal.

[10] There is no merit in the claim that the judgment is not supported by evidence

which is binding upon the defendant Roma Da Roza. The agency of her husband and co-defendant was sufficiently shown. He testified: "My wife's name is Roma V. Da Roza. She and I own the ranch upon which the work was done. I have charge of the operation of the ranch."

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

100 Cal. App. 629

MORANDA et al. v. MAPES et al. ★
(Civ. 3819.)

District Court of Appeal, Third District, California. Sept. 18, 1929.

Rehearing Denied Oct. 17, 1929. Hearing Denied by Supreme Court Nov. 14, 1929.

1. Appeal and error ☞1011(1)—Findings of trial court based on conflicting evidence are conclusive on appeal.

Findings of trial court based on conflicting evidence are conclusive on appeal.

2. Quieting title ☞52—Judgment enjoining defendants from asserting or claiming right, title, or interest in land of plaintiffs, quiets title against defendants.

In action to quiet title, judgment enjoining defendants from asserting or claiming any right, title, or interest in or to land belonging to plaintiffs, in effect quiets plaintiffs' title thereto against defendants.

3. Boundaries ☞3(5)—Courses, distances, and quantity may be considered in determining boundary line, if evidence relating to location of monuments conflict.

In action to quiet title, if evidence relating to location of monuments on land is in conflict, courses, distances, and quantity contained in description of land become important facts to be considered in determining such conflict.

4. Quieting title ☞10(1)—To recover in action to quiet title, plaintiff must show title in himself.

In action to quiet title, plaintiff's right to recover must rest on strength of his title, and not on weakness of defendants'.

5. Appeal and error ☞1053(1)—Admitting evidence as to boundary line based on common reputation, if error, held harmless, where subsequently stricken out.

In action to quiet title, admitting evidence as to boundary line based on common reputation of boundary, if error, held harmless, where subsequently stricken out.

6. Quieting title ☞44(2)—In action to quiet title evidence as to location of south bank of slough referred to in deed held admissible on issue involved.

In action to quiet title, where plaintiff's predecessor in interest acquired title through deed executed in 1873 which described the land as "lying southeast of the east bank of Mormon Slough," and issue involved was location of south bank of Mormon Slough, evidence as to

the location of the south bank of Mormon Slough about the year 1890 held admissible.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Barthol Moranda and another against Clarence Wells Mapes and another. From a judgment, plaintiffs appeal. Affirmed.

Berry & Watson and A. H. Carpenter, all of Stockton, for appellants.

Woodward, Briggs & Blewett, of Stockton, for respondents.

FINCH, P. J. This is an appeal by the plaintiffs from a judgment determining the northerly boundary line of land owned by them.

The court found that the plaintiffs' predecessors in interest acquired title through a deed executed October 4, 1873, by John Durham to James Swaltney, which described the land as "lying southeast of the east bank of the Mormon Slough and containing 15.25 acres"; that "the south bank of Mormon Slough (referred to in said deed as southeast bank) as it then existed coincided with the following line," describing the line fixed by the judgment as the plaintiffs' northerly boundary line.

The defendant Mapes claims ownership of lands lying on the northerly side of the plaintiffs' said boundary line, his predecessors in interest also having acquired title from John Durham. The court found that "neither the plaintiffs nor the defendant Clarence Wells Mapes nor Nannette Bollinger have acquired title by prescription, or otherwise" to the land in dispute, but that "the record title to said tract of land * * * has, at all times herein named and does now vest in Samuel Bollinger. * * * That the defendant Clarence Wells Mapes, for a period of more than five years immediately preceding the commencement of this action, has paid all taxes levied and assessed against" the lands in dispute, "the greater part of which is situated between the banks of Mormon Slough, as said banks now exist."

The decree adjudges "that the defendants should be, and each of them is hereby forever enjoined and debarred from asserting or claiming any right, title, estate, lien or interest in and to" the land found by the court to belong to plaintiffs.

The complaint alleges that the plaintiffs are the owners of the land described therein, "lying southeast of the southeast bank of Mormon Slough," and sets forth the boundaries thereof by courses and distances; the northerly boundary being given as a meander line along the south bank of Mormon Slough. The answer of defendant Mapes denies the particular description contained in the complaint and alleges, in substance, that the

southerly boundary line of his land is the "south bank of Mormon Slough." It thus appears that the only issue for the court to determine was the location of the south bank of Mormon Slough. The valuable part of the land in dispute is referred to as an island, above which Mormon Slough divides into two channels which unite again at the lower end of the island. The northerly channel is now a deep slough, while the southerly channel is shallow. There is a substantial and sharp conflict in the evidence as to which one of these was the original channel. Witnesses for the defendant Mapes testified that at a time 30 years or more before the trial the main slough ran south of the island, and that at that time there was a fence in the approximate location of the plaintiffs' northerly boundary as fixed by the judgment herein. As stated, the deed from Durham to Swaltney described the land thereby conveyed as containing 15.25 acres, while the land adjudged to belong to the plaintiffs contains 15.36 acres. The land described in the complaint as belonging to the plaintiffs contains 16.28 acres.

[1] It is clear that the findings of the court, based on the foregoing evidence, are conclusive on this appeal, notwithstanding the testimony of the plaintiffs' witnesses to the contrary.

[2] Appellants contend that the judgment does not quiet their title to the land found by the court to belong to them. The plaintiffs did not pray for a decree directly quieting their title, but for judgment that the claims on the part of the defendants are void, that they have no interest in or claim to the property, and that they be forever enjoined from asserting or claiming any right or interest therein adverse to the plaintiffs. The judgment forever enjoining the defendants from "asserting or claiming any right, title, estate, lien or interest" in or to the land belonging to the plaintiffs in effect quiets the latter's title thereto against the defendants. *Wolf v. Gall*, 174 Cal. 140, 144, 162 P. 115. There was no issue before the trial court as to the plaintiffs' title to such land. The answer admits that the plaintiffs own those parts of the land described in the complaint "lying southeast of the southeast bank of Mormon Slough, as said bank existed on the 4th day of October, 1873." The findings definitely locate such bank as it existed October 4, 1873, and the decree establishes such location as the plaintiffs' northerly boundary line. As said by this court, under somewhat similar circumstances, in *Martin v. City of Stockton*, 39 Cal. App.

552, 559, 179 P. 894, 897: "In view of the whole judgment roll, there can be no future controversy between the parties to this action as to the questions involved in this litigation."

[3] It is true, as urged by appellants, that courses, distances, and quantity contained in a description of land must yield to monuments. "However, to justify an application of the rule, the monuments must be fixed and certain." 4 Cal. Jur. 399. If the evidence relating to the location of such monuments is in substantial conflict, as in this case, then courses, distances, and quantity become important facts to be considered in deciding such conflict. *Hostetter v. Los Angeles T. Ry. Co.*, 108 Cal. 38, 42, 41 P. 330; *Goss v. Golsinsky*, 12 Cal. App. 71, 76, 106 P. 604.

[4] Appellants attack the finding that the record title to the land in dispute is vested in Samuel Bollinger, who is not a party to this action and who, they assert, without citing any evidence to that effect, has been dead for many years. "The plaintiff in an action of this kind must show title in himself. His right to recover must rest on the strength of his own title—not the weakness of defendants." *Rockey v. Vieux*, 179 Cal. 681, 682, 178 P. 712, 713; *Knoke v. Knight* (Cal. Sup.) 273 P. 786.

[5, 6] Appellants contend that certain evidence, which they set out in their brief, was "extremely prejudicial." The only part of this evidence to which objection was made was to the effect that, based on "common reputation of the boundary line," the fence hereinbefore referred to was considered the boundary line between the plaintiffs' land and that lying to the north thereof at a time 30 years or more before the trial. All such testimony, based on reputation, was subsequently stricken out. The other evidence which appellants contend was prejudicial related to the location of the south bank of Mormon Slough about the year 1890 and was clearly admissible.

The evidence bearing on every material issue is in substantial conflict, but there is no doubt as to its sufficiency to support the findings.

The plaintiffs made a motion for a new trial, which motion was denied by the court. The affidavits produced in support of the motion contain nothing to warrant a new trial.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

208 Cal. 251

JONES et ux. v. KELLY. (S. F. 12638.)

Supreme Court of California. Sept. 26, 1929.

1. Pleading ⚡49—Full scope should be given pleading and special consideration paid to leading allegations to determine whether pleading states cause of action *ex contractu* or *ex delicto*.

To determine whether pleading states cause of action *ex contractu* or one *ex delicto*, it should be construed according to its full scope and effect rather than according to a single sentence or expression contained therein, and special consideration should be given to prominent and leading allegations.

2. Action ⚡27(1)—Action arising from breach of promise is *ex contractu*, and one arising from breach of duty growing out of contract is *ex delicto*.

Cause of action arising from breach of promise is action *ex contractu*, and cause of action arising from breach of duty growing out of contract is *ex delicto*, and is none the less such because it incidentally involves breach of contract.

3. Action ⚡28—Duty to abstain from injuring person, property, or rights of another being independent of contract, plaintiffs may sue in tort or contract (Civ. Code, § 1708).

Duty under Civ. Code, § 1708, to abstain from injuring person or property of another or infringing upon another's rights is independent of contract, and attaches over and above terms thereof, and therefore plaintiffs may treat injury as tort or breach of contract at their election.

4. Appeal and error ⚡917(1)—Supreme Court passing on merits of demurrer must assume truthfulness of allegations of amended complaint.

On appeal, Supreme Court must assume truthfulness of allegations of amended complaint for purpose of passing upon merits of demurrer thereto.

5. Action ⚡27(2)—Complaint charging landlord maliciously, oppressively, and wantonly disconnected water supply from tenants' dwelling held to state cause of action in tort.

Tenants' complaint alleging that landlord, after having rented to them dwelling house, including supply of water for domestic purposes, maliciously, willfully, with express malice and evil motive, wantonly, oppressively disconnected and destroyed water supply, *held* sufficient to state cause of action in tort, since lease conveyed estate in demised premises which entitled tenants to equal protection of law in use and enjoyment of habitation, and shutting off water supply to residents used for domestic, household, and sanitary purposes is interference with use and occupation of property and in effect amounts to an ejection.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Charles Jones and wife against Michael J. Kelly. Judgment for defendant and plaintiffs appeal. Reversed, with directions.

Superseding opinion 274 P. 368.

George D. Collins, Jr., of San Francisco, for appellants.

J. C. Flannery, of San Francisco, for respondent.

SEAWELL, J. Appeal prosecuted by plaintiffs, husband and wife, in an action to recover damages, both actual and exemplary, for the alleged destruction by defendant of the plaintiffs' water supply, the parties occupying the relation of landlord and tenant. A demurrer, both general and special, to the amended complaint, was sustained without leave to amend, and judgment thereupon entered in favor of the defendant. From the fact that the demurrer was sustained without leave to amend the amended complaint, it is apparent that the trial court was of the opinion that a cause of action could not be predicated on tort, the main issue presented by the complaint, and therefore did not deem it necessary to pass upon other alleged infirmities of lesser importance which are easily amendable. We will therefore confine ourselves to the main issue discussed by the briefs.

The amended complaint is quite brief, and concisely sets out the contentions of appellants:

"Aver by way of inducement to the cause of action for the trespass hereinafter alleged, that heretofore to-wit: in the month of March, 1924, the plaintiffs hired from defendant and he let to them as his tenants from month to month, at a monthly rental, and for the use, occupancy and habitation of plaintiffs, as and for their home and dwelling place, the dwelling house and premises then and there owned by defendant and situated at No. 22 Harper street in said city and county of San Francisco, together with a sufficient supply of water to the same, for the household and domestic uses of plaintiffs in said dwelling and home and for their drink, bathing, washing of clothes, and also for necessary toilet and culinary purposes therein.

"That thereupon and with the consent of defendant and upon said terms of tenancy, including said water supply, the said plaintiffs on the 15th day of March, 1924, and as said tenants, entered into the possession and occupancy of said dwelling house as their home and habitation, and paid the said rental therefor to defendant, until the trespass hereinafter alleged. That during all the times said premises were occupied by plaintiffs as said tenants, the said water supply was necessary for said purposes, and essential to the beneficial use and enjoyment of said dwelling house as a fit and suitable place of

habitation for human beings. That accordingly and by reason of the fact that said water supply was necessary for said purposes during the existence of said tenancy, the said defendant furnished said plaintiffs as said tenants with said water and in said dwelling house from said 15th day of March, 1924, until the time of the trespass hereinafter alleged, to-wit: on the 22nd day of May, 1926.

"That while said dwelling house was occupied as aforesaid by plaintiffs and during the continued existence of said tenancy and while plaintiffs as said tenants were in the quiet and peaceable possession, occupancy and enjoyment of said dwelling house as their home, place of abode and habitation, and were then actually using said water supply therein solely for the necessary purposes hereinbefore stated, the said defendant on the 22nd day of May, 1926, without the consent of plaintiffs and against their will and without notice or warning to either of them, did wilfully, maliciously and with express malice and evil motive, wantonly, oppressively and solely for the malevolent purpose of annoying, inconveniencing, harassing and injuring the plaintiffs, cut off, disconnect, discontinue, terminate and destroy said water supply and entirely deprive the plaintiffs of the same and did thereby seriously, maliciously, oppressively, wantonly and wilfully, annoy, inconvenience and harass plaintiffs and greatly injure them in their feelings and inflict upon them by said wilful and malicious trespass, very great trouble, severe hardship, detrimental privation, personal indignities and mental suffering, all of which is to their actual damage in the sum of three thousand dollars and in the further sum of two thousand dollars exemplary damages. That in support of said claim to exemplary damages the plaintiffs aver that this action is not brought for a breach of an obligation arising out of said contract of tenancy, in failing to supply water to plaintiffs in said premises, but is brought solely to recover for said trespass in maliciously, oppressively and wantonly cutting off said water supply, to the great annoyance, harassment, hardship and injury of plaintiffs as hereinbefore alleged."

[1-5] It is the contention of respondent that the amended complaint does no more than tend to establish a breach of the contract demising the premises described in the amended complaint, and that a cause of action sounding in contract cannot be converted into a trespass or tort by alleging the acts which form the basis of the breach were maliciously, oppressively and wantonly committed. On the other hand, appellants admit that the averments show the existence of a contract, but contend upon authority that the contractual relations between the parties are mere matters of inducement preliminary to the statement of a cause of action in tort. "In determining whether a pleading is in-

tended to state a cause of action *ex contractu* or one *ex delicto* it should be construed according to the full scope and effect rather than according to a single sentence or expression contained therein; and special consideration should be given to the prominent and leading allegations." 21 Ency. Pl. and Pr. 657; *Harding v. Liberty Hospital Corp.*, 177 Cal. 520, 171 P. 98. If the cause of action arises from a breach of promise, the action is *ex contractu*, but, if it arises from a breach of duty growing out of the contract, it is *ex delicto*. *Mobile Life Ins. Co. v. Randall*, 74 Ala. 170. A tort and trespass is none the less such because it incidentally involves a breach of the contract. *Stock v. Boston*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430. The law imposes the obligation that "every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights." Section 1708, Civ. Code. This duty is independent of the contract and attaches over and above the terms of the contract. This being so, the plaintiffs may treat the injury as a tort or as a breach of contract at their election. 1 Page on Contracts (2d Ed.) § 57. That appellants have a proprietary interest in the demised premises which goes by the name of estate is not open for debate. 1 Tiffany, *Landlord and Tenant*, 162. The situation as presented by the pleadings, we think, is well encompassed by the following excerpt from *Rich v. New York Central & H. R. R. Co.*, 87 N. Y. 382: "It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty * * * may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud." A tort may grow out of or make part of, or be coincident with a contract. The fact that there existed a contract between the plaintiffs and the defendant would not immunize the latter from the penalty that is ordinarily visited upon tort-feasors. Had the defendant, under the relationship shown to exist between the parties, wilfully and maliciously removed the doors or windows from said premises occupied by plaintiffs, he could not have escaped the penalty which the law imposes upon tort-feasors on the theory that his relations with plaintiffs were also contractual. In effect the illustration and the act complained of are alike. By the lease the plaintiffs were conveyed an estate in the demised premises, and they were entitled to equal protection of the law in the use and enjoyment of their habitation against all persons, including the defendant. Shutting off the water which supplies a residence for domes-

tic, household, and sanitary purposes is a serious interference with the use and occupation of property and in effect amounts to an eviction. The water supply which furnished said residence at the time plaintiffs leased said premises and went into possession and during the whole period of occupancy formed a material part of the estate, and, if disturbed in the manner alleged in the complaint, would amount to tortious conduct on the part of defendant. We must assume the truthfulness of the allegations of the amended complaint for the purposes of passing upon the merits of the demurrer.

The judgment is reversed, with directions to overrule the demurrer.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

208 Cal. 243

PEOPLE v. CHANDLER. (Cr. 3242.)

Supreme Court of California. Sept. 26, 1929.

Homicide $\Rightarrow$ 231—Evidence that defendant, living illicitly with deceased, charged deceased with having another man and making false reports, established malice in murder prosecution (Pen. Code, §§ 188, 189).

In prosecution for murder, evidence that defendant lived in illicit relationship with deceased, and on evening of murder engaged in conversation with deceased, in which he accused her of having another man, and of making false reports to him as to what she received, *held* sufficient to show malice, both express and implied, as defined by Pen. Code, §§ 188, 189.

In Bank.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

James Chandler was convicted of murder in the first degree, and he appeals. Affirmed.

C. V. Rude, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

SHENK, J. The defendant was prosecuted, by information, for the murder of one Jessie Gafford, 28 years of age. The jury returned a verdict of murder of the first degree, without recommendation. The defendant appeals from the judgment imposing the extreme penalty, and from the order denying his motion for a new trial.

For about 30 days prior to December 23, 1928, the defendant was living with Edwin Echols at Compton avenue and Adams street, in the city of Los Angeles. The deceased was living at the same place. Intermittently for three years past she had been living with the defendant in an illicit relationship. There

was evidence that she was engaged in illegal traffic in intoxicating liquors, and there was also evidence from which the jury might reasonably infer that she was a prostitute, and was sharing with the defendant the proceeds from one or both of her activities. In the late morning and early afternoon of December 23, 1928, the defendant was at the nearby home of a woman at which the deceased was a frequent visitor. During that time the defendant had some drinks, and police officers were called to take him away. However, when the officers arrived, about 5 o'clock, they concluded that it was not necessary to arrest him. Whereupon he was taken to his own home by Echols.

Later on in the evening he returned to the neighbor's house, where he became engaged in a conversation with the deceased, in which he accused her of having another man. He continued to upbraid her for other reasons. He accused her of not charging enough in her illicit transactions with others, and of making false reports to him as to what she had received. The deceased disputed all of the accusations, but the defendant refused to accept her explanations and protestations of truthfulness and became violent. In the house of the neighbor he first began his physical abuse of her by beating her with a dead, but unpicked, chicken. Later he assaulted her by striking her body with a chair and kicking her. This conduct on the part of the defendant was seen by an eyewitness who testified at the trial.

After nightfall police officers were again called. When the police machine turned into the alley in the rear of the neighbor's house, the headlights disclosed the defendant kicking the prostrate and disheveled body of his victim. He endeavored to escape by running and hiding under the workbench of a nearby garage, where he was apprehended. The walls and the floor of the room where the defendant first assaulted the deceased were bespattered with blood. The remnants of the broken chair with which he struck her contained blood marks. A broken mop stick, with human blood on it, was found in the yard, and pools of blood were found where the body lay in the alley. There was evidence of marks on the ground in the rear of the house, which it was reasonable to assume were caused by dragging the body from the house to the alley.

The defendant did not claim that he was intoxicated at any of the times when he was seen assaulting the deceased. He protested that he was not, and the police officers testified that he was not intoxicated when he was arrested. His wholly inadequate explanation was that he was endeavoring to take the deceased to her home. The autopsy surgeon testified that there were numerous contusions and abrasions on the arms, legs, and body of the deceased, that her left wrist was fractur-

ed, and that death was caused by concussion of the brain and a subdural hemorrhage following injuries of the head.

The first contention is that the evidence is insufficient to support a verdict of murder of the first degree because of the alleged absence of proof of malice. There is no merit in this claim. The accusations of the defendant against the deceased, considered in connection with their prior relations, fully furnished this element, and stamp the offense with malice, both express and implied, as defined by sections 188 and 189 of the Penal Code.

The only other point made by the defendant is that the court committed prejudicial error in giving certain instructions to the jury. The entire charge to the jury has been examined. It was full, fair, and complete, and no error appears therein.

The judgment and order are and each is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.



208 Cal. 200

RYAN v. FARRELL et al. (L. A. 9763.)

Supreme Court of California. Sept. 24, 1929.

1. Automobiles ⇨197(7)—Employer is not relieved of liability for injuries by employee because automobile was employee's private car used with employer's consent.

If person causing injuries was employee of defendant rather than independent contractor and was acting in course of employment when inflicting injuries, defendant would not be relieved of liability by reason of circumstance that automobile was not one supplied by defendant for use of employees, but was private car of employee used in performing services for employer with express or implied consent of employer.

2. Master and servant ⇨330(3)—Finding that automobile company had such control over salesman as made salesman employee, not independent contractor, held authorized by evidence.

Evidence that automobile salesman entitled to drawing account and commissions on sale of automobiles was employed for no definite length of time, and that company had right to discharge him at any time, and evidence that salesman was required to report every morning for instructions, authorized jury to conclude that company possessed right to exercise such control over salesman as made salesman employee of company not independent contractor.

3. Master and servant ⇨318(1)—That certain freedom is inherent in nature of work does not change character of employment, where employer has general control over work.

That certain amount of freedom of action is inherent in nature of work does not change

character of employment in determining whether there was relationship of employer and employee, or employer and independent contractor, where employer has general supervision and control of work.

4. Automobiles ⇨193(8)—Automobile salesman, injuring plaintiff when returning from trip to interview prospective purchaser, held acting in "course of employment" at time of injury.

Plaintiff, injured by salesman of defendant company, did not fail to show salesman was acting in "course of employment" at time of injury, where automobile salesman made trip to interview prospective purchaser and was making return trip when he injured plaintiff.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Course of Employment.]

5. Master and servant ⇨302(2)—Employee does not cease to act in course of employment when starting on return trip after performing errand for employer.

Employee who has gone on errand on behalf of master does not cease to be acting in course of employment at moment he starts on return trip after having performed errand.

6. Master and servant ⇨302(6)—Master will be held responsible for injury by servant combining own business with master's, unless it clearly appears that servant could not have been serving master.

Where servant is combining his own business with that of master's or attending to both at substantially same time, no nice inquiry will be made as to which business servant was actually engaged in when third person was injured, but master will be held responsible unless it clearly appears that servant could not have been directly or indirectly serving master.

In Bank.

Appeal from Superior Court, San Diego County; C. C. Haines, Judge.

Action by L. R. Ryan against J. W. Emerson Farrell and another. From an order granting plaintiff a new trial following entry of judgment of nonsuit, defendant Edwards-Merritt Company appeals. Affirmed.

J. C. Hizar, of San Diego, for appellant.

P. M. Andrews and Allen E. Rogers, both of San Diego, for respondent.

SEAWELL, J. Defendant Edwards-Merritt Company, a corporation, appeals from an order granting a new trial on motion of plaintiff following the entry of a judgment of nonsuit in favor of defendant in an action wherein plaintiff sought to recover damages for personal injuries received when an automobile in which he was riding was struck and overturned by an automobile operated by defendant J. W. Emmerson Farrell, claimed by plaintiff to be an employee of appellant company. The trial judge granted the nonsuit at the close of plaintiff's evidence on the ground that plaintiff had failed to establish that said

J. W. Emmerson Farrell was an employee of appellant for whose negligence it would be liable on the doctrine of respondeat superior. Thereafter plaintiff's motion for a new trial was granted by a different judge than the one who had rendered the judgment of nonsuit.

[1] The evidence bearing on the relationship of Farrell, the driver of the automobile, and appellant company is found in the testimony of Farrell. Appellant maintained a sales agency in the city of San Diego for the sale of Chrysler and Maxwell automobiles. Farrell had been connected with said agency as a salesman for about a year at the time of the accident. He received a commission on all sales made and was allowed a drawing account of \$150 a month, amounts paid being deducted from commissions on sales made. In calling upon prospective purchasers Farrell used an automobile purchased from appellant on conditional sales contract and not fully paid for, and at the time he struck the automobile in which plaintiff was riding he was returning to San Diego, his place of residence, from Pacific Beach, where he had gone with the purpose of interviewing a prospective purchaser. He testified that salesmen connected with appellant generally used between 100 and 120 gallons of gasoline a month, 40 gallons of which were furnished by said appellant. If Farrell was the employee of appellant, rather than an independent contractor, and was acting in the course of his employment when he inflicted injuries upon plaintiff, appellant is not relieved of liability by reason of the circumstance that the automobile was not one supplied by it for the use of its employee, but was the private car of said employee used by him in performing service for his employer with the express or implied consent of said employer. *Brimberry v. Dudfield Lumber Co.*, 183 Cal. 454, 191 P. 894.

Farrell further testified that he was employed for no definite length of time, and that the company had the right to discharge him at any time. All salesmen were required to report at appellant's office every morning at 8:15 for a sales meeting to receive instructions in regard to the promotion of sales from appellant's sales manager, who had charge of all salesmen. At these meetings the sales manager discussed with salesmen the details of their work. He also gave the salesmen the names of prospective customers to call upon. Farrell stated that he regarded himself as under the control and management of appellant.

Farrell's duties consisted in inducing prospective customers to agree to buy cars from appellant, at prices fixed by it. On behalf of appellant he procured the signatures of buyers to written contracts of purchase either at appellant's agency or wherever it might be convenient for the buyer to execute the contract. If a secondhand car was taken in,

he secured an appraisal from the Certified Market, as directed by the sales manager, and the car was taken in at the valuation thus fixed.

[2] From the facts and circumstances testified to concerning the relationship between Farrell and appellant, the jury might well have concluded that appellant possessed the right to exercise that degree and kind of control over Farrell which distinguishes an employer from one for whom another is rendering services as an independent contractor. Hence the trial judge did not err in granting a new trial on motion of plaintiff following the judgment of nonsuit.

[3] Not only is the evidence consistent with a right of control, which is the governing factor, but it appears that there was an exercise of such control through the instructions which were given to the salesmen at the daily meetings. The fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control of it. *Cameron v. Pillsbury*, 173 Cal. 83, 159 P. 149.

In *May v. Farrell* (Cal. App.) 271 P. 789, the District Court of Appeal affirmed the judgment in an action against appellant herein growing out of the same collision as the instant case. Although the evidence given in that case was not identical in all particulars with that herein, the court in its discussion says much that is applicable in the instant case. We do not regard *Barton v. Studebaker Corp.*, 46 Cal. App. 707, 189 P. 1025, as inconsistent with the decision we here make. Each case must necessarily be determined on its own particular facts, and while the court in that case did not regard the facts as indicating an authoritative right of control, in the instant case a jury may have concluded such right to exist.

[4-6] Nor can it be held that plaintiff failed to show that Farrell was acting in the course of his employment when plaintiff was injured. Farrell had made the trip from San Diego to Pacific Beach to interview a prospective purchaser and was making the return trip when he injured plaintiff. An employee who has gone upon an errand on behalf of his master does not cease to be acting in the course of his employment at the moment he starts upon the return trip after having performed the errand. *May v. Farrell*, supra. Plaintiff expected also to meet his wife at the Coronado ferry on his way home from Pacific Beach. It is the established rule in this jurisdiction that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could

not have been directly or indirectly serving his master. *Brimberry v. Duffield Lumber Co.*, 183 Cal. 454, 191 P. 894; *Kruse v. White Bros.*, 81 Cal. App. 86, 253 P. 178; *May v. Farrell*, supra; *Dennis v. Miller Automobile Co.*, 73 Cal. App. 293, 238 P. 739. It does not clearly appear here that at the time Farrell struck plaintiff he had so far departed from the normal or direct route of his return trip to San Diego that it could be said that he was acting without the course of his employment.

The order granting a new trial is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

208 Cal. 172

PELLISSIER v. TITLE GUARANTEE & TRUST CO. et al. (L. A. 9479.)

Supreme Court of California. Sept. 23, 1929.

1. Appeal and error $\S$ 1011(1)—Trial court's findings on conflicting evidence were conclusive, where supported by evidence.

Trial court's findings of facts on conflicting evidence were conclusive, where they were supported by the evidence.

2. Judgment $\S$ 580—Where appeal was still pending from judgment, such judgment could not be pleaded as bar to subsequent action (Code Civ. Proc. $\S$ 1049).

Where appeal had been taken from judgment, and action was still pending and undetermined, under Code Civ. Proc. $\S$ 1049, at time of instant action, such judgment could not be pleaded as bar to instant action.

3. Abatement and revival $\S$ 16—Party in whose favor judgment appealed from was rendered, may plead prior action in abatement, and lay foundation for securing continuance until final determination of first action.

Party, in whose favor prior judgment, from which appeal has been taken, has been rendered, may, in subsequent action, plead prior action in abatement, and lay foundation for securing continuance of trial of second action until final determination of first.

4. Deeds $\S$ 54—Deed must be delivered to effectuate passing of title.

Delivery of a deed must be made to effectuate passing of title from grantor to grantee, and, if delivery is wanting, the deed is void ab initio, and is no better than a blank form.

5. Vendor and purchaser $\S$ 229(1)—It was unnecessary that purchasers of lots have actual notice that title company executing sales contract held only legal title, and that approval of plaintiff, seeking to rescind contract, was necessary to consummate deal.

It was unnecessary that defendant purchasers of lots have actual notice that title company executing sales contract held only legal title to lots, and that approval of plaintiff, who was suing

to rescind contract was necessary to consummate deal, but it was sufficient, if circumstances were such as to put prudent person upon inquiry.

6. Vendor and purchaser $\S$ 244—Evidence supported finding that purchasers of lots had notice that title company, executing sales contract, held only legal title, and that plaintiff's approval was necessary to consummate deal.

In action to rescind contract for sale of real property, evidence held sufficient to support finding that defendant purchasers had notice that title company, executing sales contract, held only the legal title, and that approval of plaintiff was necessary to consummate deal.

In Bank.

Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action to rescind a contract for the sale of real property by Marie Julie Pellissier against the Title Guarantee & Trust Company, Emma Summers, Francis W. Henry, and others. From a decree for plaintiff, the last-named defendants appeal. Affirmed.

For opinion of the District Court of Appeal, see 274 P. 552.

I. Henry Harris, of Los Angeles, for appellant.

Denis & Griffith and Lawler & Degan, all of Los Angeles, for respondent Pellissier.

E. W. Sargent, E. J. Vaughn, G. B. Colby, Tanner, Odell & Taft, O'Melveny, Tuller & Myers, and Homer I. Mitchell, all of Los Angeles, for respondent Title Guarantee & Trust Company.

PRESTON, J. After a careful reconsideration of this cause, we are pleased to adopt the opinion of Mr. Justice Plummer of the Third Appellate District as the opinion of this court in bank:

The plaintiff's complaint in this action sets forth the incorporation of the Title Guarantee & Trust Company; that prior to the date hereinafter mentioned the plaintiff was the owner in fee simple of all that certain real property described as the west half of the northwest quarter of section 25, township 1 south, range 14 west, S. B. M., in the county of Los Angeles; that on or about the ——— day of February, 1913, the plaintiff executed and delivered to the defendant Title Guarantee & Trust Company an instrument absolute in form, conveying all of said property to the Title Guarantee & Trust Company; that upon the same date an agreement in writing was entered into between the plaintiff and the Title Guarantee & Trust Company, wherein and whereby it was agreed that said conveyance, though absolute in form, was made in trust; that no consideration was paid therefor; that the title to said property was held in trust by the Title Company for the benefit of the plaintiff; that the conveyance was made by the plaintiff to

the Title Company for the purpose of enabling the Title Company to subdivide and make sales of lots in said tract, to such persons, at such prices, and upon such terms as the Title Company should be thereafter instructed by the plaintiff; that said trust agreement has, since the date thereof, remained in full force and effect, and was in full force and effect at the time of the institution of this action.

It is further set forth in the complaint that, after the execution of the instruments just referred to, the Title Company proceeded to subdivide said real property into city lots, and had a map of the subdivision thereof duly recorded; that in said subdivision and upon said map there were two lots described as lots 188 and 189 of tract No. 2189, commonly known as Pellissier Square. The complaint further alleges that on or about the 1st day of February, 1923, and while said trust agreement referred to was in full force and effect, the Title Company executed a written contract for the sale of said lots 188 and 189 to one Francis W. Henry, for the total purchase price of \$27,500. It is further alleged in the complaint that the defendant Emma Summers was the real party in interest, and that the contract executed in the name of Francis W. Henry was for her uses and purposes. The complaint then alleges that the defendants Summers and Henry, and each of them, knew and had actual notice that the defendant Title Guarantee & Trust Company held only the naked legal title to said property; that it was held in trust for the plaintiff; that the plaintiff was the real owner thereof, and that her consent and approval were required before the Title Company could make any conveyance or agreement for the sale of said lots, or either of them. It is then alleged that the plaintiff never instructed the Title Company to make any sale of said property, or to execute or deliver the contract of sale therefor, and never consented to or approved the making of any such sale or such contract, and had no prior knowledge of the execution of said contract, and, immediately upon learning thereof, informed the Title Company that she did not consent to or approve the same, and forthwith caused defendants Summers and Henry to be advised of such fact, and demanded a return and cancellation of the contract.

The prayer of the complaint is for a decree declaring said contract void; that it be delivered up and canceled; that the defendants Summers and Henry be held as involuntary trustees for the benefit of the plaintiff, if any rights they have under said contract. A copy of the contract referred to is attached to the complaint, marked Exhibit A, bearing date of February 1, 1923, purporting to have been executed between the Title Guarantee & Trust Company and Francis W. Henry, whereby the Title Company agrees to convey

to Francis W. Henry lots 188 and 189 of tract No. 2189, known as Pellissier Square, for the sum of \$27,500, payable in installments, the first installment being the sum of \$2,500, to be paid on the execution of the contract; the other installments to be paid at stated times and in the amount set forth in the contract. A number of restrictions are set forth in the contract, not necessary to be particularly referred to herein. The contract is signed by the Title Guarantee & Trust Company, by A. F. Morlan, vice president, and A. R. Kilgore, secretary, and by Francis W. Henry; approved by W. H. Taggart, assistant trust officer. The answer of the defendants Summers and Henry denies each and every of the allegations of the plaintiff's complaint. The defendant Paul M. Reidy was brought in by an amendment to the complaint, but whatever interest the defendant Reidy acquired was acquired from the defendant Francis W. Henry, after the beginning of this action, or after the controversy, relating to the contract referred to, had arisen, and is subject to, and dependent upon, any rights, if any, which the defendant Francis W. Henry may have in and to said lots, and need not be further mentioned herein. The Title Company, by its answer, admitted practically all of the allegations of the complaint, but set forth in its answer that the contract referred to was never delivered by it to either the defendant Summers or the defendant Henry, although its possession was obtained by said defendants, who declined and refused to return the same to the Title Guarantee & Trust Company when demand was made therefor.

While the plaintiff's complaint does not allege the nondelivery of the contract by the Title Company to the defendant Francis W. Henry, or to his agent, Emma Summers, the cause was tried as though delivery was one of the issues tendered for determination by the court. As a considerable portion of the testimony is directed to the question of delivery, and the argument of counsel is directed to the same subject, we conclude that the trial was had upon the theory that the issue of delivery was tendered to the court, even though not specifically set forth in the pleadings, and the decision of this cause must be had in view of the theory entertained at the trial of the action.

The findings of fact, after referring to many items which are not disputed, find in paragraph No. 5: That the contract between the Title Company and the defendant Francis W. Henry was executed in duplicate, the material part of which is in these words: "The said contract was prepared in duplicate, and one copy of it was afterwards taken away from the office of said Title Guarantee & Trust Company, without the knowledge or consent of said Company or of plaintiff, and thereafter, without the knowledge or consent of said Company, or this plaintiff, was signed and acknowledged in due form by Francis W.

Henry before said Anna C. Durkee, as notary public, and the certificate of acknowledgment was signed by her under the date of March 15, 1923, and not otherwise. Said contract was never delivered to said Henry, or to any person for her, or at all. Said Emma A. Summers obtained possession of the said copy of said contract so acknowledged by said Henry, before said acknowledgment was made, and would not return it to said Title Guarantee & Trust Company, although due demand therefor was made on her." And then further found in paragraph No. 7: "That the said defendants Summers and Henry, and each of them, knew and had actual notice that the defendant Title Guarantee & Trust Company, held only the naked legal title to said property in trust for this plaintiff, and that this plaintiff was the real owner of the property, and that her consent and approval was required before said defendant Title Guarantee & Trust Company could make any conveyance or agreement for the sale of said lots, or either of them." It may be here stated that the finding of the court that the contract was "signed" by Francis W. Henry before Anna C. Durkee, as notary public, has no support whatever in the testimony. There is no controversy whatever that both copies of the contract were signed by the defendant Francis W. Henry at the residence of the defendant Emma Summers, prior to the signing thereof by Morlan and Kilgore acting for the company. The finding as to acknowledging and recording is likewise unquestioned. The decree went in favor of the plaintiff, and from this decree the defendants Summers and Henry appeal.

Finding No. 8 is to the effect that the plaintiff never instructed the Title Company to make any sale of the lots in question, or to execute or deliver any contract of sale therefor; that she never consented to or approved of the contract, and does not now consent thereto or approve the same; that, immediately upon learning of the contract, she informed the Title Company of her disapproval, and had demand made upon the defendants Summers and Henry for the return of the contract, etc.; and, further, that the plaintiff never received any of the purchase price for said lots.

The first point made by the appellants is that findings Nos. 7 and 8 are not supported by the evidence, in that there is no evidence to show that the appellants knew and had actual knowledge that said Title Company held only the naked legal title in trust for plaintiff, or that appellants knew that plaintiff's consent and approval was required before the Title Company could make any conveyance or agreement of sale, or that plaintiff never instructed the Title Company to make any sale of the property, or execute or deliver said contract of sale, or that plaintiff had no prior knowledge of such contract, or that, immediately upon learning thereof, in-

formed the Title Company that she did not approve.

Point 2 is based upon the denial of the appellants' motion for nonsuit.

Point 3 is based upon the fact that the evidence shows there was a previous action upon identical issues, wherein the same parties were adverse in interest, the Title Company suing in a representative capacity for Mrs. Pellissier.

Point 4 made by the appellants is to the effect that, by the terms of the trust agreement, Mrs. Pellissier is estopped from suing the defendants Summers and Henry.

Point 5: That plaintiff is bound by the acts of her agent.

Point 6 relates to the manner in which Mrs. Summers obtained possession of the contract.

The seventh ground for reversal set forth by the appellants is urged upon the theory that the plaintiff has no cause of action, and no standing in court.

Before considering the 7 assignments of why a reversal should be had, we will state that the admitted or uncontroverted facts set forth in the record are: Execution, delivery, and recordation of a deed, absolute in form, by which the plaintiff purported to convey to the Title Company the premises involved in this action, the same being included in the larger tract mentioned in the conveyance; that the trust agreement executed between said parties at the same time was not placed upon record, nor were its terms and conditions ever made known to the appellants; that for a period of some years James J. Donahue had been the real estate broker or sales agent negotiating and making sales of lots in Pellissier Square; that, while acting as such broker or sales agent, the appellant Summers interviewed him relative to the purchase of the two lots in controversy; that, following the negotiations between Summers and Donahue, Summers made an offer for the property of \$27,500; that, in pursuance of this offer, Donahue executed a preliminary agreement for the sale of the lots and asked of, and received from, the appellants the sum of \$500, which was to be applied as a part of the first payment to be specified in the contract of purchase; that the negotiations between Summers and Donahue resulted in an understanding between them as to the terms of payment to be set forth in the contract, and also as to other conditions to be inserted in the contract, not necessary here to mention; that, following these negotiations, a contract was drawn up in duplicate by the trust officer of the Title Company; that, after the contract was so executed in duplicate, it was delivered to Donahue, who took the same to the residence of Mrs. Summers, and there the duplicate copies of the contract were signed by the appellant Francis W. Henry, and then handed back to Mr. Donahue, who returned the contracts to the Title Company, and in a day or two thereafter

Mrs. Summers went to the office of the Title Company, having with her a cashier's check for the sum of \$2,000; that Mr. Taggart, the trust officer of the company, produced the duplicate copies of the contract which had not then been signed or executed on the part of the company; that Mr. Taggart took the duplicate copies of the contract, went into the appropriate offices of the company, where the name of the Title Company was affixed by, and together with, the names of the vice president, A. F. Morlan, and the secretary, A. R. Kilgore, and the seal of the company affixed, following which Mr. Taggart returned to the presence of Mrs. Summers with the duplicate contract in his possession. The subsequent history of the contract is controverted.

The trust agreement, among other provisions, contained the following paragraphs, numbered third, fifth, and seventh, to which our attention has been specifically directed: "Third: When said map has been duly accepted and recorded as required by law, the party of the second part shall issue contracts of sale and convey lots in such subdivision to such person or persons, at such prices, and upon such terms as it shall be hereafter instructed by the said party of the first part, her heirs or assigns." "Fifth: The party of the second part shall impose such restrictions, covenants and conditions in all agreements and deeds executed by it as it shall be in writing requested to do by said party of the first part, her heirs or assigns." "Seventh: Any conveyance made by the Title Guarantee & Trust Company to the purchasers of lots shall vest in such purchasers an absolute and unassailable title, and there shall be no obligation on the part of the purchasers to see to the application of the purchase money, it being expressly understood by all parties hereto that any conveyance made by the party of the second part shall be binding upon all parties hereto, and should the party of the second part violate any of the provisions hereof, then the beneficiary shall have recourse only against said party of the second part."

While many reasons have been assigned by appellants for reversal, the determination of this cause really depends upon whether material findings are supported by the testimony. It may be here stated that finding 5, to the effect that the contract was never delivered, is not assailed as being contrary to the evidence, the argument of appellants being that, after the signature of the Title Company was properly attached, the delivery of the contract by the trust officer Taggart was immaterial.

Did the appellants know that the Title Company held only the legal title, and that the approval of Mrs. Pellissier was necessary to consummate the deal, or have knowledge of circumstances sufficient to put them upon inquiry? The deed and trust agreement herein referred to covering Pellissier Square

were executed in the year 1913. The negotiations relative to lots 188 and 189 involved in this action practically all took place during the latter portion of January and the month of February, 1923. The record shows that in the year 1920, seven years after the execution of the deed of conveyance by the plaintiff to the Title Company, and three years preceding the negotiations involved in this action, Mrs. Summers had and carried on negotiations with Mr. Donahue, and, also, personally, with Mrs. Pellissier, relative to the purchase of a certain other lot included in Pellissier Square, fronting on that certain street known as Western avenue. It appears from the testimony that this lot was priced by Mrs. Pellissier at \$3,700, and that Mrs. Summers offered to Mr. Donahue for said lot the sum of \$3,500; that Mrs. Pellissier declined to accept Mrs. Summers' offer, and Mrs. Summers finally agreed to buy the lot at the figure named by Mrs. Pellissier. The testimony of Mr. Donahue is as follows: "At that time (1920) I had some lots south on Wilshire Boulevard on the east side of Western avenue, at \$3,700.00. She (meaning Mrs. Summers) asked me if I could deliver one of them for \$3,500.00. I told her no, I didn't think I could deliver it because of our price of \$3,700.00. Mrs. Pellissier as a rule never cut her prices. She was very firm about prices she had given on properties. She (referring to Mrs. Summers) said, 'Isn't there any way for you to go to her, or for me to go to her?' I said, 'I don't see why it would be necessary, Mrs. Summers.' But after persuading me to go down, I had Mrs. Summers go in and meet Mrs. Pellissier at her residence at the corner of Serrano and Seventh street, Los Angeles, and she spoke to Mrs. Pellissier, and Mrs. Pellissier turned her down on the \$3,500.00 offer." The testimony in the record shows that a contract for the sale of the lot just referred to facing on Western avenue was executed in favor of Mrs. Summers, but our attention has not been called to, and we have not discovered in the transcript, by whom the contract of sale was executed, unless it is covered by general testimony, set out in the record, that all contracts for the sale of lots in Pellissier Square were executed by the Title Company.

In relation to the negotiations covering the lots in controversy, the witness Donahue testified, in substance that, during the month of January, 1923, Mrs. Summers came to him and offered \$22,500 for the two lots. The exact words of the witness' testimony in this particular are: "I refer now back to when she made the offer of \$22,500.00, and I told her that Mrs. Pellissier would not take it, I was positive of that." The witness further stated that at that time he took the \$25,000 offer from Mrs. Summers to Mrs. Pellissier, and it was refused; that the first offer was made on or about the 2d or 3d of January, 1923. In relation to the different

offers, the witness Donahue further testified: "I told Mrs. Summers the \$25,000.00 offer was refused by Mrs. Pellissier, and again she made another offer of \$27,500.00, with the terms about the same that were in the former contract. When I speak of the former contract I mean the contract for \$25,000.00. At this time I drew another contract, on the evening of February 3d, at her home—(meaning Mrs. Summers' home)—for \$27,500.00. At that time Mrs. Summers said she wanted to have the deal completed as fast as possible. I told her I would. Within the next two or three days I went to the Title Company. I did not get hold of Mrs. Pellissier, and I ordered the Title Company to bring down a contract showing it in Francis Henry. I drew the contract for \$27,500.00, and Mrs. Summers at the time put up \$500.00 in currency. This was in the reception-hall at the home of Mrs. Pellissier. Mrs. Summers took the contracts, went out in the reception-hall and had the contract signed by Francis W. Henry." The testimony of the trust officer Taggart, tending to bring home to the knowledge of Mrs. Summers the interest of Mrs. Pellissier in the lots, is as follows: "When Mrs. Summers came in I passed the copy of the contract to her to read. She objected to certain things in the contract and asked for certain modifications or amendments. I said, 'I can't grant this. I will have to call Mrs. Pellissier up and see whether or not she will permit it.' I stepped to the telephone and called Mrs. Pellissier's phone, and Mrs. de Rulet answered the phone. I explained to her what Mrs. Summers wanted, and she said she couldn't answer the question for me that she would have to see her mother, so I came back from the phone and told Mrs. Summers that I couldn't give her an answer, and that if she would come in tomorrow, I would perhaps get in touch with Mrs. Pellissier, or words to that effect. I gave her a receipt, however, for her check for \$2,000.00, before she left. I think, at the time she gave me the cashier's check, I gave her the receipt, because I wasn't ready yet to deliver the contract, and the receipt for the money would be sufficient until I delivered the contract." The testimony of Mrs. Summers, called as a witness for the plaintiff, and examined under the provisions of section 2055, Code of Civil Procedure, was to the effect that three years previous to the negotiations involved in this action she went with Mr. Donahue to the residence of Mrs. Pellissier to see her about a lot in Pellissier Square situate on Western avenue; that Mr. Donahue said: "We would have to go and see her about the piece of property." The testimony of Mrs. Summers, as to the negotiations had in 1923, covering the two lots, was substantially the same as that given by Mr. Donahue, save and except that, where the witness Donahue used the name "Mrs. Pellissier," Mrs.

Summers testified that Donahue used the name "owner." Appellants not having raised the question that the testimony was insufficient to support the finding of nondelivery of the contract, it is unnecessary to set forth any of the testimony further than to say there is sufficient testimony to show that the contract came into the possession of Mrs. Summers without any manual tradition from the Title Company. In other words, that, when the contract was handed to Mrs. Summers to look over or examine, she proceeded to take the contract away with her. As we read her testimony, this is not denied by Mrs. Summers, the contention of appellants being that delivery was nonessential.

[1] The record shows that at a date previous to the negotiations between Summers and Donahue, relative to lots 188 and 189, the plaintiff had substantially stated that she would sell the two lots for \$27,500, but we find no testimony in the record that the plaintiff ever authorized the particular sale or execution of the particular contract now before the court. Whether the facts presented in the record were sufficient to justify the trial court in drawing the inference that such authorization had been given, rather than the finding that such authorization had not been given, was a matter exclusively for the trial court, as in all these matters there was considerable conflicting testimony, and nothing has been presented to us justifying the conclusion that the assailed findings have no support in the evidence.

The motion for nonsuit is so bound up with the other assignments of error as not to require separate consideration. The third assignment of error, and the reason why a reversal should be had, is based upon the fact that there was a previous action begun and prosecuted by the Title Company against the appellants, involving the validity of the contract now under consideration; that in such prior action the appellants had judgment against the Title Company.

[2, 3] While the record in the former action was introduced in testimony at the trial of this cause, a reference to the answer of the appellants shows that the pendency of said action was not pleaded in abatement of the present action, and that no effort was made to have the trial of this action continued until the final determination of the action between the Title Company and the appellants. The record in the case of the Title Company against the appellants showed that an appeal had been taken from the judgment of the trial court in that action, and that, under the provisions of section 1049 of the Code of Civil Procedure, it was still pending and undetermined at the time of the trial of the present action, and did not constitute a bar. Until a judgment has become final, it cannot be pleaded as a bar to a subsequent action, but, if the party, in whose fa-

vor the prior judgment has been rendered, so elects, he may in a subsequent action plead a prior action in abatement, and lay the foundation for securing a continuance of the trial of the second action until the final determination of the first. *Brown v. Campbell*, 100 Cal. 635, 35 P. 433, 38 Am. St. Rep. 314; *Harris v. Barnhart*, 97 Cal. 546, 32 P. 589; *Leonard v. Flynn*, 89 Cal. 335, 26 P. 1097, 23 Am. St. Rep. 500; *Estate of Ricks v. Ricks*, 160 Cal. 467, 117 P. 539; *Howard v. Howard*, 67 Cal. App. 56, 226 P. 984. By reason of the failure of the appellants to properly plead the judgment in the former action by way of abatement it is unnecessary for us to consider the cases cited to the effect that an action prosecuted by a trustee, in which the trustor does not join, is binding upon the trustor. The cases cited by the appellants state the law accurately as to the facts presented, but are not applicable here.

[4] We cannot agree with appellant's contention that delivery of the contract was not essential to its binding force and effect. The law applicable to delivery, and the necessity therefor, is very clearly stated in 9 California Jurisprudence, p. 149, § 48, and is peculiarly applicable here: "There is no better established legal principle than that the transfer of the ownership of real estate, so far as the transfer is to be made by deed, necessitates a delivery of that deed to effectuate the passing of title from the grantor to the grantee. Delivery is the force that vitalizes the instrument without which, though signed and acknowledged, it is invalid, and not effective for any purpose. If delivery is wanting, the deed is void ab initio, and it is no better than a blank form. Consequently it is recognized that prior to its actual delivery the grantor named in the instrument may change the character of the delivery originally contemplated, and has the right to destroy and nullify the instrument itself. And this operative characteristic of delivery is not peculiar to deeds, but attaches to all written contracts."

[5, 6] Whether the appellants had actual written notice is not necessary to support the finding of notice. If the circumstances are such as to put a prudent person upon inquiry, that is all that is required. See 25 Cal. Jur., page 637, § 283, where the rule is fully stated. It is argued, however, that under the terms of a trust agreement the only remedy on the part of the plaintiff is by an action against the Trust Company. This would be true if the other factors set forth in this opinion had not entered into this cause. The dealing of Mrs. Summers with Mrs. Pellissier in 1920, after the execution of the conveyance to the Title Company, unquestionably gave her knowledge of the beneficial interest and ownership of Mrs. Pellissier in the property involved. This, coupled with the fact that the

finding, that the contract was never delivered, necessitates an affirmance of the judgment, and it is so ordered.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.

208 Cal. 168

JOY MFG. CO. v. JULIAN PETROLEUM CORPORATION. (L. A. 9968.)

Supreme Court of California. Sept. 18, 1929.

1. Sales ☞384(1)—Measure of damages for breach of contract to buy oil pumps held under contract to be \$50 for each pump defendant refused to accept.

In action for breach of contract for purchase by defendant of oil pumps under which price was subject to revision at end of each six months' period, it being purpose of contract to allow net profit to plaintiff of \$50 per pump, measure of damages held to be \$50 per pump for each of undelivered pumps which defendant refused to accept.

2. Sales ☞49—In action for breach of contract, validity of severable provisions without bearing on recovery sought will not be determined (Civ. Code, § 1674; St. 1907, p. 984; 15 USCA § 1 et seq.).

In action for breach of contract for purchase by defendant of oil pumps, question whether contract was invalid under Civ. Code § 1674, St. 1907, p. 984, and 15 USCA § 1 et seq., will not be considered, where alleged invalid provisions had no bearing on recovery and, if invalid, were clearly severable.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by the Joy Manufacturing Company against the Julian Petroleum Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Anderson & Anderson, A. G. Ritter, McAdoo, Neblett & O'Connor, and Wm. H. Neblett, all of Los Angeles, and J. Hart Willis, of Dallas, Tex., for appellant.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles, and Stanley J. Smith, of Oakland, for respondent.

LANGDON, J. This appeal is by the defendant from a judgment against it in the sum of \$101,150 as damages for the breach of a contract for the purchase by the defendant of certain oil pumps, known as Joy pumps, from the plaintiff and respondent.

The contract involved provides that for the first 100 pumps to be delivered under the contract appellant should pay at the rate of \$240 per pump, and for the second 100 pumps the

appellant should pay at the rate of \$220 per pump. The first 200 pumps were delivered and paid for and are not involved in this action. The contract provides that all pumps delivered in excess of the first 200 should be paid for at the rate of \$210 per pump. It is further provided that the price set is "made subject to revision at the end of each six months' period in order that the price may at that time be adjusted to meet market conditions on deliveries following revision of price, it being the purpose of this contract to allow a net profit to the second party (plaintiff herein) of fifty dollars per pump."

The contract also contained a provision that, if the plaintiff did not make prompt deliveries, the defendant might manufacture, in plaintiff's plant, at its own expense, Joy pumps, in which event defendant should pay plaintiff a royalty of \$50 per pump for every pump so manufactured. There is also a provision which recites that, if the plaintiff sells pumps on a wholesale basis for installation in Southern California, the price shall exceed the price "for the current period" to the defendant by at least \$50.

One of the points made upon appeal has relation to the finding of the trial court "that as a result of the breach of the terms of said agreement by said defendant, said plaintiff * * * has been damaged in the sum of \$50 a pump for all pumps provided for in said agreement to be delivered by plaintiff to defendant and to be paid for by said defendant, which were not delivered by plaintiff solely because of the refusal of said defendant to comply with the terms of said agreement and the breach of said agreement by said defendant." It is further found "that on account of said failure, plaintiff * * * has been damaged in the sum of \$50 a pump for each of said 2,002 pumps, making a total of \$100,100, in addition to the damage in the sum of \$1,050 which plaintiff has suffered because of the refusal of defendant to make the payment provided for in the modification agreement for the month of March, 1925."

[1] The appellant admits that 2,002 pumps were undelivered because of its refusal to accept the same, and the only question with reference to damages is whether the plaintiff should recover at the rate of \$50 per pump for each of these pumps. No evidence was offered upon the question of cost of production, profits, etc., and, unless the contract is susceptible of the construction that a price adjustment was to be made at stated periods which could and would guarantee a profit of \$50 a pump to plaintiff, the findings with reference to damages are not sustained by the record.

280 P.—60½

As stated by appellant, "the trial judge broadly interpreted the contract in question as in and of itself fixing a minimum measure of damages for its breach at \$50 per pump bought of the respondent corporation, not, from his viewpoint, as liquidated damages, but as a fixed profit to be realized according to the expressed 'purpose of this contract' under the prices fixed in the contract, or under the prices to be mutually fixed by each six months' revision of prices provided for in paragraph 5."

The construction placed upon the contract by the trial judge seems not only a permissible one to us, but it seems the only construction which could be placed, fairly, upon its terms, and this conclusion disposes of several of the arguments made upon appeal.

[2] It is contended, under many subheadings assigning reasons for the contention, that the contract sued upon is invalid upon its face. It is contended that certain provisions of the contract are invalid because violative of section 1674, Civil Code, and that certain provisions thereof violate the so-called Cartwright Act (St. 1907, p. 984) and the federal anti-trust acts (15 USCA § 1 et seq.). It is unnecessary for us to decide these points because the asserted invalid provisions have no bearing upon the recovery sought here, and no necessary connection with the provisions of the contract relied upon in this action, which is for breach of the condition to receive and pay for certain specified pumps. If the provisions relied upon by defendant and appellant be invalid, they are clearly severable from the remainder of the contract.

In the case of Ragsdale v. Nagle, 106 Cal. 332, 39 P. 628, 630, it was claimed that a contract was invalid, as violative of sections 1673, 1674, and 1675 of the Civil Code. The court said: "It is claimed that the contract is void because it goes beyond the scope of the law in certain particulars. For present purposes only, let us concede that the contract is broader in certain respects than the law; still, it is entirely valid in all those particulars in which it comes within the provisions of the law. Brown v. Kling, 101 Cal. 295, 35 P. 995; City Carpet, etc., Works v. Jones, 102 Cal. 506, 36 P. 841."

This rule of law applied to the contract in question upon this appeal disposes of the second group of objections made by appellant, and it is unnecessary to discuss them.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.; RICHARDS, J.

208 Cal. 228

CONTINENTAL SECURITIES & INVESTMENT CO. v. RAWSON et al.
(L. A. 10057.)

Supreme Court of California. Sept. 26, 1929.

1. Corporations ☞1—Corporate entity of corporation owned entirely by two brothers could not be disregarded, to fraudulently deprive nonresident brother of profits of corporate transactions.

Evidence that two brothers acquired entire stock of corporation domesticated in California for purpose of transacting business there, and brother becoming manager of corporation alone remained in state and transacted business in name of corporation, and thereafter falsely represented to brother outside state that corporation was failing, and sought to extinguish nonresident brother's right by changing contracts in name of corporation and substituting own name in place of corporate name, showed that transactions were those of corporation, and did not justify court in setting aside corporate entity to deprive nonresident brother of profits of transactions, since disregard of corporate entity would work fraud on nonresident brother.

2. Corporations ☞1—Disregard of corporate entity requires proof that owners control corporation and that adherence to corporate fiction would work fraud.

Whether corporation is one-man corporation or two-man corporation, it is necessary to show that absolute control of corporation was in hands of owners, and that adherence to fiction of separate existence of corporation would sanction fraud, to authorize court to disregard corporate entity.

3. Corporations ☞430—Trustees innocently participating in carrying out purpose of common-law trust held not immune from accountability to corporation for transactions between corporation and trust.

Trustees of common-law trust innocently participating in carrying out purposes of legitimate common-law trust are not immune from accountability to corporation for transactions conducted in name of corporation with trust.

In Bank.

Appeal from Superior Court, Los Angeles County; Merle J. Rogers, Judge.

Action by the Continental Securities & Investment Company against W. D. Rawson and others, in which defendants Rawson filed a cross-complaint. Judgment for defendants, and plaintiff appeals. Reversed.

Halverson & Price and George Halverson, all of Los Angeles, and O. P. Soule, of Salt Lake City, Utah, for appellants.

Fred Mansur, of Los Angeles, Thos. Marieux, of Salt Lake City, Utah, and Dryer, Castle, McConlogue & Richards, of Los Angeles, for respondents.

SHENK, J. This is an action wherein it is sought to compel the defendants to make an accounting of certain transactions alleged

to have taken place on behalf of the plaintiff corporation. The defendants W. D. and Lydia K. Rawson filed a cross-complaint, to quiet their title to the real properties involved in the transaction. Findings and judgment went for the defendants, and their title as cross-complainants was quieted. The plaintiff appeals, under the so-called alternative method.

John F. Rawson and the defendant W. D. Rawson are brothers. While both were residing in Utah, and in 1916, they, with others, organized the plaintiff, the Continental Securities & Investment Company, under which the two brothers, as principal owners of the stock of the corporation, conducted a general real estate and stock and bond brokerage business. When the Securities Commission Act, or so-called "Blue Sky" Law, of Utah went into effect in 1919 (Laws 1919, c. 111), the plaintiff corporation ceased to do a brokerage business in that state, although it continued to maintain an office in Salt Lake City. In June, 1918, the brothers acquired all of the stock of the corporation and thereafter continued to own the same in equal proportions. After the Utah Securities Commission Act went into effect, the defendant W. D. Rawson remained for a time in Utah, selling stock of the Utah-California Oil Products Company. Later in 1919 he came to California in connection with the business of the latter company, and has remained here in business in and around Los Angeles. In 1920 he organized the United States Oil Company. Thereafter, and until June, 1922, he engaged in promoting the interests of both oil companies and in conducting a brokerage business for himself.

In June, 1922, John F. Rawson made a trip to Los Angeles at the suggestion of his brother. Prior to that time W. D. Rawson had negotiated for the subdivision of 40 acres of land in Orange county belonging to Henry and Cordelia Winters, with the view of selling the same in small lots, with certain reservations as to oil production. In July, 1922, the first contract was entered into between the plaintiff corporation and Henry Winters and wife for the sale of the Winters tract in lots of 25x25 feet in dimension, with 2 acres reserved for "club" and oil-drilling purposes. On July 18, 1922, an application was made by the plaintiff to the real estate commissioner for a real estate broker's license. On July 21, 1922, the plaintiff, as a foreign corporation, filed its articles of incorporation with the secretary of state, complied with all of the laws of the state of California, and thus became entitled to do business in this state. A bank account was opened in the name of the plaintiff corporation, consisting of \$1,688.11, joint funds of the brothers, and \$805 furnished by W. D. Rawson. With these funds the land was surveyed, corporate stationery, including letterheads in the usual form, were purchased, a lecture hall 30x70 feet long was constructed at an expense of some \$1,500, and

a lot-selling campaign was started. The venture at first met with scant success, for only 14 or 15 lots were sold. Liabilities in excess of receipts were incurred. Also, the plaintiff was notified that, owing to the form of the contract with the purchasers of lots, the Corporate Securities Act of this state (St. 1917, p. 673, as amended) was being encroached upon, and that it would be necessary for the plaintiff corporation to secure a permit from the commissioner of corporations, if it desired to carry on its lot selling campaign under the plan then in force.

After consulting at some length with reference to the prospects, John F. Rawson announced to his brother that "he didn't think he wanted to stay" in California any longer; that it "didn't look like" they would be able to succeed in selling the subdivided tract, and that he "felt that he would go home; and, as his son was now getting married, that he would go home and go in business with him." W. D. Rawson testified: "And I told him, if he left me now, with all these difficulties on my hands, and this matter to straighten out, that it created a great hardship upon me, and I tried to persuade him to remain here and help me, and would eventually get a contract worked out, so that this thing could be sold.

* * * His response to that was that he felt he owed a duty to his son, and that he preferred to go home and go in business with himself, and that I could work out something here for myself." The "difficulties" which W. D. Rawson had in mind were that their funds were exhausted, debts had been incurred, and it appeared that it would be necessary to refund the money paid by the purchasers to whom the 14 or 15 lots had been sold. Under these circumstances John F. Rawson returned to Salt Lake City about August 17, and engaged in business with his son under the name of the plaintiff corporation.

W. D. Rawson then entered upon negotiations to obtain a new contract with the Winterses which he concluded under date of August 22, 1922. This contract was in writing. The Winterses were named as the parties of the first part, and Continental Securities & Investment Company, a corporation organized and existing under the laws of the state of Utah, as party of the second part. The corporate name was signed to the document by W. D. Rawson, president, and J. F. Rawson as secretary. Under date of August 23, 1922, W. D. Rawson mailed to his brother at Salt Lake City a copy of the new contract, and in the letter accompanying the same told his brother that he had signed the brother's name as secretary, explained the terms of the new contract, and his plans for a new lot selling campaign in considerable detail and stated: "Can tell you more after a few days' run. I am having a hell of a time with bills and no money to pay them, because must have some to start up with. Anything you can send will help much in getting started up."

Under the contract of August 22, 1922, the plaintiff corporation was constituted the exclusive fiscal agent of the Winterses in the sale of the lots. W. D. Rawson immediately entered upon a renewed lot-selling campaign, printed maps, literature, cards, and stationery, all in the name of the plaintiff corporation, employing numerous salesmen, and carrying on all of the business in the name of the plaintiff corporation. A trust agreement to handle the proceeds from the sale of the lots and the conveyance of title was entered into with a local bank, with the plaintiff corporation as a party thereto. The sale of lots developed slowly through September and much of October, but in the latter part of October, 1922, sales were frequent and the returns were large. By July, 1923, the larger part of the Winters tract was sold, and the Winterses were paid the balance of the purchase price to them, the total being \$70,000.

About May, 1923, W. D. Rawson made arrangements for the purchase of the Edenwild tract from Fred W. Griffith for the sum of \$30,000, on terms of \$5,000 cash and the balance in notes secured by a trust deed on the property. When asked to whom the Griffith deed should run as grantee, W. D. Rawson replied, "To the Continental Securities & Investment Company." When requested for a resolution of the board of directors authorizing the execution of the trust deed back to Griffith, W. D. Rawson stated that it would be unnecessary to go to that trouble, but to make the deed run to W. D. Rawson, which was done under date of June 4, 1923. W. D. Rawson then paid the initial payment of \$5,000 by check made in the name and from the funds on deposit in the name of the plaintiff corporation. From sales in the Winters tract and in the Edenwild tract the deposits in the bank to the credit of the plaintiff corporation totaled \$232,368.45. In January, 1924, W. D. Rawson organized the Continental Finance Corporation under the laws of this state, continued thereafter to transact the same business as theretofore conducted under the name of the plaintiff corporation, and the deposits to the credit of the Continental Finance Corporation from January 18, 1924, to October 15, 1925, totaled \$79,959.52. The trial of the action was commenced on November 10, 1925.

After the efforts of W. D. Rawson, all in the name of the plaintiff corporation, were plainly meeting with success, and, according to his testimony, some time between January and June, 1923, he went to the Winterses, reported to them that John F. Rawson had gone back to Utah and was no longer interested in the Winters tract enterprise, and requested them to change the fiscal agency contract of August 22, 1922, so as to name W. D. Rawson individually as the agent. The Winterses complied with the request, signed a new contract embodying the same terms as the contract of August 22d, but substituting the name of W. D. Rawson for the name of the

plaintiff corporation wherever the latter appeared in the old contract. Thereupon, in the presence of the Winterses, W. D. Rawson "tore up" the contract of August 22, 1922, made in the name of the corporation. On September 6, 1922, W. D. Rawson wrote to his brother, stating that he was about ready to start; that "the new plan appeals, but can't say how it will sell, and if it don't I am down and out, for I have spent my last dollar. * * * Will know to-morrow how business is going. Will drop you a line when I come in; all is rush now."

On September 7th John F. Rawson wrote to his brother from Salt Lake City, stating that he had "broken up" the office there and was negotiating for the sale of the office furniture; that he had been unsuccessful in selling his home on satisfactory terms, and concluded: "Realizing your position as I left you—the perils and hazards of the situation—I have watched every mail with the hope you would keep your promise and advise me on the conditions. I can only imagine one interpretation for your long silence, and that is continued adversities. Your silence interpreted by me thus has caused me to play more cautiously, to halt, to hesitate, to be indecisive. If the business has gone bad with you there, which I am inclined to infer, and we can establish a business here that is substantial, lucrative, and on a broad enough basis, I am sure we shall be glad to invite you to join us. * * * I have negotiations under way for the office furniture, negotiations for the sale of my home, and while negotiations along either line are not satisfactory to me, they may become so, and I may advise you I am loose here and starting for there; but I cannot hardly believe I shall be successful for a little time yet."

Under date of September 11, 1922, W. D. Rawson, still using the stationery of the Continental Securities & Investment Company, fiscal agents, W. D. Rawson, managing director; J. F. Rawson, secretary-treasurer, wrote to his brother as follows: "We have made two runs to Winters so far, but without any sales. We start to-morrow to make steady runs. I now have about 45 salesmen and solicitors working, and we expect 150 people out to-morrow, but can't tell with what results. * * * I haven't any money, in fact had \$7 overdraft, not knowing you had drawn, so I am holding on and hoping; if money comes soon we survive, otherwise bust, with bills galore. I believe, however, it will go this time, though the profit will not be large, but it will be a start along a new line of business."

On October 21, 1922, W. D. Rawson wrote to his brother as follows: "There has not been anything developed of material interest in the [Winters] subdivision, and I am arranging to take in a bunch of fellows, who ought to be able to get an organization, so that the property can be handled. Of course,

I will have to make concessions to suit them, owing to circumstances which you are well acquainted with. I had great hopes in Brown, but have waited as long as it is possible to wait. Therefore, any plans that we previously had will have to be forsaken, so I hope that you and Brown will be able to succeed in the Bear Lake and Mineral Point undertakings. We went down to the property yesterday, but did not have any one there to make any sales to."

Again on January 18, 1923, W. D. Rawson wrote to his brother as follows: "I am working with a group of fellows here. We are handling all kinds of real estate, exchanges, and business chances, and in fact most everything that we can get to handle that is marketable here. Do not know just how successful we will be yet, as it is something new, and has not been fully tried out. * * * I am still working to clear up the outstanding obligations of the Continental incurred in the early subdivision undertaking, but just how long it will take I cannot tell."

Under date of February 22, 1923, John F. Rawson wrote to W. D. as follows: "Attached to this letter is a clipping of an ad of some fellow who says he has some money to invest. I am making an effort to get in touch with this fellow, with a view of interesting him in the Winters contract. I hope that the Winters line-up is in shape, so we can take this fellow on, if I catch him. I wish you would tell me frankly and by return mail what the chances are for me to make a living and some money, if I came to Los Angeles and help in the business there. Can we put the Winters over? I have got to move here now. I must either join you in Los Angeles, or I must enter into business alliances here which will make it impossible to join you. * * * I want your reply as to the business outlook by return mail."

Finally on February 28, 1923, W. D. Rawson wrote to his brother as follows: "Yours of the 22d inst. received and carefully noted. Also the clipping of the ad attached, but we cannot do anything in the way of taking the party in on handling Winters' property. The Corporation Commission rule that the club memberships, as arranged when you were here, are a security and have tied the matter up for considerable time. In fact, every move that has been made they have undertaken to kill the proposition. Real estate in not moving in Los Angeles. We have worked for two months on local business and haven't made a single sale. We are now looking at some mining property with the view of taking hold of it, but do not know yet what the results will be. Business is quiet, so I cannot offer any encouragement in anything. Brown was here about a month ago, and I showed him things as they were at that time, and there isn't any improvement, so he decided to continue with his soap people. We have been expecting for weeks that something might

pick up in the way of business, but it seems to get worse, and every move that is made the commission put their stamp of disapproval on, so that it is almost impossible to do anything except work for wages for somebody else."

In July, 1923, John F. received information that there had been much activity and success with sale of lots in the Winters tract since October of the previous year, and contrary to his brother's "discouraging" letters from October 21st on. He went to Los Angeles, became acquainted with the true situation, and demanded an accounting from his brother. After many conferences between the two, and failing to arrive at a solution of their difficulties, they came to a final break in October, 1923. On January 5, 1924, a meeting of the stockholders of the plaintiff corporation was held in Salt Lake City, directors were elected and the board was organized with Roscoe, son of John F. Rawson, as president, Kate Rawson, vice president, and John F. Rawson, secretary-treasurer. On January 8th, by authority of the board of directors, John F. Rawson, on behalf of the plaintiff corporation, made a demand on W. D. Rawson for an accounting of all of the latter's transactions with relation to the business of the plaintiff corporation in the state of California. Following a refusal to comply with the demand this action was brought on March 14, 1924.

From the standpoint of the plaintiff the case was tried and is now presented on the theory that on the facts the brothers were the equal owners of the stock of the plaintiff corporation, with W. D. Rawson as the managing director and John F. as the secretary-treasurer; that all of the transactions, from the inception of the Winters tract enterprise down to the demand of the plaintiff corporation for an accounting, were corporate transactions, in which each brother would be entitled to the proceeds in proportion to his stock ownership. On the part of the defendants, the cause was tried and is now presented on the theory that the relationship between the two brothers was that of copartners; that upon the departure of John F. Rawson for Salt Lake City on August 17, 1922, he abandoned the partnership enterprise and effected a dissolution of the partnership by his failure to perform his duties under the alleged agreement of partnership as provided in subdivision 2 of section 2452 of the Civil Code as it existed prior to August 14, 1929; that during all of said transactions the plaintiff corporation was but the alter ego of the two brothers; that the corporation was a two-man corporation, whose corporate existence should be disregarded in adjusting the rights of parties; that the success in handling the two tracts of land was due entirely to the efforts and activities of W. D. Rawson, and that it would be inequitable to permit John F. Rawson to share in the proceeds.

The court found in favor of the defendants on their theory of the case and entered judgment dismissing the action. The main contention of the plaintiff on the appeal is that the evidence is insufficient to support the findings so made.

[1] The foregoing statement of facts is supported by the record without substantial conflict. From what has been related, and from further examination of the record, it is established without question, and without any substantial showing to the contrary, that the plaintiff corporation was at all times involved in the controversy a legal entity, entitled to transact business in the states of Utah and California; that from the inception of the Winters tract enterprise all of the activities of W. D. Rawson were carried on in the name of the plaintiff corporation, down to the time of his organization of the Continental Finance Corporation in January, 1924; and that there was no thought or purpose on the part of W. D. Rawson to dispute or deny the rights of his brother as a stockholder in the corporation until the Winters enterprise was plainly approaching success. He then entered upon a willful and deliberate scheme of misrepresenting to his absent brother the conditions as they truly existed. In the execution of his purpose he sought to extinguish his brother's rights, by tearing up the contract of August 22, 1922, made in the name of the corporation, and prevailing upon the Winters to sign a new contract of the same date, substituting his own name in the place of the corporate name. If the relationship of the brother was that of a copartner, and the copartnership was dissolved on August 17, 1922, when John F. Rawson returned to Salt Lake City, as contended by the defendants, what was the purpose of W. D. Rawson in misrepresenting to his brother the true situation with reference to sales in the Winters tract as disclosed by his letters written to his brother from October 21st on, when in fact the success of the enterprise appeared beyond question, and in attempting to wipe out his brother's interest by destroying the contract made in the name of the corporation, in which the absent brother had a half interest?

The only rational conclusion to be drawn from the evidence is that all of the transactions here involved were transactions of the plaintiff corporation, as such, and were so considered by W. D. Rawson, until he conceived the plan to deceive his brother as to the corporation's success. The plaintiff corporation was domesticated in this state for the purpose of transacting business here. All letterheads, literature, contracts, and bank accounts were in the name of the corporation. Accounts were kept and W. D. Rawson made income tax returns in the name of the corporation. Real estate brokers' licenses were obtained in the name of the corporation. It is not seriously contended by the defendants that the misrepresentations were not made

by W. D. Rawson to his brother. It is argued, however, that because the court found the plaintiff corporation to be a two-man corporation, and that the interests of the brothers were equal, the court should cast aside the corporate veil and award the proceeds of the transactions to the defendants, because, in truth, the success ultimately attained was due to the efforts of W. D. Rawson after the departure of his brother from the state.

The documentary evidence discloses without substantial conflict that the absent brother was ready and anxious to return to California, if conditions would seem to render it probable that he could further the enterprise by his assistance. If the other original stockholders in Utah, who sold their holdings to the brothers, had retained their stock interests there could be no reasonable basis for the claim that they, although absent from this state, would not be entitled to share in the profits of the corporation's activities, notwithstanding said profits might accrue only because of the energy, foresight, and ability of the corporation's managing director. The fact that the brothers became the sole owners of the stock did not destroy the interests of either, and a court would not be justified in wiping out the interest of either in favor of the other, unless it be made to appear that in the interest of justice, or to prevent fraud, the corporate entity should be disregarded. In *Minifie v. Rowley*, 187 Cal. 481, at page 487, 202 P. 673, 676, it was said: "Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice. *Erkenbrecher v. Grant*, 187 Cal. page 7, 200 P. 641; *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 P. 986." See, also, *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, 227 P. 723.

[2] When the corporation is organized or perpetuated for the particular purpose of carrying out the plans of partners or associates in business, the same rule has been held to apply. *Wise Realty Co. v. Stewart*, 169 Cal. 176, 146 P. 534; *Shorb v. Beaudry*, 56 Cal. 446; 6 Cal. Jur. p. 595. Whether the corporation be deemed a "one-man" corporation or, as here claimed, a "two-man" corporation, the rule

would be the same and the two essential elements must be present. The first element, viz. the absolute control of the corporation at the times in question was in the hands of the brothers, was present. But the second element, viz. a state of facts upon which the adherence to the fiction of the separate existence of the corporation would sanction a fraud, is lacking. On the contrary, there is present herein such a state of facts that, if the corporate existence is to be disregarded, the result will be to sanction the fraud of one brother against the other, and permit the one to become enriched by his own dishonesty and deceit; whereas, if the separate corporate existence be adhered to, such a result will be prevented. If the brother in Utah had been truthfully informed of the approaching success of the Winters tract enterprise, the conclusion is inevitable from the record that he would have joined his brother in Los Angeles and assisted in promoting the project, in which event their original understanding would have been carried out, whether they operated under the name of a corporation, or under an authorized fictitious name, or in their individual names. It is by reason of the wrongdoing of W. D. Rawson that the defendants are now endeavoring to erect a barrier to the accounting and in doing so are seeking the aid of a court of equity in accomplishing the purpose. Equity will not so lend its aid, and the chancellor should lend a deaf ear to the plea.

Therefore, since the defendants must be held to the corporate form of the transactions conducted by W. D. Rawson, it would seem to be quite immaterial whether John F. Rawson was in Utah during the time that the business was being conducted by the corporation. Wherever he might be, his stock ownership was sufficient evidence of his interest in the corporate transactions. No contention is advanced that the corporation may not in a proper case call to account one of its officers on behalf of its stockholders.

[3] There is and can be no criticism of the conduct of the individual defendants other than W. D. Rawson. The defendants, trustees of the Winters Club, were innocent participants in carrying out the purposes of an obviously legitimate common-law trust; but their right, so far as the accounting is concerned, are in law no more immune from accountability than the defendant W. D. Rawson himself.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

208 Cal. 185

TITLE GUARANTEE & TRUST CO. v. HENRY et al. (L. A. 8465.)

Supreme Court of California. Sept. 23, 1929.

1. Quieting title $\S$ 47(2)—In action to quiet title, finding that plaintiff was owner of property could not stand where plaintiff was only trustee.

In action to quiet title, where court had stated during trial that plaintiff was merely holder of legal title and that full equitable title was in third party, finding that plaintiff was owner of property could not stand.

2. Specific performance $\S$ 120—In purchaser's suit for specific performance of contract for sale of realty, declaration of trust held admissible to show that beneficiary was indispensable party.

In purchaser's suit for specific performance of contract for sale of realty against trustee, declaration of trust held admissible to show that beneficiary was indispensable party.

3. Trusts $\S$ 189—Conveyance in violation of terms of trust would not have been act of trustee in exercise of its powers.

Conveyance in violation of terms of trust would not have been act of trustee in exercise of its powers, but would have been act in defiance of restrictions upon trustee.

4. Trusts $\S$ 371(8)—Purchaser must allege and prove purchase for value and without notice to obtain protection of statute providing that grant to trustee not disclosing trust must be deemed absolute as to bona fide purchasers (Civ. Code, $\S$ 869).

To entitle purchaser to protection of Civ. Code, $\S$ 869, which provides that grant to trustee which does not disclose trust must be deemed absolute as to purchasers for value and without notice, purchaser must allege and prove that he was innocent purchaser for value.

5. Specific performance $\S$ 120—In purchaser's suit for specific performance, declaration of trust held admissible, since it might have shown that vendor being trustee had no power to convey.

In purchaser's suit for specific performance, declaration of trust making vendor trustee held admissible, as it might have shown that vendor had no real interest in property and had no power to convey.

6. Specific performance $\S$ 120—In purchaser's suit for specific performance against trustee, declaration of trust held admissible as material to question of delivery of contract of sale to purchaser.

In purchaser's suit for specific performance against trustee, instrument creating vendor trustee of property conveyed held admissible as material to question as to whether contract for sale of realty had been delivered to purchaser; there being some evidence that third party was real owner and in charge of disposition of such property.

7. Specific performance $\S$ 106(4)—In purchaser's suit for specific performance beneficiary was necessary party, although trustee alleged itself to be owner in action against purchaser to quiet title.

Where trustee as vendor brought action to cancel contract of sale of realty in which action purchaser filed cross-complaint for specific performance of such contract, fact that trustee in original complaint alleged itself to be owner did not excuse purchaser from duty of making beneficiary party, since in original action trustee was acting in consonance with its powers under declaration of trust.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Suit by the Title Guarantee & Trust Company against Francis W. Henry and another, in which the named defendant filed cross-complaint against the named plaintiff. From a judgment for the defendant, plaintiff appeals. Reversed.

Superseding opinion in 274 P. 572.

E. W. Sargent, E. J. Vaughn, G. B. Corby, Tanner, Odell & Taft, O'Melveny, Tuller & Myers, and Homer I. Mitchell, all of Los Angeles, for appellant.

I. Henry Harris, of Los Angeles, and T. E. Davis, for respondents.

PRESTON, J. The judgment is reversed. Enough of the facts and the principles applicable thereto to show the propriety of this conclusion will now be set forth.

Plaintiff sued defendants to cancel a certain outstanding instrument, purporting to be a contract of sale and purchase, made by it with defendant Henry under date of February 1, 1923, affecting the title to certain lots in Los Angeles known as Nos. 188 and 189 of tract 2189 or Pellissier Square, as per the official map thereof. The complaint was in two counts, the first in the ordinary form of an action to quiet title, and the second attacking specifically said written instrument alleging that it was never executed and delivered; the material allegations upon which the prayer for cancellation was based being as follows: "That on or about February 5, 1923, the defendant Emma Summers was proposing to purchase the above described real estate and to place the same in the name of Francis W. Henry, above mentioned as a defendant, for the sum of \$27,500.00, on terms and conditions to be contained in a written contract and to be approved by one Marie Julie Pellissier. That plaintiff caused to be prepared contracts for the sale of said real estate in duplicate, a copy of which is hereto annexed marked Exhibit 'A,' and had signed the same, but said contracts were not complete or ready for delivery and had not been approved by said Marie Julie Pellissier. That on or about said date the defendant Emma Summers had deposited with plaintiff checks in the sum of

\$2,500.00, which said checks would be accepted and applied on account of said contract as soon as said contract should be ready for delivery. * * * That said defendant Emma Summers surreptitiously and without the knowledge or consent of the plaintiff or its said employee took one of said duplicate copies of said alleged contract and departed from the office, and is now claiming that said contract was delivered to her."

Defendants answered, putting in issue all the material allegations of the complaint, including specifically a denial of ownership of the property by plaintiff. Defendant Henry at the same time interposed a cross-complaint wherein he set up said contract and alleged performance on his part and his further readiness, willingness, and ability to perform each and every term thereof, repudiation and refusal to carry out the terms thereof by plaintiff, adequacy of the purchase price; that said contract was in all respects just and reasonable, and that plaintiff's assent thereto was not obtained by misrepresentation, concealment, circumvention, or unfair practices of any kind, and that defendant Henry had fully and fairly performed all conditions precedent on his part to the obligations of plaintiff, wherefore he prayed that he have specific performance of said contract decreed, and a conveyance of said property directed to him upon compliance with the terms and conditions mentioned therein. But there was no allegation in said cross-complaint that plaintiff owned any estate, right, title, or interest in or to said property, nor indeed that plaintiff as a grantor was in possession thereof.

To this cross-complaint plaintiff answered denying execution of said written instrument, denying that defendant Henry paid it the sum of \$2,500, but admitting that checks were left with it in that sum, which checks were not accepted or cashed, and specifically pleading, in accordance with the second count of its complaint, that said instrument was never delivered at any time to defendant Henry or his codefendant, but was surreptitiously and unlawfully taken from its possession without its consent.

The court made findings and gave judgment denying relief to plaintiff and decreed to defendant Henry the relief prayed for by him, including specific adjudication of the due execution and delivery of said written instrument, performance thereof so far as required on the part of said Henry, payment by him of said sum of \$2,500, and his willingness and ability to complete the contract in accordance with its terms and repudiation thereof by plaintiff. The court also found that plaintiff owned the property in fee simple; that it was not necessary that said contract of purchase be approved by said Marie Pellissier; and that in truth and fact the document was delivered to said defendant Henry.

Many claims are put forth by appellant as grounds for reversal of this action, chief

among which are that under the evidence offered, including the documentary evidence rejected, it became the duty of defendant Henry, as a cross-complainant, and of the court, inasmuch as he failed to do so, to make Marie Julie Pellissier a party to this action before entering a decree of specific performance; that in this connection the court erred particularly in refusing to admit in evidence the terms of the trust under which the legal title to the property in question was held by plaintiff, the contention being that said trust instrument on its face showed that plaintiff held only the naked legal title to said property, whereas the equitable and real title was in the said Marie Julie Pellissier. These two contentions only need receive our attention.

At the opening of the trial of said cause, plaintiff offered in evidence said instrument referred to, being a declaration of trust made on the 25th day of February, 1913, setting forth the terms upon which said property was conveyed to and held by it, said Marie Julie Pellissier being the beneficiary thereunder. Said instrument, among other provisions, contained the following: " * * * Party of the second part (plaintiff) shall issue Contracts of Sale and convey lots * * * to such person or persons, at such prices, and upon such terms as it shall be hereinafter instructed by the said party of the first part, her heirs or assigns." Further: "The party of the second part shall impose such restrictions, covenants and conditions in all Agreements and deeds executed by it as it shall be in writing requested to do by said party of the first part, her heirs or assigns."

It was stipulated in open court by both parties that said Marie Julie Pellissier did not consent to the execution or delivery of the contract of purchase in question. It was further announced by the court several times during the trial that plaintiff was merely the holder of the legal title and that the full equitable title was in the said Pellissier. It was also testified to by several witnesses that no sales of any kind were made without first securing the consent of said equitable owner.

[1] Under this situation it is manifest that the finding by the court that plaintiff was the owner in fee simple of the property in suit cannot stand. It should also be noted that the cross-complaint contained no allegation of ownership or estate or possession in the plaintiff. On the contrary, the answer to the cross-complaint denied that plaintiff was the owner thereof. It is true that at the trial permission was granted to said defendant to withdraw that portion of his answer in this respect, but the defect in the cross-complaint was never supplied by any allegation or proof that plaintiff held any estate whatsoever in or possession of said lands.

[2, 3] Under the terms of the declaration of trust as it appears in the record, it would have been a breach of duty on the part of the trustee and a direct violation of the terms

thereof for it to have executed the contract in question without consent of the real owner, Marie Pellissier. Had the declaration of trust been admitted in evidence it would have clearly followed that Marie Pellissier was an indispensable party to the determination of the issues in said action. A conveyance in violation of the terms of the trust would not have been an act by the trustee in the exercise of its powers but would have been an act in defiance of the restrictions upon it. The principle announced in the case of *Mitau v. Roddan*, 149 Cal. 1, 84 P. 145, 6 L. R. A. (N. S.) 275, is here applicable because the situation here is but the converse of the situation there. See, also, the recent case of *Lake v. Dowd* (Cal. Sup.) 277 P. 1047.

Defendant Henry is doubtless desirous of coming within the operation of that portion of said declaration of trust which reads as follows: "Any conveyance made by the Title Guarantee and Trust Company to the purchasers of Lots shall vest in such purchasers an absolute and unassailable title, and there shall be no obligation on the part of the purchasers to see to the application of the purchase money, it being expressly understood by all parties hereto that any conveyance made by the party of the second part shall be binding upon all parties hereto, and should the party of the second part violate any of the provisions hereof, then the Beneficiary shall have recourse only against said party of the second part."

The waiver of certain rights for a violation of the trust does argue that the trustee is acting within the line of his authority. If plaintiff is forced to convey, the said Marie Julie Pellissier will be forced to accept such action and will be relegated to a cause of action against the trustee personally. This is an added and convincing reason why she is a necessary party to this action. It has been well said in *O'Connor v. Irvine*, 74 Cal. 435, 16 P. 236, 239: "If the necessary parties to a full determination are not before the court it is the duty of the court on its own motion to order them brought in; and this, although the defendants in the action have omitted to raise an objection of defect of parties by demurrer or answer. The failure of the court so to do is fatal to the judgment." See *Mitau v. Roddan*, supra, and *Lake v. Dowd*, supra.

[4] Defendant invokes section 869 of the Civil Code, which reads as follows: "Where an express trust is created in relation to real property, but is not contained or declared in the grant to the trustee, or in an instrument signed by him, and recorded in the same office with the grant to the trustee, such grant must be deemed absolute in favor of purchasers from such trustee without notice, and for a valuable consideration." The contract here in question is an executory contract, and the cross-complainant could not under the evidence be interested as a purchaser without notice for a valuable consideration beyond the

initial payment made by him at the inception of the transaction. *Davis v. Ward*, 109 Cal. 186, 41 P. 1010, 50 Am. St. Rep. 29; *Henry v. Phillips*, 163 Cal. 135, 140, 124 P. 837, Ann. Cas. 1914A, 39. This observation brings to the foreground the absence of any allegation or proof that cross-complainant was an innocent purchaser for value. The rule is stated in *Kenniff v. Caulfield*, 140 Cal. 34, 45, 73 P. 803, 806, as follows: "To entitle a party to protection as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith and without notice, actual or constructive, prior to and down to the time of its payment; for, if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser. *Eversdon v. Mayhew*, 65 Cal. 167, 3 P. 641; *Davis v. Ward*, 109 Cal. 190, 41 P. 1010, 50 Am. St. Rep. 29; *County Bank of San Luis Obispo v. Fox*, 119 Cal. 64, 51 P. 11."

[5] Said declaration of trust was admissible in evidence upon another theory. A seller cannot be required to specifically perform in a case where he is entirely without power so to do, as, for example, where he has no estate of any kind or character in the property the subject of the action. Here had said document been introduced in evidence in connection with other testimony, it might easily have been determined that plaintiff was without any real interest in said property and the decree of specific performance would only have had the effect of clouding the title of said Marie Pellissier. *Smith v. Bangham*, 156 Cal. 359, 364, 104 P. 689, 28 L. R. A. (N. S.) 522; *Bell v. Bank of California*, 153 Cal. 234, 239, 94 P. 889; *Farnum v. Clarke*, 148 Cal. 610, 618, 84 P. 166.

[6] It is also true that the reception by the court of this declaration of trust in evidence might have had a bearing upon the finding as to whether or not delivery was actually made to cross-complainant of said contract, there being sufficient evidence in the record for at least an investigation of the question as to whether or not the cross-complainant knew at all times that Marie Pellissier was the real owner and in charge of the disposition of said property and that a sale could not be made without her consent.

[7] There is no merit in the contention that because plaintiff in its original complaint alleged itself to be the owner of this property, cross-complainant would not be required to make Mrs. Pellissier a party to the action. The answer to that claim is pointed out in the cases of *Mitau v. Roddan*, supra, and *Lake v. Dowd*, supra, because by such action plaintiff was not acting in violation of its trust but in consonance with its powers thereunder. See, also, *Solomon v. Redona*, 52 Cal. App. 300, 193 P. 643.

It should be noted that we are not measuring here the rights defendants might have

against the trustee as an individual, but we are declaring that under the showing made specific performance should not be decreed without the presence of Marie Pellissier as a party to the action.

We think the subject need not be pursued further.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.

208 Cal. 246

CAMM & HEDGES CO. v. BANK OF COVELO et al. (S. F. 12580.)

Supreme Court of California. Sept. 26, 1929.

1. **Fraud** ⇨58(1)—In materialman's action for fraudulent representations, evidence held insufficient to support plaintiff's contention that defendants by statements and promises substituted themselves as principal debtors.

In action by firm supplying materials for school building seeking to recover damages for false representations which prevented plaintiff from filing a "stop" notice, and thus diverting last payment of contract to payment of plaintiff's claim, evidence held insufficient to support plaintiff's contention that defendants by statements and promises substituted themselves as principal debtors.

2. **Fraud** ⇨20—Materialman suing for fraudulent representations held not entitled to recover on theory that defendants' misrepresentations caused plaintiff to waive certain rights of lien.

In action by firm supplying materials for school building seeking to recover damages for false representations which prevented plaintiff from filing a "stop" notice, and thus diverting last payment of contract to payment of plaintiff's claim, plaintiff held not entitled to recover on theory that defendants by making misrepresentations which plaintiff believed and relied on caused plaintiff to waive certain rights of lien.

3. **Contracts** ⇨90—Evidence held insufficient to show any consideration for defendants' promises to materialman to notify him when notice of completion was filed and money paid (Civ. Code, §§ 1709, 1710).

In action by firm supplying materials for school building seeking to recover damages for false representations which prevented plaintiff from filing a "stop" notice, and thus diverting last payment of contract to payment of plaintiff's claim, evidence held insufficient to show any consideration for defendants' promises to notify plaintiff when notice of completion was filed and when certain money was paid over, so that there was no liability on theory of breach of contract nor under Civ. Code, §§ 1709, 1710.

4. **Mechanics' liens** ⇨132(14) — Materialman has constructive notice of recorded filing of notice of completion.

Filing of notice of completion was matter of public record of which materialman is held to have constructive notice.

In Bank.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by the Camm & Hedges Company against the Bank of Covelo and others, for damages for fraudulent representations. Judgment for defendants, and plaintiff appeals. Affirmed.

Superseding opinion in 275 P. 828.

G. P. Hall and Emmett I. Donohue, both of Petaluma, for appellant.

Thomas, Thomas & McCowen, Will Van Dyke, and Hale McCowen, Jr., all of Ukiah, for respondents.

LANGDON, J. This action was brought to recover damages for alleged fraudulent representations and promises. Motions for nonsuit as to each of the individual defendants were granted at the close of plaintiff's case, and at the conclusion of the trial judgment was entered in favor of the defendant bank on a directed verdict. The plaintiff appeals.

A. W. Biggers was engaged in constructing a school building near the town of Covelo for the Round Valley union school district. He was indebted to the Bank of Covelo for overdrafts and loans in the sum of about \$6,100 and assigned to that bank all moneys due and to become due him under the contract. Plaintiff supplied materials for the school building and had an unpaid claim therefor of over \$3,200. Mr. Owens, representing plaintiff, went to Covelo on January 21, 1924, for the purpose of collecting this claim. While there, he met some of the defendants who are alleged to have made fraudulent statements and false promises which prevented plaintiff from filing a "stop" notice, and thus diverting the last payment on the contract to the payment of plaintiff's claim.

The money due Biggers was collected by the bank, and after satisfying its own claim, the balance was placed in the checking account of Biggers and was disbursed by him.

[1] It is contended by appellants, first, that defendants by their statements and promises substituted themselves for and in place of A. W. Biggers as principal debtors. The contention is not supported by the evidence. The testimony of Owens is to the effect that he first made inquiry of defendant Long, thinking he was the secretary of the board of trustees. Long introduced him to defendants Johnson and Rohrbough, who at the time were standing on the sidewalk in front of the Bank of Covelo. A general conversation followed. Defendant Long was a stockholder and officer of the bank. Defendants Johnson and Rohrbough were each directors and stockholders of the Bank of Covelo, the latter being president and the owner of a majority of the capital stock. Mr. Owens testified:

"Mr. Rohrbough told me that there was \$11,000 of money that was yet to be paid on account of the contract for the school building; that there was sufficient money there to pay our bill, together with all other bills, and Mr. Rohrbough said that all of the money was being paid through the Bank of Covelo and that the bill of Camm & Hedges would be paid together with all bills, because there was sufficient money with which to pay it.

"Q. Now, at that time state whether or not Mr. Rohrbough said to you all of the accounts are being paid through the bank? A. He positively stated all bills are being paid through the Bank of Covelo.

"Q. And on the 21st of January when you had this interview he said there was sufficient funds on hand to meet the bills? A. Sufficient money on hand to meet the bills because there was over \$11,000 that was still to be paid out on account of that contract.

"Q. What was said by you and what was said by Mr. Rohrbough in the presence of Mr. Long and Mr. Johnson and what did they say? A. That I was there for the purpose of filing a stop notice if there was—if the notice of completion had been filed; but they said it hadn't been filed because the architect had not yet accepted the building owing to some changes made—some extras, and that had been held up. * * * I asked Mr. Johnson after I found out he was the secretary of the Board of Trustees if he would notify Camm & Hedges whenever the notice of completion was filed and the warrants drawn for the payment—for the last payment, and he promised he would notify Camm & Hedges when that took place. * * * Having received this assurance that our bill would be paid, I relied upon that assurance and left for Petaluma."

The foregoing conversation indicates no promise on the part of the defendants nor any of them to be substituted as principal debtor in the place and stead of the contractor Biggers, nor does it contain any promise on the part of plaintiff which would furnish a consideration for such alleged substitution. The plaintiff was not bound to withhold a stop notice and might have filed one at any time had it so desired, without violating a legal duty to defendants. There is nothing in the record which would warrant submitting this question to the jury, and any finding by a jury in favor of plaintiff upon this contention would be unsupported by the evidence.

[2-4] It is also contended by appellant that defendants, by making certain misrepresentations and promises without intention of keeping them, which misrepresentations and promises were believed and relied upon by plaintiff, caused plaintiff to waive certain rights of lien to plaintiff's damage.

The misrepresentations alleged are: "That there was then due and owing to said A. W. Biggers for and on account of the construction of said school building the sum of

\$11,000 or thereabouts, and that said sum was sufficient to pay all bills against said building and for labor and materials furnished and consumed in the construction thereof and that said sum was in the Bank of Covelo and being held by said bank in a fund for the payment of the claims against said building and said fund and that the bank was handling said fund and that all bills for labor and material furnished and consumed in the construction of said school building would be paid by said defendants through said bank and from said fund and that said defendants would notify said plaintiff when said money was to be paid over."

There is no proof that the sum of \$11,000 or thereabouts was not owing to Biggers on account of the school building. The only evidence in the record on this question is to the effect that something over this amount was due him at the time the statement is alleged to have been made. There is no proof that this sum was not sufficient to pay all bills against said building for labor and materials. There is no proof that the individual defendants knew that the bank would not pay all such bills out of the fund collected by it through Biggers' assignment and no proof of any authority in said defendants to make representations on behalf of the corporation defendant, the Bank of Covelo. There is no proof of any consideration for the promise of Johnson to notify the plaintiff when the money was paid over, as stated in the pleading, nor for the promise to notify plaintiff when the notice of completion was filed, as testified to by Mr. Owens. There is no liability, therefore, on the part of these defendants on the theory of breach of contract, nor is there a liability under section 1709, Civil Code, for there is no proof of any of the conditions enumerated in section 1710, Civil Code. While the plaintiff introduced a copy of the recorded notice of completion, showing its filing on January 17, there is nothing in the record to show that the defendants knew of its filing. It is true it had been signed and sworn to before a notary public by defendant Johnson, as clerk of the board of trustees, but the record shows that it was recorded at the request of G. R. Redwine and it does not appear that the defendants knew of its filing and recording. The testimony of Owens is that they told him the architect was "holding it up" because of some extra work which he had not accepted, and there is nothing in the record to show that this was not their belief at the time of the conversation with Owens. It is further to be observed that the filing of the notice of completion was a matter of public record of which the plaintiff had constructive notice.

We are in accord with the ruling of the trial court that the facts of this case can create no legal liability on the part of the defendants. The plaintiff neglected to protect its rights and relied upon others to do so

for it, but the persons relied upon were under no legal liability to protect the plaintiff and accepted no moral responsibility in the matter.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

208 Cal. 240

STATE BAR OF CALIFORNIA v. JONES.*
(S. F. 13383.)

Supreme Court of California. Sept. 26, 1929.

Rehearing Denied Oct. 17, 1929.

1. Attorney and client ☞31, 32—Statute creating State Bar and regulating practice of law held valid (St. 1927, p. 38).

St. 1927, p. 38, providing for creation, organization, and powers of State Bar of California, and for regulation of practice of law, held not unconstitutional.

2. Attorney and client ☞54—Attorney who failed to demand public trial in proceedings for his suspension could not claim that he was deprived of public hearing (St. 1927, p. 38).

Where attorney was denied public hearing in proceedings for suspension from practice, due to his failure to demand a public trial, under the State Bar Act (St. 1927, p. 38), there was no denial of right to public trial, since purpose of providing for private trial, unless public trial is requested, is to shield attorney.

3. Attorney and client ☞58—One-year suspension from practice for attorney's attempt to cause miscarriage of justice through inducing clients to give perjured testimony held not excessive penalty.

Suspension of attorney from practice of law for period of one year, on account of attempt to cause miscarriage of justice through advising clients to give perjured testimony, held not excessive penalty.

4. Attorney and client ☞53(2)—Charge that attorney attempted to cause miscarriage of justice through perjured testimony held sustained by evidence in proceedings for suspension (St. 1927, p. 38).

In proceedings for suspension of attorney under State Bar Act (St. 1927, p. 38), evidence held to sustain charge of attorney's attempt to cause miscarriage of justice through perjured testimony, on account of which Board of Governors of State Bar recommended one year's suspension from practice.

In Bank.

Application for review of Order of Board of Governors of State Bar of California.

Proceedings by the State Bar of California against Edward V. Jones, attorney at law. The State Bar, through its Board of Gover-

nors, recommended suspension, and the attorney petitions for review. Action of Board of Governors approved, and petitioner suspended from practice for one year.

E. H. Hoar, of Bakersfield, for petitioner.
Strother P. Walton, of Fresno, for respondent.

PRESTON, J. This proceeding was instituted to review an order of the Board of Governors of the State Bar of California, recommending to this court the suspension of petitioner for a period of one year from the practice of law in this state. Said recommendation is based upon the following findings made by the local administrative committee of Kern county, after its hearing, upon legal notice and in due form, of the charges preferred against him.

That the evidence showed that petitioner was not guilty of any misconduct in connection with the first transaction set forth in the notice to show cause. As to the facts set forth in the second transaction, the committee found that: "On May 11, 1928, in the superior court * * * in the case of People * * * v. * * * Powers * * * and Newberry, * * * accused of robbery, the said accused was the attorney for said defendants at the trial of said case on said day. That on said day, said accused advised the said defendants to testify therein and thereat that the defendants 'had gone to the place of the alleged robbery in the evening prior to the alleged robbery, got drunk there, and later woke up in an automobile, and discovered that all our money had been taken from us, and that on looking around in the automobile that we discovered a six-shooter, and that we decided to take the six-shooter and go in the house and recover our money.' That the said accused, at the time he gave such advice, believed the same to be false. That said defendant Al Powers attempted to so testify and would have so testified, had not the court sustained objection of the district attorney to such testimony, on the ground that it was irrelevant. That by said advice the said accused intended to cause a miscarriage of justice." From the foregoing findings, the committee found said accused was guilty of conduct involving moral turpitude, in that in said action he intentionally endeavored to cause a miscarriage of justice, and for that reason said committee recommended that his license and right as an attorney at law be suspended for the period of one year.

Petitioner alleges: (1) That the State Bar Act is unconstitutional; (2) that he was deprived of a public hearing; (3) insufficiency of the evidence to sustain said charge; and (4) that the penalty imposed is excessive.

[1] The first contention may be disposed of quickly, for recent decisions have established beyond question the constitutionality of said

State Bar Act (St. 1927, p. 38). State Bar of California v. Superior Court (Cal. Sup.) 278 P. 432; In re Cate (Cal. Sup.) 279 P. 131; In re Petersen (Cal. Sup.) 280 P. 124.

[2] As to the second contention, the rules of procedure provide that these hearings shall not be public, unless so ordered by the Board of Governors or requested by the accused. Petitioner claims that a request by him for a public hearing would have antagonized the committee, and by so placing the burden of such request upon an accused the rule, in effect, deprives him of his right to a public trial. We cannot subscribe to this view. The clear purpose of the rule is not to prejudice the rights of an accused, but rather, where circumstances do not decree that a public hearing would be wiser, to shield and protect him from public criticism. Here petitioner was denied such a hearing through his own indifference only, for he failed to exercise his privilege of making demand therefor.

[3] The other two contentions, insufficiency of the evidence and excessive penalty, may be considered together, for, granting that the evidence was sufficient to prove the charge, the penalty is not excessive. A deliberate attempt to cause a miscarriage of justice through perjured testimony is not a light offense, and might justify a penalty more severe.

[4] In support of the charge there were introduced and received in evidence, by the express consent of the accused, affidavits of the two defendants convicted in said robbery case, to the effect that the accused suggested said untrue defense to them. While these documents were properly admitted at a hearing of this character upon the consent of petitioner, by reason of their source, they carry little weight. However, testimony, corroborated to some extent by petitioner himself, was given by Judge R. B. Lambert, of the Kern county superior court, before whom said robbery trial was had, and therein lies the foundation of the case against petitioner. It is unnecessary to detail said testimony, for sufficient it is to say that, taken in connection with the other evidence, it amply and abundantly supports the findings and justifies the recommendation of the local administrative committee. A reading of the record impels the conclusion that it was in the mind of petitioner, knowing said defendants were guilty, to have the court, if possible, accept said fabricated defense, an imposition meriting disclosure and punishment.

It is therefore ordered that the action and recommendation of the Board of Governors in this matter be approved, and that the petitioner herein, the said Edward V. Jones, be and he is hereby suspended from the practice of law in this state for the period of one year from and after the date of filing of this order.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

208 Cal. 216
 DYER v. McCORKLE et al. (S. F. 12847.)

Supreme Court of California. Sept. 26, 1929.

1. Automobiles ☞193(11)—Boy assisting truck driver in making deliveries was invitee as to driver's employer, if employer consented, or gave driver express or implied authority to grant such privilege.

Boy, who boarded moving truck while helping driver thereof to make milk deliveries, was invitee as to truck driver's employer, if present with consent of employer, or with consent of employee having express or implied authority to grant the privilege, though presence without knowledge of master, and with knowledge of servant, who had no authority to hire him, would make him a mere licensee.

2. Master and servant ☞302(1)—Servant's negligence as to master's invitee is binding on master, if servant is engaged in accomplishing object in line of assigned duties.

One who occupies position of invitee as to master is entitled to ordinary care at hands of servant, and servant's omission to exercise ordinary care is binding on master, if at time of injury the servant is engaged in accomplishing object in line of duties assigned him by master.

3. Automobiles ☞245(30) — Whether truck driver's employer consented to driver's engaging boy to assist in deliveries held question of fact in boy's action for injuries.

Whether employer of truck driver, engaged in making milk deliveries, consented to driver's procuring assistance of boy in delivering milk, held question of fact for jury, in action for boy's injuries received in boarding moving truck as result of driver's negligence.

4. Automobiles ☞244(26)—Employer's consent to truck driver's engaging boy to assist in deliveries could be implied from custom, usage, or conduct, without direct evidence, in boy's action for injuries.

Consent of employer to practice of employee driving milk truck to engage boy to help him in making deliveries could be implied from custom, usage, or conduct, without necessity of direct evidence of consent in action for injury sustained by boy claimed to be invitee as to truck driver's employer.

5. Master and servant ☞308—Nature of servant's work may indicate that master consented to presence of person procured by servant as helper.

Nature and character of work done by servant may contribute force to conclusion that master knew of and consented to presence on his premises of person procured by servant to aid servant in his work.

6. Automobiles ⚡244(26) — **Verdict against truck driver's employer for injuries sustained by boy, mounting truck while assisting in making deliveries, held sustained.**

In action for injuries sustained by boy in boarding moving truck, while engaged by truck driver to assist him in making deliveries of milk, evidence of custom of driver to employ boy's services, and of consent of driver's employer, held sufficient to sustain verdict against employer.

Langdon, J., dissenting.

In Bank.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Dayton Dyer, also known as Dayton Dyer Sibley, by Winifred Dyer Sibley, his guardian ad litem, against B. T. McCorkle and Frank M. Helm, Inc. Judgment for plaintiff, and defendants appeal. Affirmed.

Superseding opinion in 274 P. 587, and superseding judgment in 274 P. 592.

Fenston, Williams & Hansen and Frank Kauke, all of Fresno, for appellants.

Gallaher & Jertberg, of Fresno, for respondent.

PRESTON, J. The judgment is affirmed. As justification for this holding we offer the following:

The action is by plaintiff, an infant, at the time the cause of action arose, of 12 years, against defendant corporation, as master, and the other defendant, as its servant, to recover damages for personal injuries suffered by plaintiff on April 11, 1926, on account of the alleged negligence of said servant. Negligence was denied by both defendants, and contributory negligence was pleaded, defendant master especially denied liability for the acts of its servant which resulted in said injuries to plaintiff. Plaintiff had judgment. The amount of the verdict, as such, is not questioned; neither is serious contention made that negligence was absent. In fact, no defense of any kind is urged for the defendant servant. The prime issue is the liability, if any, of the master under the facts here appearing.

Defendant corporation owned and operated at the time in question a dairy farm near and milk route in Fresno city. The codefendant, its employee, was engaged in delivering milk and cream to customers in said city, using therefor an electric truck. For a considerable period of time next prior to said accident, he had practiced the plan of enlisting the aid of young boys in making deliveries to the various homes served with milk and cream. The boy then so engaged would ride upon the running board of the truck and deliver bottles to one side of the street, while the driver delivered them to the other side. In the dispatch of this business, if the driver of

the truck was in his seat prior to the return of the boy to the truck, he would set the truck in motion before the lad actually reached it; the latter jumping on the running board and seizing an upright bar while the truck was in motion. These boys would be paid small sums of money by the driver, as well as given candy to eat and milk to drink.

The older brother of plaintiff had followed this practice for a period ending about six weeks before the accident, and during the subsequent six weeks plaintiff had almost daily followed the truck in its afternoon deliveries. He estimated that he made 50 trips with said driver during said period. He had received small sums of money frequently from the driver, as well as candy and milk. At the time in question the driver, having no milk to deliver on his side of the street, was in his seat on the truck as plaintiff, returning from a delivery at a home, reached a point some 4 or 5 feet distant from the truck. The truck then began to move, and in endeavoring to jump to the running board, and to seize said bar to balance himself, plaintiff fell, was run over, and his leg was broken, and other injuries were received by him.

The question is: Did the master of the truck, under these circumstances, owe the plaintiff the duty of ordinary care? It should be noted that defendant driver did not take the witness stand, nor did the manager or any other officer of the corporation deny knowledge of or assent to this practice on the part of said driver of engaging these young boys to assist him. The manager was simply asked whether the authority of the servant included power to hire assistants in his work. Presumably this question related to the authority of the servant to employ assistants for the company, and did not relate to authority in the servant to solicit and procure assistance on his own account.

The contention of appellant is that, if authority in the servant to engage the services of boys is conceded, plaintiff becomes an employee of the master, and hence comes under the Workmen's Compensation Act; that, if the servant had no authority to engage such services, then plaintiff was a mere volunteer, to whom the master owed no duty, except for injuries resulting from the servant's willful act.

[1, 2] There is no evidence whatever upon which to conclude that plaintiff was an employee of the master. In attempting to board the truck of defendant corporation, plaintiff was there as one of three classes of persons: A trespasser, a licensee, or an invitee. If there without the knowledge or consent of the master or servant, he was a trespasser. If there without the knowledge of the master but with the knowledge of the servant, who had no authority to invite him, he was a mere licensee. But, if there with the consent of the

master or with the consent of the servant having authority, express or implied, to grant the privilege, he was an invitee. As an invitee he was entitled to ordinary care at the hands of the servant, and the omission in this particular would be binding upon the master, if at the time of infliction of the injury the servant was engaged in accomplishing an object in the line of the duties assigned to him by such master.

[3] Whether or not the consent of the master was present is a question of fact. The verdict for plaintiff includes such a finding by the jury, if evidence may be found in the record to sustain it. Save this, no other question is here in doubt.

[4] Direct evidence of such consent is not required. It may be implied from custom, usage, or conduct on the part of the master or servant. *Brown v. Feather River Lumber Co.*, 203 Cal. 493, 498, 265 P. 203, 57 A. L. R. 812; *Lawrence v. Kaul Lumber Co.*, 171 Ala. 300, 55 So. 111; *Harvey v. Deep River Logging Co.*, 49 Or. 583, 90 P. 501, 12 L. R. A. (N. S.) 131; *Hodge v. Sycamore Coal Co.*, 82 W. Va. 106, 95 S. E. 808.

[5] It may also be true that the nature and character of the work being done by the servant will contribute force to the conclusion that the master knew of and consented to the presence on his premises of a person procured by his servant to aid him in his work. In the case of *Purtell v. Phila., etc., Coal, etc., Co.*, 256 Ill. 110, 99 N. E. 899, 43 L. R. A. (N. S.) 193, Ann. Cas. 1913E, 335, where employees of a coal company, engaged in unloading coal from vessels, hired and paid an 11 year old boy to carry water for them, the custom of so doing having prevailed for many years, the court concluded that said employment of a water boy must have been known to those in charge of the company's yard, and that it was a reasonable and economical measure taken by said employees in the performance of their work. The boy was struck and injured by a block hanging from a boom in such a manner as made working conditions unsafe on the coal dock. The court, affirming the judgment awarding him damages, further held that he was on the premises of the company by its implied invitation, to do work in which he and the company were interested, and that the company was required to exercise reasonable care for his safety while so working there.

In *Atkins v. Lackawanna Transportation Co.*, 182 Ill. 237, 54 N. E. 1004, it was held that, where the owners of a vessel engaged in carrying merchandise permitted a boy to board it for the purpose of supplying its employees with drinking water, for which purpose they hired him, said owners must exercise reasonable care towards the boy while he was on the vessel.

In *Illinois Central Railroad Co. v. Hopkins*, 200 Ill. 122, 65 N. E. 656, it was held that

one going to a railroad depot to deliver meals to mail clerks on a train, pursuant to their agreement with her, such practice having been followed for years with the knowledge and consent of the railroad company, was not a mere licensee upon the depot platform, but was to be regarded as there by the implied invitation of said railroad company.

[6] Here we have neither a denial by the servant or the master of authority in the servant to engage upon his own account the services of plaintiff in the dispatch of the master's business. Neither do we have a denial by the master of knowledge of or consent to the custom practiced by the servant. Indeed, the custom was so open, notorious, and continuous that the master could hardly have been ignorant of it. In fact, the character of the work was such as to make probable acts of this kind on the part of the servant. Viewing the evidence as a whole, coupled with the absence of pertinent evidence in the possession of defendants, we are of the clear view that it is sufficient to sustain the verdict.

In the case of *Giannini v. Campodonico*, 176 Cal. 548, 169 P. 80, there is not only denial by both master and servant of authority to engage the services of the plaintiff, but there is an entire absence of facts upon which to predicate holding that authority in the servant to engage the plaintiff was granted. Moreover, the nature of the work of the servant was such as to practically preclude the idea that aid or assistance would or should be sought. We therefore find no conflict between the holding there made and the one we here make.

There is a second appeal in the case entitled "*Winifred Dyer Sibley, Plaintiff and Respondent, v. B. T. McCorkle and Frank M. Helm, Inc., a Corporation Doing Business under the Firm Name and Style of Jersey Farm Dairy Company, Defendants and Appellants*," Appellate Court No. 6351, Civil, an action for hospital and medical bills incurred in treating the infant plaintiff for the injuries received. That case is controlled by the ruling above and such is the stipulation of the parties.

On authority of the conclusion we have announced, the judgment in this cause too is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.

LANGDON, J. I dissent. The opinion of the District Court of Appeal, First Appellate District, Division 1, heretofore filed herein and written by Justice Parker, pro tem., clearly expresses my views of the legal situation presented by the record, and I hereby adopt the following portion thereof as my dissenting opinion:

"The main point presented and urged by appellant goes to the liability of the dairy company, the admitted employer, and appel-

lant urges its freedom from responsibility on the ground that the driver was acting wholly without the scope of his employment. Appellant contends that the boy either was an employee of the dairy company or he was not; that, if he was an employee, his recourse was to the accident commission; that, if he was not an employee, he was a mere volunteer. The theory of the trial in the lower court was that there was no employment, and the plaintiff insists such to be the case. Appellant seems content, as far as its argument proceeds, to concur in this. However, the main question to be determined is as to the acts and conduct of the servant McCorkle and the scope of his employment and authority. There is no evidence in the record that the dairy company ever had any knowledge of the fact that the driver was permitting boys to ride in the truck or to assist in the deliveries. True, the infant plaintiff testified that one time the driver told him that he did not want 'too many kids' on the truck, but as against the dairy company this one item of testimony cannot be considered as even the slightest evidence of knowledge or acquiescence on the part of the employer. It is manifest that throughout the transaction the driver was acting within the scope of his employment in so far as the delivery of the milk might be regarded as the very purpose of such employment. It is further apparent from the record before us that in pursuit of the employment the servant had no authority, express or implied, to employ, invite, or permit assistants to aid him in his work.

"Appellant has put forth many reasons why the judgment of the trial court should be set aside; respondent, on the other hand, urges as many reasons why it should be affirmed. It would serve no useful or instructive purpose to set out in detail these various contentions and analyze each—distinguishing, approving, or rejecting in turn. * * * From the facts of the case as hereinafter outlined we are of the opinion that the relationship of employer and employee did not arise or result as between the infant plaintiff and either McCorkle or the dairy company. That is to say, no such relationship arose or was implied to the extent that the matter of compensation would properly or at all come before the industrial accident commission pursuant to the Workmen's Compensation Act. * * * As between plaintiff infant and the dairy company there was no appointment or contract or apprenticeship, express or implied, oral or written; nor was there any authority, express, implied, or incident to the performance of his duties, that empowered the driver, McCorkle, to create, as between the infant and the dairy company, the relation of master and servant or employer and employee. The term of service was on no schedule, nor was any wage provided therefor. No duty of service was accepted by the plaintiff or any obli-

gation of wage payment fastened upon defendant dairy company.

"The case of *Giannini v. Campodonico* * * * is illustrative of the law applicable. In that case the facts bear a striking resemblance to the case at bar. Plaintiff there was a boy of 14 years of age and resided across the street from the stable owned by defendant, who employed a colored stableman to take care of the horses and wagons and keep the stable in order. On the morning of the accident the boy saw the stableman leaving in a buggy, and at that time the stableman requested the boy to clean the stable during his absence, and promised him a nickel upon his return. A small door which was part of a large sliding door was left open for the boy. Subsequently the boy and two other boys entered the stable, and while in the premises the large sliding door fell, breaking the leg of the boy who had been engaged by the stableman, and inflicting other injuries upon him. Upon several occasions theretofore the boy had performed errands for the stableman at the latter's request and received some sort of remuneration. The door which fell down had previously been out of order and the stableman had attempted to remedy the defect. The court holds as follows: 'Disregarding the testimony advanced by defendant and looking only to the case as presented by' plaintiff, 'no ground for holding the defendant liable appears. It is well settled that as against a trespasser or mere licensee the owner of property owes no duty to keep the premises in safe condition. The only duty is to abstain from wilful or wanton injury. In other respects one who thus enters upon the premises does so at his own risk and subject to all the ordinary risks which attach to such premises. * * * It is only in the case of one who has been expressly or impliedly invited upon the premises that the duty exists to exercise due care not to injure him or permit the premises to be in such condition that injury results. * * * The first question is whether the request of the stableman in this case is such an invitation as to render' the boy 'an invitee. * * * The facts * * * show that the duties of the stableman were of such a menial character that the position could not have carried with it the implied right to delegate the work or hire others to assist in the same. * * * In fact, the duties were such that the stableman could very easily perform them without aid. It must therefore be held that the request to do the work was unauthorized and could not impose any additional liability upon the defendant. * * * The stableman's promise to pay' the boy 'to clean the stable could not make the latter an invitee. Neither can prior services raise such a relation, especially where it is not pretended that they were brought home in any way to the defendant. The fact that respondent is a minor does not give him any

greater rights under the circumstances. "That might excuse him from concurring negligence, but cannot supply the place of negligence on the part of 'defendant,' or confer an authority on one who has none. It may excite our sympathy, but cannot create rights or duties which have no other foundation." This ends quotation from *Giannini v. Campodonico*, 176 Cal. 548, 169 P. 80.

"In the case of *Curry v. Addoms*, 166 App. Div. 433, 151 N. Y. S. 1017, where plaintiff had been engaged by a janitor who was without authority to engage any other person, the court says: 'It is also urged that the plaintiff was a licensee. If so, she must trace her license to the defendant; but as he knew nothing of her, and was not bound to do so, and as the janitress,' by her contract with plaintiff, 'had no right to commit the defendant, he owed her no duty in the matter of steps.' The case of *Higbee Co. v. Jackson*, reported in 101 Ohio St. 75, 128 N. E. 61, is exhaustively annotated in 14 A. L. R., commencing at page 131. The action concerned the rights of a boy who had been invited to ride in a truck. The invitation was extended by the driver, without the knowledge of his employer, and accepted. The court says: 'The grant of permission, so far as the company is concerned, was a mere nullity.' The most that can be said is that the boy had no right upon the truck and that when he got in he was a trespasser as far as the defendant was concerned.

"The foregoing cases can in many respects be directly applied to the case at bar. The work of the truck driver was menial work, as the term goes. Surely it is demonstrated that it was not work that required assistance, inasmuch as it was work that a 12 year old child could do, as far as the delivery of the milk itself was concerned, and the assistance was not rendered in the driving of the truck. Relying, also, on the *Campodonico* Case, we conclude that the boy was not an invitee. Therefore, being neither an employee, nor a licensee, nor invitee, there is but one other status in which he can be placed, and that is he was a trespasser as far as defendant Dairy Company was concerned. As such trespasser he was entitled to protection from willful or wanton injury. *Sessions v. Southern Pacific Co.*, 159 Cal. 599, 114 P. 982; *Higbee Co. v. Jackson*, supra. If the driver of the truck had permitted the boy to be seated upon the truck and after driving some distance had suddenly become mindful of his breach of duty, he would not have been permitted to recklessly push the boy off and injure him. Likewise, seeing the boy in a dangerous position, he would not be permitted, ruthlessly and with no regard for the boy's safety, to run him down.

"Notwithstanding the confused and indiscriminate use at times of the terms 'negligence' and 'willfulness' by judges and text-

writers it is certain that the weight of authority supports the view that these terms have a distinct and well-defined meaning which is clearly pointed out in *Holwerson v. St. Louis & S. Ry. Co.*, 157 Mo. 216, 57 S. W. 774, 50 L. R. A. 850, and accepted by California courts in *Tognazzini v. Freeman*, 18 Cal. App. 474, 123 P. 540; *Taylor v. Pacific Electric R. Co.*, 172 Cal. 645, 158 P. 119. Willful misconduct means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the supreme court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence.' To constitute 'willful misconduct' there must be actual knowledge or that which in the law is esteemed to be the equivalent of actual knowledge, of the danger to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, 185 P. 510. Wanton negligence, likewise, means something in addition to mere actionable negligence. To constitute wantonness in the eye of the law it is not necessary to allege or show an intent to injure. Gross negligence, or what is sometimes called the 'last' negligence, may be the equivalent of willful or wanton negligence; and where the conduct of defendant exhibits reckless indifference to probable consequences, with knowledge of facts and circumstances likely to result in injury, it becomes wanton negligence. *Kramm v. Stockton R. Co.*, 3 Cal. App. 618, 86 P. 738, 903. 'Recklessness' and 'wantonness' are stronger terms than ordinary negligence, and mean a disregard of security equivalent to bad faith and a willful or malicious disposition to injure. To constitute wantonness there must be a design, purpose, or intent to do wrong, or cause the injury, but a recklessness amounting to an utter disregard of consequences will supply the place of a specific intent. *Chicago, R. I. & P. Ry. Co. v. Lacy*, 78 Kan. 622, 97 P. 1025. See, also, *Words and Phrases*, Second Series, vol. 4, p. 1236 et seq.

"Without going further into the various constructions placed upon the term 'wanton,' it will suffice to say that to lawyer and layman alike the word, in common usage, immediately suggests something of complete abandonment of care. We are unable to conclude that the negligence here established on the part of the driver of the milk truck can be characterized as either willful or wanton in the sense contemplated by the law applicable. To so hold would be disregarding the plain import of the terms. The boy had been doing the same thing for over a month and a half and his brother before him for some months. Day after day exactly the same procedure was followed. If the driver was on the truck before the boy got back, he would start up and move to the next house or next point of

delivery. The boy would jump on and ride to that point. This boy was of the age of 12 years and normal, as far as appears, for that age. The truck was stopped at a distance of four feet, which demonstrates the speed at which it was traveling. We do not mean to say that because a course of conduct, such as a boy jumping on a truck, had been pursued for some months, that fact alone would render it free from negligence. But it is obvious that knowledge and experience serves the purpose of illustrating what is safe and what is dangerous, because these factors serve to a great extent in pointing the course of the future. There is not a scrap of testimony from which it can be inferred that the driver knew the boy was getting on the truck or was attempting to get on. One witness testified that the boy shouted to the driver to go ahead, but the boy denied so doing. Taking either view of this, our conclusion would not be affected. If it could be held that the boy assured the driver it was all right to proceed, then the driver might reasonably assume the boy in a position of safety.

"Respondent contends that inasmuch as the complaint alleged that the driver willfully, wantonly, and recklessly drove the truck, and that the plaintiff was injured by reason of the wantonness, willfulness, and recklessness of the defendants, the verdict of the jury, being a general verdict, imports a finding for plaintiff upon these issues. To sustain this contention it is necessary that there be some evidence supporting the allegations. Surely if plaintiff had offered no evidence at all, save as to the extent of his damage, and had offered no evidence at all as to the negligence, nor had defendant, a verdict for plaintiff would find no support in the mere allegations of the complaint. In the case of Higbee Co. v. Jackson, *supra*, the entire subject is completely annotated. Many authorities have been collected in the note, and from a reading of the cases it becomes evident that the allowing of the rights of even a trespasser to the person invited by the servant, without the scope of his employment, is a question of much dispute, and where granted is a concession, and extension of the doctrine of respondeat superior. The doctrine of respondeat superior had its origin in consideration of public policy. Out of the necessities of new social and economic conditions it has been developed and extended, and its growth and application have been influenced and directed by these conditions. The rule itself and its development are examples of the process by which the judgment of society as to what is necessary to the public welfare has from time to time been expressed in juristic form. But in extending the doctrine we cannot destroy it and deprive the master of all rights. If an employer's business and fortune were committed wholly to a servant or employee with-

out regard to the nature or scope of the latter's employment, modern business would practically cease. The law has been exceedingly generous as to the plaintiff in cases such as in the instant case to give him the protection it has, in so far as it renders the master liable for a situation over which he has so little control. The basis of this solicitude of the law is the principle which is sometimes characterized as the humanitarian doctrine which is only invoked to prevent willful or wanton injury.

"We are of the opinion that by no specious reasoning should the doctrine be extended. By giving such loose or careless construction to the terms 'willful' and 'wanton' as is sought here would be to destroy entirely any distinction between the various degrees of negligence. To sustain the contention of respondent here would be to hold affirmatively that wanton and willful misconduct means lack of ordinary care and would be in direct defiance of authority and destruction of principle. The court below, under the facts, should have granted the defendant's motion for a nonsuit."

208 Cal. 256

TUPMAN et al. v. HABERKERN et al.
(L. A. 9575.)

Supreme Court of California. Sept. 26, 1929.

1. Appeal and error $\hookrightarrow$ 1010(1)—Appellate court merely reviews action of trial court, and findings below founded on substantial evidence are conclusive, notwithstanding provisions authorizing additional findings on appeal (Const. art. 6, §§ 4½, 4¾; Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

Appellate tribunal possesses none of functions of jury and cannot weigh evidence or determine facts, but its sole province is to review action of trial court and correct its errors, and findings of trial court founded on substantial evidence are conclusive on appeal; this rule not being affected by Const. art. 6, § 4½, requiring that error be prejudicial to warrant reversal, or by section 4¾, permitting Legislature to give appellate courts power to make findings of fact contrary to or in addition to those made by trial court in cases tried by the court, or by Code Civ. Proc. § 956a, as added by St. 1927, p. 583, enacted pursuant thereto, permitting appellate court to make additional findings.

2. Appeal and error $\hookrightarrow$ 1012(1)—Supreme Court on appeal from judgment rendered on exhibits and transcript of evidence by judge not hearing testimony, held without authority to determine weight of testimony in reviewing findings (Const. art. 6, §§ 4½, 4¾; Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

Supreme Court on appeal from judgment rendered by trial court, sitting without a jury, on basis of exhibits and transcript of evidence and proceedings had before another judge, held limited to questions of law and without author-

ity to reconsider weight and credibility of evidence in reviewing findings, notwithstanding fact that trial judge had not seen the witnesses or heard their testimony, and notwithstanding Const. art. 6, § 4½, relative to harmless error, and section 4¾, and Code Civ. Proc. § 956a, as added by St. 1927, p. 583, empowering appellate courts to make findings of fact contrary to or in addition to those made by appellate court.

3. Appeal and error ⇨1178(1)—Reviewing court on reversal after making new contrary findings should remand cause (Const. art. 6, § 4¾; Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

Where reviewing court makes findings additional or contrary to those made by trial court under authority given by Const. art. 6, § 4¾, and Code Civ. Proc. § 956a, as added by St. 1927, p. 583, under which appellate court may give or direct the entry of judgment, reviewing court should not render judgment, but should on reversal remand cause for further proceedings, in view of necessity of having proper judgment below for issuance of process.

4. Appeal and error ⇨14(2), 1202—Straight reversal necessitates new trial, but if reversal is with directions to enter judgment for appellant, respondent may move for new trial or appeal from judgment so entered (Const. art. 6, § 4¾; Code Civ. Proc. § 963, and § 956a as added by St. 1927, p. 583).

If judgment of reviewing court is a straight order of reversal, new trial must be had upon going down of remittitur, but if judgment is reversal with directions to enter judgment against respondent under Const. art. 6, § 4¾, and Code Civ. Proc. § 956a, as added by St. 1927, p. 583, authorizing additional findings on appeal, respondent may move for new trial, or take appeal from judgment so entered under Code Civ. Proc. § 963.

5. Appeal and error ⇨1176(2)—Power to direct trial court to enter judgment for appellant should be exercised only where respondent could not succeed on retrial (Const. art. 6, § 4¾; Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

Power of reviewing court to direct trial court to enter judgment for appellant under Const. art. 6, § 4¾, and Code Civ. Proc. § 956a, as added by St. 1927, p. 583, authorizing additional findings on appeal, should be exercised only when, upon a full consideration of the record, the party against whom the judgment is for the first time entered in the trial court could not successfully meet the contentions of his adversary upon a retrial or reconsideration of the case below.

6. Appeal and error ⇨1176(2)—Reversal, based on new findings by appellate court, with directions to enter judgment, cannot be ordered unless it appears that respondent could not make substantial showing below (Const. art. 6, § 4¾; Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

If new findings by appellate court be made basis of reversal with directions to trial court to enter judgment for appellant, pursuant to authority given by Const. art. 6, § 4¾, and Code

Civ. Proc. § 956a, as added by St. 1927, p. 583, it must appear from the record, or from the new evidence taken, that on no theory grounded in reason and justice could respondent make a further substantial showing in the trial court in support of his case.

7. Appeal and error ⇨1122(2)—Reviewing court may not make additional findings, where judgment must be reversed and new trial ordered (Const. art. 6, § 4¾; Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

When judgment appealed from must be reversed and a new trial ordered, either pursuant to a general order of reversal, or a specific remanding of the cause for new trial, findings of fact by reviewing court are unauthorized, notwithstanding Const. art. 6, § 4¾, and Code Civ. Proc. § 956a, as added by St. 1927, p. 583, relative to findings on appeal additional or contrary to those of trial court.

8. Mines and minerals ⇨101—Finding of abandonment of joint enterprise to acquire claims on government oil lands, and that defendants in procuring royalty interest therein were not guilty of fraud, held sustained.

In action for accounting of profits received by defendants through royalties under lease from government of oil lands, based on claim of joint enterprise between plaintiffs and defendants to acquire claims and of conspiracy among defendants to defraud plaintiffs by inducing applicant for patent to abandon pending application, findings of abandonment of joint enterprise under which plaintiffs claimed interest, and that defendants were guilty of no fraud, held sustained by evidence.

In Bank.

Appeal from Superior Court, Kern County; T. N. Harvey and Pat R. Parker, Judges.

Action by H. I. Tupman and others against C. F. Harberkern and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Anderson & Anderson, of Los Angeles, for appellants.

F. E. Borton and Borton & Petrini, all of Bakersfield, for respondents.

SHENK, J. This is an appeal from a judgment in favor of defendants in an action wherein the plaintiffs sought an accounting of profits received by the defendants by virtue of a transaction involving a lease from the United States government of certain oil lands in the Elk Hills district in Kern county. The action was brought on the theory that the lease procured at the conclusion of the events hereinafter outlined was the fulfillment of a joint adventure entered into among the plaintiffs, H. I. Tupman, Fred V. Gordon, and C. V. Anderson, and two of the defendants, C. F. Haberkern and S. P. Wible. The defendant T. E. Klipstein was joined in the action on the theory that he conspired with the other two defendants to deprive the plaintiffs of their alleged share of profits.

By their amended complaint plaintiffs al-

lege in substance that they and the defendants Haberkern and Wible on April 10, 1910, entered into an agreement whereby they became associated for the purpose of acquiring a five-sevenths interest from one R. J. White, in certain placer mining claims designated as Red Top Nos. 1, 2, 3, and 4, which embrace all of section 2 in township 31 south, range 24 east, M. D. B. & M., in Kern county; that the parties to the agreement should aid in the acquisition of said interest but that the same should stand of record in the name of R. J. White until such time as applications to the United States government for patent to all of said claims should be successfully prosecuted and concluded; that on June 4, 1910, said R. J. White executed a grant deed conveying a one-seventh interest each to H. I. Tupman, Fred V. Gordon, C. V. Anderson, C. F. Haberkern, and S. P. Wible, parties to this controversy, and a one-seventh interest to his son R. E. White; that R. J. White made application to the United States government for patent, which application remained pending until about March, 1922; that pursuant to an alleged conspiracy among the defendants to defraud the plaintiffs of their interests, the defendants, by falsely representing to R. J. White that the plaintiffs were not longer interested, procured an abandonment by R. J. White of the pending application and a conveyance of said land to the United States government, which was the consideration for the lease by it to Pan-American Oil Company of the northerly 1,000 feet of said section 2; that the consideration paid by the Pan-American Oil Company was a royalty to R. J. White of 2 per cent, and a royalty to the defendants of $3\frac{1}{2}$ per cent. of all oil or gas produced therefrom; that oil was developed and produced from the leased land; and that plaintiffs are entitled to a proportionate three-fifths of the royalties paid to the defendants. The answers of the defendants contained denials of the association mentioned and of the allegations of fraud and conspiracy. By their amended answer the defendants Haberkern and Wible admitted the execution and delivery of the deed of June 4, 1910, but alleged that it was made and delivered as to said defendants in confirmation of their original locators' rights and interests to which the plaintiffs were strangers, and that nothing was to be furnished or contributed by the defendants; that on the other hand the deed as to the plaintiffs was in consideration of their joint efforts to prosecute the application of R. J. White for a patent and to procure one Coffin to do the necessary development work upon the land. They also grounded their defense on the alleged fact that the plaintiffs had abandoned their interest in the lands and in the enterprise. They admitted the lease by the United States government of a portion of said section to Pan-American Oil Company, but on a basis of $3\frac{1}{4}$ per cent. royalty to all of the defendants, a portion of

which went to the defendant Klipstein for his services.

The issues framed by the pleadings were tried before Hon. T. N. Harvey, judge of the superior court, sitting without a jury. After the trial was completed, but before he rendered his decision, Judge Harvey resigned from his office as judge of the superior court. Upon stipulation of the parties the exhibits and a transcript of the evidence and proceedings had before Judge Harvey were submitted to Hon. Pat R. Parker, judge presiding, for decision and judgment, and whose findings accorded with the view of the transaction alleged by the defendants. Judge Parker found that the transactions of April 10th and the deed of June 4, 1910, did not constitute a joint adventure; that all interest of the parties to the transaction had been abandoned on February 24, 1921, and their interests in said section 2 on said date relinquished to R. J. White. It was also found that there was no conspiracy nor any false representations and that no fraud or deceit was practiced upon any of the plaintiffs. The judgment for the defendants was accordingly made and entered.

The main contention of the plaintiffs on their appeal from the judgment is that the evidence is insufficient to support the findings, and principally the finding that there was not a joint venture among the plaintiffs and the defendants Haberkern and Wible which subsisted at the date when the lease transaction was consummated. If the findings of fact are supported by the record, the plaintiffs' appeal must necessarily fail. Needless to state, the evidence and the inferences to be drawn therefrom present a serious conflict in the record. The appellants make the contention that this court is in the same position in reviewing the evidence to determine whether the findings are supported as was the judge who made his findings and decision from the printed record. In other words, the appellants urge that, in such a case as this, namely, where the record is presented for decision to a trial judge who has not seen the witnesses and heard their testimony, the reviewing court must also determine whether the "deciding judge," as appellants have designated him, was justified in giving weight and credibility to the evidence introduced by the prevailing party; that is to say, that this court itself must determine the credibility of the witnesses and the weight to be accorded their testimony.

This contention calls for a declaration of the law in effect at this time with reference to the powers of the court on appeal to weigh the evidence and make findings in addition to or contrary to the findings of the trial court.

[1, 2] Prior to the adoption of section $4\frac{1}{2}$ of article 6 of the Constitution, in 1914, section $4\frac{1}{4}$ of the same article, in 1926, and section 956a of the Code of Civil Procedure, in 1927 (as added by St. 1927, p. 583), it was firmly

established that an appellate tribunal in this state possessed none of the functions of a jury, and that the sole province of the court on appeal was to review the action of the trial court, correct its errors, and thus pass upon questions of law only. This was the established rule at common law. *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879. In *Bauder v. Tyrell*, 59 Cal. 99, it was said: "The trial court decides as to the facts, the court of review (in this state) as to questions of law only." Such has been the unbroken rule since the adoption of the Constitution of 1879. Prior to that time this court had declared in at least two cases that when the testimony in the trial court consisted entirely of depositions, the court on appeal would examine the evidence to determine whether the trial court had correctly found the facts therefrom and would not be bound by the rule which forbids a disturbance of the judgment where there is a conflict in the evidence. *Wilson v. Cross & Co.*, 33 Cal. 60; *Lander v. Beers*, 48 Cal. 546. But in 1881, in *Bauder v. Tyrell*, supra, and in 1892, in *Reay v. Butler*, 95 Cal. 206, 30 P. 208, 209, the court adhered to the general rule; the latter case holding that the general rule should govern even as to deposition evidence. We find therein the following significant statement: "It was said, however, in the opinion of the court in two or three cases, notably in *Wilson v. Cross*, 33 Cal. 60, that the reason of the rule is that the court below has the advantage of observing the appearance and bearing of the witnesses, and that such reason does not obtain when the witnesses do not appear personally in court. But it may be well argued that such is not the only reason of the rule; that it is founded in the essential distinction between the trial and the appellate court under our system, and grows out of considerations of jurisdiction; that it is the province of the trial court to decide questions of fact, of the appellate court to decide questions of law; that this court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion." *Reay v. Butler*, 95 Cal. 206, 214, 30 P. 208; 2 Cal. Jur. 912 et seq., and cases cited. We find no good reason for applying a different rule as between evidence consisting of the transcript of the testimony taken before another judge and deposition evidence. In neither case has the deciding judge the witnesses before him so that he may appraise their credibility, but he has the facts before him, and his findings therein, unless there is no substantial basis therefor, are final. The general rule must be applied in the present case unless the recent constitutional enactment and legislation above referred to have so modified it as to empower the court to weigh the evidence and in effect become generally a judge of the facts. Certainly section 4½

of article 6 of the Constitution, adopted in 1914, does not confer such power. The theory of that section is based upon the assumption that the reviewing court may find error in the record as a matter of law, and the effect of the section was to release the reviewing court from the rigid rule that prejudice was presumed from error and to enjoin upon the reviewing court the duty to declare, when confronted in the record with any one or more of the enumerated errors, whether the error found to exist has resulted in a miscarriage of justice, and not to reverse the judgment unless such error be prejudicial. Whether the error found to be present "has resulted in a miscarriage of justice" presents a question of law on the record before the court, and the purpose of the section was to require the court to declare as matter of law whether the error has affected the substantial rights of the party complaining against it, and not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies. *Snyder v. Miller*, 29 Cal. App. 566, 575, 157 P. 22.

When we turn to section 4¾ of article 6 of the Constitution, as adopted in 1926, we find that it is not self-executing. It is a grant of power to the legislature. That section provides: "Sec. 4¾. In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the legislature may grant to any court of appellate jurisdiction the power, in its discretion, to make findings of fact contrary to, or in addition to, those made by the trial court. The legislature may provide that such findings may be based on the evidence adduced before the trial court, either with or without the taking of additional evidence by the court of appellate jurisdiction. The legislature may also grant to any court of appellate jurisdiction the power, in its discretion, for the purpose of making such findings or for any other purpose in the interest of justice, to take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and to give or direct the entry of any judgment or order and to make such further or other order as the case may require."

Pursuant to the foregoing grant of power, the Legislature adopted section 956a of the Code of Civil Procedure at its session of 1927. That section is in the following language:

"In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the supreme court or a district court of appeal may make findings of fact contrary to, or in addition to, those made by the trial court. Such findings may be based on the evidence adduced before the trial court either with or without the taking of evidence by the court of appellate jurisdiction, pursuant to such rules as the supreme court may prescribe.

"The said courts of appellate jurisdiction may, for the purpose of making such findings

or for any other purpose in the interest of justice, take, pursuant to such rules, additional evidence of or concerning facts occurring at any time prior to the decision of the appeal and may give or direct the entry of any judgment or order and make such further or other order as the case may require. This section shall be liberally construed to the end, among others, that wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial."

Following the effective date of the new section, this court adopted rule XXXVIII, prescribing the method of procedure for taking additional evidence, either on the court's own motion or on application of a party to the action—in either case on notice to the parties to be affected thereby.

When section 4½ of article 6 was presented for adoption to the electors of the state, the argument in its favor (and there was no opposing argument) stated:

"This amendment empowers the legislature to grant to the appellate courts the right in non-jury cases, where a judgment is based on findings of fact which are unwarranted or insufficient, to make new findings and to direct the entry of a different judgment in accordance with the new findings. This will enable the appellate courts to dispose of many cases finally on one appeal, whereas now the appellate court must always send cases back to the trial court for retrial and the making of new findings, even though it conclusively appears from the record what the findings should be.

"The other important power given the legislature is to authorize the appellate courts to take new evidence on appeal concerning matters which occurred prior to trial in the lower court or pending the appeal. It often happens that a litigant neglects to prove some simple fact in the trial court which is essential to his case and which, if he could prove it in the appellate court, would produce a result favorable to him. The right to take new evidence on appeal will also enable more cases to be finally disposed of on the first appeal, and will bring about a more just disposition of cases. The appellate courts will not develop into trial courts because they will undoubtedly exercise this power sparingly and will refer any complicated questions of new evidence to the trial court or a referee for hearing.

"The amendment works for elasticity, simplicity and expedition of procedure."

In line with the purpose of the proposed constitutional amendment, as disclosed by its language and the very appropriate argument in its favor, the Legislature incorporated the final sentence in section 956a, as follows: "This section shall be liberally construed to the end, among others, that wherever possible causes may be finally disposed of by a single

appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial." Neither the constitutional amendment nor section 956a of the Code of Civil Procedure was intended to abrogate the general rule respecting the powers of the trial court in its determination of questions of fact or the rule that the reviewing court is bound by the findings of the trial court if based upon substantial evidence. It is plain that in order to transform or convert appellate tribunals into triers of fact and thus require them to pass upon the credibility of witnesses and the weight and sufficiency of the evidence, the intention so to do must be clearly disclosed. The respective provinces of the trial and reviewing courts are so distinct and well defined and of such long standing that in order so to do it must clearly appear that it was the purpose of the new law to uproot the old system and supplant it with a fact-finding appellate system. This we do not believe to have been the purpose of the changes in the law. In other words, it was not the purpose generally to so confuse the functions of the respective courts as to make the findings of the trial courts, when based on substantial evidence, merely recommendations as, for example, the finding of a referee or commissioner.

We arrive at the foregoing conclusion without detracting in the least from what we believe to be the true meaning and purpose of the new law. In the light of the history of the constitutional amendment and the phraseology of the legislation adopted pursuant thereto, and having in contemplation the evils or defects in practice and procedure thus attempted to be remedied, we perceive the primary and principal purpose of the change in the law to be that, whenever possible, and the interests of justice would seem to require, the reviewing court should have the power to make new findings contrary to or in addition to those made by the trial court, either on the record presented or on new evidence to be taken under the direction of the court, all with reference to material issues framed by the pleadings, to the end that the judgment or order appealed from may be affirmed and further litigation terminated, and where otherwise under the old practice the judgment or order would have to be reversed. The evils intended to be remedied by this primary and principal purpose of the legislation were, for example, the requirement under the old practice that when the trial court failed to find on a material issue the decision was against law and the judgment or order would have to be reversed (see 24 Cal. Jur. p. 940 et seq. and cases cited), notwithstanding the fact that there existed in the record ample evidence to support a finding in favor of the party prevailing in the trial court if a finding on the issue had been made and no contrary conclusion from the evidence could reasonably be drawn; in which event, under the

new practice, the reviewing court could make the omitted finding, affirm the judgment and thus terminate the litigation. Again, the requirement under the old practice that where the prevailing party had omitted to prove a fact to support a finding in his favor the judgment must be reversed notwithstanding the obvious ability of the prevailing party to prove such fact. In such case the court of review could, under the new practice, order proof of such fact, either on its own motion, or on application of the party interested, make a finding thereon and, if favorable to the prevailing party, affirm the judgment and terminate the litigation. An illustration of the state of the old practice in this regard is found in the case of *Central Sav. Bank of Oakland v. Lake*, 62 Cal. App. 588, 217 P. 563, where the judgment was reversed because the prevailing party had omitted to prove the formal substitution of trustees in a suit involving the validity of a sale under a trust deed. The case was reversed for that reason and on retrial the proof of the substitution was made. *Central Sav. Bank of Oakland v. Lake*, 201 Cal. 438, 257 P. 521. Under the present practice the reviewing court on the first appeal could have taken evidence of the fact omitted to be proved at the trial, made a finding thereon, affirmed the judgment, and thus terminated the litigation. Other illustrations might be given, but sufficient have been noted to indicate defects in the old procedure intended to be remedied by the new law to the end "that wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court."

[3, 4] When the reviewing court is importuned by the appellant, as in the present case, to make findings on the evidence in the record contrary to the findings of the trial court and to reverse the judgment on the findings so made on appeal and to give or direct the entry of a judgment in favor of the appellant, a more complex situation is presented. It may not be gainsaid that the language of section 4½ of article 6 of the Constitution, followed in *hæc verba* in section 956a of the Code of Civil Procedure, purports in terms to vest in the reviewing court the power "to give" any judgment in the appellate tribunal which the case might seem to require. It needs no argument to support the statement that the power "to give" a judgment is tantamount to the power "to render" or "to pronounce" a judgment. But the power to render a judgment thus purported to be given an appellate tribunal cannot be interpreted to mean that the court on appeal would have the power to render *in such court* any judgment which the case on the record might seem ultimately to require. It is beyond question that under the new law the court on appeal may, on the findings made contrary to the findings of the trial court or in addition thereto on the record evidence, or pursuant to new

evidence taken in the reviewing court, render such a judgment in the reviewing court as would affirm or modify and affirm the judgment of the trial court, thus terminating the litigation. But if the reviewing court should assume to make contrary or additional findings, or findings on new evidence taken, and on such findings reverse the judgment and render and enter in the reviewing court a judgment for the appellant, this singular and impossible situation would be presented: The records of the trial court would disclose a judgment for the respondent with no authority in law for the clerk of the trial court to issue process thereon except in accordance with the terms of the contrary judgment entered in the trial court. The records of the reviewing court would disclose a judgment for the appellant, with no means prescribed by law for the issuance of process out of the office of the clerk of the reviewing court for the enforcement of the judgment.

[5] The conclusion, therefore, is inevitable that upon a reversal of a judgment the cause must be remanded and further proceedings be taken in the trial court. If the judgment of the reviewing court be a straight order of reversal, a new trial must be had upon the going down of the remittitur. If the judgment of the reviewing court be an order of reversal with directions to the trial court to enter a judgment in favor of the appellant, the party against whom a judgment for the first time is rendered, namely, the respondent on the appeal, would have the right to move for a new trial or to take an appeal from the judgment so entered, or he might do both. See *Estate of Baird*, 198 Cal. 490, 246 P. 324; *Klauber v. San Diego St. Car Co.*, 98 Cal. 105, 32 P. 876; section 963, Code Civ. Proc. It is true that the new law in terms purports to vest in the reviewing court the power to direct the trial court to enter a judgment for the appellant. But such direction can be effectual only upon a reversal of the judgment appealed from, and, as has been stated, the judgment entered pursuant to such direction does not terminate the litigation. It may be true in a practical sense that the judgment on appeal may so establish the law of the case as to make further proceedings in the trial court or a subsequent appeal from the directed judgment futile. But such has always been the law. Reviewing courts in this state had the power upon reversal to direct the trial court to enter judgment in favor of the appellant long prior to the enactment of the new law under consideration. This power, however, has been exercised sparingly and should be exercised only when, upon a full consideration of the record, the party against whom the judgment is for the first time entered in the trial court could not successfully meet the contentions of his adversary upon a retrial or reconsideration of the case in the trial court. We are convinced that it was not the intention of the new law that the review-

ing courts should develop generally into trial courts; that it was contemplated that the courts of appellate jurisdiction would exercise the new power sparingly and, as a general rule, would exercise it only when the purpose of the new findings was to constitute a basis for an affirmance of the judgment or a basis for a reversal of the judgment with directions to the trial court to enter a judgment for the appellant.

[6] It is obvious that, if new findings be made by the reviewing court, and the judgment based on such findings on appeal be a straight order of reversal, or an order of reversal with a remanding for a new trial, the reviewing courts to that extent would be usurping the power of the trial court as an arbitrator of the facts. And if new findings be made as a basis of a reversal, with directions to the trial court to enter a judgment for the appellant, it must appear from the record or from the new evidence taken that on no theory grounded in reason and justice could the party defeated on appeal make a further substantial showing in the trial court in support of his cause.

[7] We therefore conclude, on this branch of the case, that by the adoption of section 4¾ of article 6 of the Constitution and the enactment of section 956a of the Code of Civil Procedure it was not intended to convert the appellate tribunals of the state into triers of fact, nor to abrogate the general rule that findings of the trial court founded on substantial evidence are conclusive on appeal; that the effect of the new law is to create and establish an exception to the general rule; that the primary and principal purpose of this exception is to enable the reviewing courts to make contrary or additional findings on the record presented or on new evidence taken, to the end that the judgment be affirmed or modified and affirmed and the litigation be terminated; that when the judgment appealed from must be reversed and a new trial is ordered, either pursuant to a general order of reversal or a specific remanding of the cause for a new trial, findings of fact by the reviewing court become inappropriate and unauthorized; and that when the judgment appealed from is to be reversed and the trial court is to be directed to enter a judgment for the appellant, the reviewing court may make findings in support of the judgment so to be entered, but this power should be exercised with caution, and only when it may be declared, as matter of law, that the respondent could not make a substantial showing in support of his cause if a new trial were had, or that the respondent could not, or should not in the interests of justice, make or be permitted to make a further showing upon a retrial if one should be had. This construction of the new law not only preserves generally the fundamental distinction between the functions of the trial courts and the appellate tribunals, but also affords to litigants and the

cause of justice the relief which the recent law intended to afford.

[8] In the light of the foregoing observations as to the powers of the court on appeal, we approach the question of whether the findings of the trial court in favor of the defendants herein are supported by substantial evidence in the record. If we find them so supported, the judgment must be affirmed.

Among the facts presented in the record favorable to the defendants, and which, taken as true, fairly and sufficiently support the findings and judgment, are the following: During the year 1910 and prior thereto the plaintiff H. I. Tupman was president of the Kern County Abstract Company in Bakersfield. The plaintiff C. V. Anderson, an attorney at law, was employed as manager and also performed legal services when required. The defendant Klipstein was employed as secretary in charge of the abstracting department. The plaintiff Fred V. Gordon, throughout these and other transactions, was an associate of the plaintiff Tupman.

The defendants Haberkern and Wible were oil and mining property operators and had known and had had dealings with Tupman and Klipstein for a period of 15 or 20 years. Prior to 1910, Tupman, Klipstein, Haberkern, and Wible had followed the procedure of locating and acquiring public mineral lands of the United States in the naval reserve area known as "Elk Hills," upon the basis of discoveries of gypsum or of fullers' earth. This had become customary because, though the land was reputed to contain oil, prospecting for oil was so expensive and burdensome that locations and applications for patent were being made on the basis of discoveries of fullers' earth, gypsum, or other such placer minerals. Consequently, R. J. White and members of his family, the plaintiff Tupman and the defendants Haberkern, Wible and Klipstein, all made or participated in the making of a large number of locations in eight or more sections in the Elk Hills district. Neither Tupman nor Klipstein participated in any of the Red Top locations made in section two by locators including R. J. White and members of his family and the defendants Haberkern and Wible. A large group, including Tupman, Klipstein, Haberkern, Wible, and members of the White family, laid claim to the largest and most valuable area in the first naval reserve. This group, with the exception of the White family, organized the "Eight Oil Company," and its interests and the so-called "White" interests were segregated, the latter retaining section two involved here. Still another independent group in which Haberkern, Wible, and Tupman were also interested, located a number of claims which have been designated in the record as the "Munzer locations." The plaintiff Tupman conducted much of the detail concerning the transactions among the par-

ties to this controversy. In fact, Tupman, Haberkern, Klipstein, and Wible were interested extensively in oil and mining transactions. It was in evidence that: "Mr. Tupman had handled virtually all of the contracts, papers and details of that nature for all of our Elk Hills matters. Those matters were very extensive. Over a period of about 15 years." The interests of the locators in section 2 were, about April, 1910, deeded to R. J. White for the purpose of his securing a patent title from the United States government in his name. The defendant Wible testified: "Mr. White, Mr. Haberkern and myself were all located in section 2. My and Mr. Haberkern's title was vested in Mr. White ultimately for him to secure a patent."

About that time the plaintiff Tupman had some negotiations with R. J. White as a result of which he procured for Mr. White a Mr. Coffin to do the development work on the claims in section 2 on a "fifty-fifty" basis, and a contract on that basis was entered into between White and Coffin. On June 4, 1910, R. J. White executed a deed whereby he conveyed a one-seventh interest in the Red Top locations to each of the plaintiffs and the defendants Haberkern and Wible, and a one-seventh interest to his son R. E. White, retaining thereby a one-seventh interest in himself. It was in evidence that this deed was made subject to White's contract with Coffin, and that it remained off the record for the purpose of facilitating application for patent in the name of R. J. White only. As a reason for the fact that Anderson and Gordon were made grantees, it was in evidence that at about that time the plaintiff Tupman stated to the defendant Klipstein that the latter was not declared "in" on the transaction because he (Tupman) had "carried" Klipstein in other deals and that he wanted Anderson and Gordon "in" on this transaction.

The application for patent to the Red Top claims was sent by Tupman to Mr. Perkins, an attorney at law residing in Visalia. The application was contested and an answer to the contest was prepared by Perkins and sent to Tupman to be verified by White. Tupman sent the answer back without the verification and allowed the matter to go by default. An application to have it reopened, however, was made, "when," as Mr. Tupman testified, "the situation had changed somewhat, was more hopeful, looked as if there was a chance to succeed in getting consideration on our Eight Oil application. * * * Prior to that, a number of years ago, we had taken up with Mr. Coffin the question of getting more money. One reason we were so indifferent about this was the absence of anybody to put up money. * * * We anticipated no losses. If our interests matured into something we could dispose of, we naturally would make a profit out of it. Our five-sevenths interest, that is,

the five-sevenths interest of the parties to this joint enterprise, was to come to them absolutely clear of any expense for the supervising of the work of Coffin, and the expense of applying for patent, defending any actions brought against us, any protest against the patent, and any other expenses incidental to procuring a patent to the land; we were not to pay for any assistance furnished to Mr. Perkins to enable him to procure patent for this land. That was included in the price that Mr. Coffin paid. Coffin was to pay Perkins for procuring the patent, besides doing all the work necessary for the application for patent. I think the agreement so states. We were not to supervise Perkins also. In return for our five-sevenths interest we in regard to this application for patent were to do whatever we could to help the thing along. You see we had been busy for some time, attempting to get patent for the Eight Oil Company; it took our time and attention. It was understood we would do what we could to assist the matter along."

The trial court's finding as to the nature of the inception of the enterprise and the character of each person's interest therein is further borne out by a letter written by Mr. Tupman to Mr. Perkins at Visalia, dated June 30, 1911, in which the former states: "Re Section 2, 31/24. All of the work performed on the above described section prior to the 10th day of April, 1910, was done by and for the original locators. Under date of April 10, 1910, Fred V. Gordon, C. V. Anderson and H. I. Tupman acquired an undivided interest in the section, C. F. Haberkern, R. J. White, S. P. Wible, and R. E. White of the original locators retaining an interest. The consideration for the transfer of interest to the last named parties was a valuable one. H. T. Coffin's interest as you understand, is that acquired under a contract made under which he advanced the additional money needed on the 10th day of April, for the further development of the land. * * *

Subsequent to these events the government withdrew from mineral entry the Elk Hills lands in Kern county and created Naval Petroleum Reserve No. 1 in that county. On February 25, 1920, Congress passed what was called the "Federal Oil Land Leasing Act" (41 Stat. 437). Pursuant to that enactment the government, in order to clear that reserve of all clouds, claims, and litigation, adopted the policy of making compromise concessions to persons who had made valid locator's claims within the area by patenting to them other lands, or leasing lands within the reserve for a royalty consideration and a relinquishment of their claims. Throughout the record it is apparent that the White claims for a patent were not considered to have much value for the reason that they were based on fullers' earth discoveries of doubtful merit and for the further reason

that it had not been established that claims to a mineral patent could be based on discoveries of fullers' earth. It was admittedly questionable whether the White claims had more than a "nuisance" value by reason of their being an uncanceled cloud on the government's title to section 2 in the First Naval Reserve.

In the fall of 1920 representatives of the Eight Oil Company, of which Tupman, Haberkern, Wible, and Klipstein were four of the five directors, were working to effect a compromise with the government "under which the Eight Oil Company by surrendering all of its interest would be enabled to get certain land without dispute and free from any claim, either in the form of a working agreement or lease." The record supports the following brief statement of the history of these efforts: During the negotiations and early in 1921 government representatives required that interests in section 2 of all Eight Oil Company members be surrendered. This was at a time when the claims to section 2 were to be settled along with its own and other claims in the compromise which the Eight Oil Company was endeavoring to effect. About this time Mr. Tupman by telephonic communication with a representative at Washington authorized the representation to government officials that none of the parties hereto who were members of that company, specifically referring to himself, Haberkern, and Wible, claimed any interest in section 2. Tupman confirmed his oral representation as to Haberkern and Wible, who appeared in the abstract record as original locators, by a telegram to the title searcher at Washington in Wible's name. There is additional evidence that both Haberkern and Wible represented that they were disclaiming interest in section 2 for the purpose of effecting a compromise of the Eight Oil Company's interests and claims. Tupman testified that he was "working for the interest of the Eight Oil Company" and "didn't want to have that deal held up." It may parenthetically be stated at this point that unquestionably the interests of the plaintiffs Anderson and Gordon were controlled by Tupman throughout. A compromise of the claims of the Eight Oil Company, joining with the Munzer, Doheny, and other interests with the exception of the White record interests, was finally concluded in 1921. Tupman, Haberkern, and Wible reported to White that they were unable to "get anything for section 2," and apparently that was thought to be an end of the White claims. However, a few months later, a government representative voluntarily stated to Klipstein that a compromise settlement of the locators' rights in section 2 might then be favorably considered for the reason that it had become known to Washington officials that section 2 was being drained by wells belonging to the Pacific Oil Company on section

35 adjoining. Klipstein took the matter up with Coffin and with White, as a result of which a six months' option was given to Klipstein signed by White and Coffin which was at its expiration renewed to Klipstein and Wible. Wible agreed to divide his compensation with Haberkern in consideration of the latter's assistance in obtaining the new option agreement from White and Coffin. Their efforts finally were accelerated by the fact that the government called for bids on section 2 and it became necessary immediately to interest some concern or group in bidding for a lease on said section. Klipstein and Wible took up the matter with Pan-American Oil Company, with whom they made the following agreement: "For and in consideration of one dollar (\$1.00), the receipt of which is hereby acknowledged, we hereby agree that in case you make a compromise with the Government under the claim of R. J. White, on section 2-31-24, Elk Hills, within thirty days (30) from date, we do hereby agree to have all interest of R. J. White and H. T. Coffin, in above mentioned lands, quitclaimed to yourself or the Government, for the consideration of your agreeing to pay us seven and one-half per cent. royalty, out of which we agree to settle in full with R. J. White and H. T. Coffin. This gives you an exclusive option for thirty days (30) from date, of the R. J. White claim upon this section of land (2-31-24). T. E. Klipstein S. P. Wible." With this instrument and the option agreement to Klipstein and Wible signed by White and Coffin, the Pan-American Oil Company succeeded in having its bid for a lease of the northerly 1000 feet of section 2 accepted. This transaction terminated the so-called "White interests" in section 2.

The appellants assign forty specifications or particulars in which they claim the evidence is insufficient to justify the findings and decision. But a careful review of the evidence printed in the bill of exceptions and consideration of the arguments of counsel does not disclose that the evidence is insufficient to support the findings. The conclusion or theory amply supported is that if any joint enterprise was created by the transaction of June 4, 1910, its purpose and object was frustrated largely by the government's withdrawal from mineral entry lands in the Elk Hills district and the navy department's contesting the locators' claims theretofore made to those lands. It was recognized by all the parties that the White claims thereafter constituted but a questionable cloud on the government's title, which in fact had so little value in the estimation of the government officials themselves and the parties hereto that those interested outside of White preferred to disclaim or abandon any claimed interest rather than hold up a settlement of claims in which they were also interested and which appeared more likely to produce re-

turns. So lightly did the government consider the White claimants that it called for bids on section 2, and the only chance which White had to obtain anything for his interest in section 2 was to act on the suggestion made to and followed up by Klipstein, without any evidence of a conspiracy or an intention to cheat, that a "trade" with the government might better be accomplished by a prospective bidder who could offer a relinquishment of the White claims, which, it is fair to assume under the evidence, initiated an entirely new venture concerning these claims or interests after the abandonment thereof by all concerned except White. See *Commercial Bank v. Weldon*, 148 Cal. 601, 84 P. 171.

Furthermore, if it be assumed, as contended by the plaintiffs, that a joint enterprise originally existed, the personnel of that original joint adventure was not perpetuated. The original group included R. J. White, the plaintiff Tupman, and the defendants. Upon the execution of the deed of June 4, 1910, R. J. White took title to the Red Top claims in trust for his grantees under the unrecorded deed. The personnel of the joint enterprise thereby became crystallized in R. J. White and his son R. E. White, the plaintiffs and the defendants other than Klipstein. By the deed of June 4, 1910, Klipstein was eliminated. Tupman testified that he told Klipstein at the time that he was not included in the new arrangement. Klipstein apparently considered himself out and has made no contention to the contrary. He was thereafter in position to deal with freedom with any one or all of those interested in the "White" claims. The difficulties of the Eight Oil Company finally were adjusted and the government's title to section 2 had been cleared except as to the nebulous claims of the beneficiaries under the title held by R. J. White, and Klipstein was not one of them. The United States government desired to lease section 2 or a portion thereof for the reason that the oil wells on section 35 adjoining and belonging to the Pacific Oil Company were draining section 2. One of the attorneys in the department of justice attending to legal matters on behalf of the federal government in connection with clearing the title to section 2 knew of the claims of R. J. White and his associates, and suggested to Klipstein that it would be of advantage in awarding the lease on section 2 if the so-called "White" claims could be cleared up at the same time. Klipstein thereupon saw Mr. Coffin in Los Angeles, who admittedly had acquired a one-half interest in whatever White and his associates claimed. Thereafter, under date of May 17, 1921, a written option was given to Klipstein, signed by Coffin and R. J. White, agreeing to transfer to Klipstein one-half of what Coffin and White might recover on the settlement of the latter's claims. This option was to run for a

period of six months from its date. When the six months was about to expire, Klipstein desired to obtain a renewal of the option, but further handling of the matter entailed additional expense. Whereupon he made a proposition to Wible that if Wible would go in with him he would share the proceeds, if any, with him. The two went to Los Angeles and obtained an extension of the option running, however, to both Wible and Klipstein. Some time thereafter the Secretary of the Interior sent out letters calling for bids on a strip of land on section 2. Klipstein and Wible endeavored to enlist the interest of Mr. J. C. Anderson of the Pan-American Oil Company in obtaining an adjustment of the claims of White and Coffin in and to said lands. Upon the agreement of Haberkern to share Wible's expense in the matter, the latter agreed to divide whatever the former might realize.

The transactions of the parties need not be further recounted. Suffice it to say that there is ample evidence in the record that whatever joint enterprise existed in the first instance had been abandoned long before Klipstein's activities in obtaining the options. Furthermore, we find no basis for the contention of the plaintiffs that the evidence is insufficient to support the finding that the defendants were not guilty of any fraud in connection with their dealings with the plaintiffs or with the so-called White and Coffin interests.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.

PRESTON, J. I concur. But I think it should be emphasized that the door is open to appellants and respondents alike to ask for the introduction of new evidence or a reconsideration of the evidence already in the record.

I agree that in the matter of the introduction of new evidence and the making of new or contrary findings, the power should be sparingly exercised, and that unless it can be seen that controlling questions will be thereby introduced, all such applications should be denied.

I agree further that in a certain sense formal findings are not necessary or appropriate in causes where a reversal is ordered. But the order of reversal upon the new evidence, or on a reconsideration of the evidence, is tantamount to a finding for the appellant. In such a case, the proper practice in most instances would seem to be to direct the proper judgment to be entered by the trial court. If the opportunity to resort to the new procedure is equal and coexistent between the litigants and is restricted to the consideration of only such questions as will determine the

course of the litigation, I see no reason why this innovation may not work for justice and the dispatch of causes pending in the courts.

208 Cal. 286

JOHNSTON v. WOLF et al. (L. A. 11443.)

Supreme Court of California. Sept. 27, 1929.

1. Appeal and error Ⓒ32—Whether appeal lies to appellate court from superior court's judgment, affirming, modifying, or reversing judgment of municipal court, depends on whether cause of action arose in city where municipal court was located (Const. art. 6, § 4b, as amended in 1928).

Under Const. art. 6, § 4b, as amended in 1928 (see St. 1927, p. 2386), whether an appeal to District Court of Appeal lies from judgment of superior court affirming, modifying, or reversing judgment of municipal court, whose jurisdiction is established by Deering's Gen. Laws Consol. Supp. 1925-1927, p. 1607, depends on the place where cause of action arose, as disclosed by record, whether inside or outside limits of incorporated city wherein municipal court is situated.

2. Constitutional law Ⓒ22—Amendment to Constitution relating to appellate court jurisdiction became law on date people ratified it (Const. art. 18, § 1; art. 6, § 4b, as amended in 1928).

Amendment in 1928 to Const. art. 6, § 4b (see St. 1927, p. 2386), relating to appellate jurisdiction of District Courts of Appeal on appeal from superior courts, held to have become law on date it was ratified by the people, under Const. art. 18, § 1, providing that, if people shall approve and ratify amendment by majority of qualified electors voting thereon, amendment shall become part of Constitution.

3. Appeal and error Ⓒ32—In determining appellate court's jurisdiction, cause of action for nonpayment of trade acceptance is considered as arising at place designated for payment.

In determining whether District Court of Appeal had appellate jurisdiction on appeal from judgment of superior court, affirming judgment of municipal court in action on a trade acceptance, assumption is that cause of action arose at place designated in instrument for its payment.

4. Evidence Ⓒ10(2)—Judicial notice taken that Florence, Cal., is outside city of Los Angeles.

District Court of Appeal takes judicial notice of fact that Florence, Cal., is outside the city limits of the city of Los Angeles.

5. Appeal and error Ⓒ32—Original jurisdiction of action on trade acceptance payable at Florence was in superior court, instead of Los Angeles municipal court, and appellate jurisdiction in District Court of Appeal (Const. art. 6, §§ 4b, 5, as amended in 1928).

Where trade acceptance for less than \$1,000 was made payable at Florence, Cal., cause of

action arose there, and original jurisdiction in action thereon for nonpayment was in superior court, instead of municipal court of Los Angeles, where action was instituted and appellate jurisdiction thereof in District Court of Appeal, under Const. art. 6, §§ 4b, 5, as amended in 1928 (see St. 1927, p. 2386).

In Bank.

Appeal from Superior Court, Los Angeles County.

Action by R. G. Johnston against Robert Wolf and Louis Wolf, copartners doing business under the firm name and style of the Wolf Cabinet & Furniture Manufacturing Company. Judgment for plaintiff was affirmed by the superior court, and defendants appeal. On motion to dismiss appeal. Motion denied.

For opinion of the District Court of Appeal, see 274 P. 1028.

Andreani & Haines, of Los Angeles, for appellants.

Goudge, Robinson & Hughes, of Los Angeles, and David A. Sondel, of Los Angeles, for respondent.

LANGDON, J. A petition for hearing in this court after decision by the District Court of Appeal, Second Appellate District, Division 2, was granted in this case to permit of further consideration of the questions involved upon the appeal, because there was presented a new problem in interpretation of a recent constitutional amendment. After careful consideration, we are in accord with the opinion of the District Court of Appeal, written by Justice Ira F. Thompson, and adopt the same as and for the opinion of this court as follows:

This is a motion to dismiss an appeal on the ground that this court has no jurisdiction to entertain it. The facts are as follows:

The respondent commenced an action in the municipal court of Los Angeles, in which he sought to recover from the defendants the sum of \$680.75. Judgment was rendered in his favor on the 21st day of June, 1928, in the amount prayed for, and on July 19, 1928, the defendants and appellants took an appeal therefrom to the superior court. On November 28, 1928, the last-named court rendered its decision, affirming the judgment of the municipal court. On December 12, 1928, appellants filed a notice of appeal from the judgment of the superior court to this court.

At the last general election, held November 6, 1928, the people ratified a constitutional amendment, proposed by the Legislature (see St. 1927, p. 2386), containing among other things, an amendment to section 4b of article 6, which, so far as pertinent to the question here involved, reads: "The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts except in cases in which appellate jurisdiction is given

to the Supreme Court in all cases at law in which the superior courts are given original jurisdiction. * * * Section 5 of the same article of the Constitution, amended at the same time, now states in part as follows: "The superior courts shall have original jurisdiction in all civil cases and proceedings except as in this article otherwise provided, and except, also, cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices' or other inferior courts. * * * The superior courts shall have appellate jurisdiction in such cases arising in municipal and in justices' and other inferior courts in their respective counties or cities and counties as may be prescribed by law." Sections 983, 984, 985 (added by St. 1925, p. 942, and amended by St. 1927, p. 118, §§ 1-3, and sections 986, 987, 988, 988a-988h, of the Code of Civil Procedure (added by St. 1927, p. 118, §§ 4-14), provide for appeals from the municipal to the superior courts, and a comprehensive mode of procedure for the hearing and disposition thereof. Section 29 of the act authorizing the establishment of municipal courts, etc. (Deering's Gen. Laws Consol. Supp. 1925-1927, p. 1607), provides that municipal courts shall have exclusive original jurisdiction of all cases at law in which the demand exclusive of interest amounts to \$1,000 or less arising in the city where the court exists, and concurrent jurisdiction with the superior and justices' courts of causes of like amount arising outside the city but within the county in which the court is situated. Finally, section 13 of article 6 of the Constitution, also amended at the last election, gives to the Legislature the right to fix by law the jurisdiction of the municipal courts and concludes with this language: "Any action heretofore taken by the Legislature in fixing exclusive jurisdiction of municipal courts in cases at law is hereby ratified and confirmed."

[1] It would seem that nothing had been overlooked which would make it clear and inevitable that the superior courts, and the superior courts only, should have appellate jurisdiction of causes tried in the municipal courts, where the last-named courts have exclusive original jurisdiction. It must be manifest, however, from the language of section 4b of article 6 that the Constitution vests in the District Courts of Appeal appellate jurisdiction of all appeals from the superior court, where the latter possesses original jurisdiction, and not merely in those cases where the original jurisdiction is exercised. The words employed are "all cases at law in which the superior courts are given original jurisdiction." It cannot be gainsaid that they are given original jurisdiction of cases in excess of the jurisdiction of justices' courts and under \$1,000 arising outside the limits of an incorporated city which has a municipal court but within the county. Over such causes they

have concurrent original jurisdiction with the municipal courts. Whether an appeal to this court lies from a judgment of the superior court affirming, modifying, or reversing a judgment of the municipal court, therefore, depends upon where the cause of action arose as disclosed by the record—whether inside or outside the limits of the incorporated city where the municipal court is situated.

[2] In our discussion of the problem we have assumed that the constitutional amendment embodying the changes we have mentioned went into effect on November 6, 1928, the date when it was ratified by the people. That it may not be thought we have overlooked this feature of the case, we now assert that to be the law. The closing sentence of section 1 of article 18 of the Constitution, in referring to amendments submitted by the Legislature, says: "If the people shall approve and ratify such amendment or amendments, or any of them, by a majority of the qualified electors voting thereon, such amendment or amendments shall become a part of this Constitution." In *Livermore v. Waite*, 102 Cal. 113, 122, 36 P. 424, 427 (25 L. R. A. 312), it is said that it is beyond the power of the Legislature to submit an amendment "that will not, upon its adoption by the people, become an effective part of the Constitution, nor is it authorized to propose an amendment which, if ratified, will take effect only at the will of other persons, or upon the approval by such persons of some specific act or condition." And in *Kingsbury v. Nye*, 9 Cal. App. 574, 99 P. 985, the court aptly states: "It is beyond dispute that the amendment went into effect upon its adoption and ratification." A similarly succinct statement is found in *San Francisco v. Pac. Tel. & Teleg. Co.*, 166 Cal. 244-252, 135 P. 971, 975, as follows: "The amendment, which is by its own terms * * * self-executing, was adopted at an election held on November 8, 1910, and became a part of the organic law on that date."

[3-5] But one question remains. Where did the cause of action arise? The affidavit supporting this motion says that the complaint alleges "that defendants accepted a trade acceptance in the sum of \$680.75, payable at the Florence National Bank, Florence, Cal., to Brents' Furniture Company." For the purposes hereof we must say that the cause of action arose at the place designated in the instrument for its payment. The breach must be held to have occurred at the place the appellants were bound by their promise to pay. *Raphael v. People's Bank of Benicia*, 45 Cal. App. 115, 187 P. 53. We take judicial notice of the fact that Florence, Cal., is outside the city limits of Los Angeles, and for that reason conclude that original jurisdiction of the action was given to the superior court, and appellate jurisdiction to this court.

The motion to dismiss the appeal is denied.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

208 Cal. 279

MOYE v. NATIONAL SURETY CO.
(L. A. 11580.)

Supreme Court of California. Sept. 27, 1929.

1. Appeal and error ⇨32—**Right of appeal to District Court of Appeals from judgment of superior court reversing judgment of municipal court held not affected by fact action was transferred from superior court of another county** (Const. art. 6, §§ 4b, 5, as amended in 1928).

Right of defendant under Const. art. 6, §§ 4b and 5, as amended in 1928, to appeal to District Court of Appeals from judgment of superior court reversing judgment of municipal court, with directions to enter new judgment after action had been transferred from superior court of another county, is the same as the right to appeal from any other judgment of the municipal court, and fact that defendant would have right of appeal from judgment of superior court transferring action would not give him right of appeal from judgment rendered.

2. Constitutional law ⇨249—**Courts** ⇨160—**Constitutional provision relating to appeal from municipal court does not deny equal protection** (Const. Cal. art. 6, §§ 4b, 5, as amended in 1928; Const. U. S. Amend. 14).

Const. Cal. art. 6, §§ 4b and 5, as amended in 1928, relating to appeal from municipal court, is not violative of Const. U. S. Amend. 14, guaranteeing equal protection of the laws.

3. Constitutional law ⇨23—**Constitutional amendment relating to remedy only held to govern right to appeal, though action was commenced prior to adoption of amendment** (Const. art. 6, §§ 4b, 5, as amended in 1928).

Since Const. art. 6, §§ 4b and 5, as amended in 1928, governing appeals from municipal courts, relate to remedy only, it governs right to appeal from judgment of superior court reversing judgment of municipal court, with directions to enter new judgment, though action in question was commenced prior to adoption of constitutional amendment.

In Bank.

Appeals from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action on surety bond by G. L. Moye against the National Surety Company. Judgment for defendant, and plaintiff appeals. On motion to dismiss appeals. Motion granted, and appeals dismissed.

For opinion of the District Court of Appeal, see 277 P. 499.

Joseph H. Call and Wm. G. Allen, both of Los Angeles, for appellant.

Baillie, Turner & Lake, of Los Angeles, for respondent.

LANGDON, J. A petition for hearing in this court, after decision by the District Court of Appeal, Second Appellate District, Division 1, was granted in this case to permit of further consideration of the questions involved upon the appeal, because they included an attack upon the validity of a recent constitutional amendment. After careful consideration, we are in accord with the decision of the District Court of Appeal, written by Justice Frederick W. Houser, and adopt, as and for the opinion of this court, said decision which is as follows:

On motion to dismiss appeal. There are two judgments of the superior court, and two appeals, in form; but, in substance, they are one judgment and one appeal, and will be so considered for the purposes of this decision.

The action upon which the proceeding before this court is predicated was upon a bond executed and delivered within the city of Los Angeles. Plaintiff originally filed a complaint in the county of Ventura. On motion presented by defendant to the superior court of that county, the place of trial was changed from Ventura county to the municipal court of the city of Los Angeles, in which court a trial resulted in judgment for plaintiff. On appeal to the superior court of the county of Los Angeles from the judgment, and from an order made after judgment, the judgment and order of the municipal court were reversed, and the case was remanded to the municipal court with directions to enter a new judgment in favor of the defendant and against plaintiff. From the judgment in the superior court plaintiff has appealed to this court, and the present proceeding is a motion to dismiss the appeal on the ground that this court is without jurisdiction to entertain or act upon the appeal attempted to be taken.

[1] It is contended by the defendant that, under the provisions of sections 4b and 5 of article 6 of the Constitution as amended in 1928, this court has no jurisdiction of the appeal. In resisting the motion to dismiss the appeal, plaintiff urges that, inasmuch as the cause of action was "transitory," the superior court of Ventura county had jurisdiction thereof. The argument seems to be that, as he would have had a right of appeal to this court from a judgment of the superior court of Ventura county, if a judgment had been rendered against him in that court, he has a right of appeal to this court from the judgment when rendered against him by any other court to which the cause was transferred. We fail to see that any such conclusion follows. The action having been transferred to the municipal court, the right of appeal from its judgment was in no respect different from the right to appeal from any other judgment of that court.

[2] Plaintiff also maintains that section 4b of article 6 of the Constitution is violative of

the Fourteenth Amendment of the Constitution of the United States, which guarantees "to each person the equal protection of the laws." In principle, the case of *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989, is decisive of the point against plaintiff's contention. See, also, *Hayes v. Missouri*, 120 U. S. 68, 7 S. Ct. 350, 30 L. Ed. 578; *Zikos v. Oregon R. & N. Co.* (C. C.) 179 F. 893.

[3] Finally, plaintiff urges that, because at the time the action was commenced (which was prior to the adoption of the constitutional amendment to which reference has been had) he had a right of appeal to this court, such right could not be taken from him by subsequent legislative or constitutional enactment. However, aside from other considerations, it is clear that, so far as the instant matter is concerned, as the constitutional amendment in question related to a change in remedy only, the point advanced by appellant is not well taken. *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148; *Pacific Gas Radiator Co. v. Superior Court*, 70 Cal. App. 200, 232 P. 995.

The motion to dismiss the appeals is granted, and the appeals are dismissed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.

PRESTON, J. I concur in this judgment. But, in order to prevent confusion between this cause and the opinion in the case of *Johnston v. Wolf* (L. A. No. 11443) 280 P. 980, it should be specially noted that the cause of action here arose within the jurisdiction of the municipal court of Los Angeles. This is not a case arising in a county where no municipal court exists, and transferred under section 398 of the Code of Civil Procedure to a municipal court for trial. Under the reasoning of *Johnston v. Wolf*, supra, I take it the right of appeal in such a case would not be abridged by transfer to a municipal court for trial and judgment.

recess, and after recess it appeared that she had violated injunction, statements of judge in presence of jury that he saw her talking with defendant's wife and another held misconduct; he not being a witness in the case, and no necessity being apparent why he should be called as a witness.

3. Criminal law §404(1)—Old finger print card in police records consulted in investigation before arresting accused held inadmissible in burglary prosecution.

In burglary prosecution, old finger print card in possession of police before commission of burglary held inadmissible; the fact that it was inspected by finger print expert during investigation preceding arrest of accused not authorizing its introduction for sole purpose of showing that accused had previously been in hands of police.

4. Criminal law §829(15, 18)—Refusal of instructions on circumstantial evidence and reasonable doubt was not erroneous, where subject-matter was adequately covered in court's charge.

Refusal of instructions on circumstantial evidence and reasonable doubt held not erroneous, where the jury were adequately instructed on such matters.

5. Criminal law §1186(4)—Errors in trial of burglary prosecution held not harmless (Const. art. 6, § 4½).

Errors in trial of burglary prosecution, particularly introduction of old finger print apparently merely for purpose of showing that accused had previously been in hands of police, held not harmless error, under Const. art. 6, § 4½, in view of the unsatisfactory character of the evidence.

Waste, C. J., and Richards, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Dallas D. Van Cleave was convicted of burglary, and he appeals. Reversed.

For opinion of the District Court of Appeal, see 276 P. 641.

Irvin C. Taplin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Tracy Becker, Deputy Atty. Gen., for the People.

208 Cal. 295

PEOPLE v. VAN CLEAVE. (Cr. 3250.)

Supreme Court of California. Sept. 28, 1929.

1. Burglary §41(1)—Evidence held to sustain conviction.

Evidence held to sustain conviction of burglary.

2. Criminal law §656(1)—Judge's statement in presence of jury as to conduct of witness in violation of admonition not to talk with others held prejudicial misconduct; he not being witness in case.

In burglary prosecution, where court had cautioned witness not to talk with others during

PRESTON, J. After a careful reconsideration of this cause, we are pleased to adopt in part, as follows, the opinion of Mr. Presiding Justice Works of the Second Appellate District, as the opinion of this court in bank herein:

"Defendant was convicted of the crime of burglary. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

[1] "It is first contended by appellant that the evidence was insufficient to support the verdict. The complaining witness, a woman, left an apartment in which she resided at

about 10 o'clock on a certain evening. Before she departed, she saw in their accustomed places in the apartment certain articles which were ascertained, later in the night, to have been abstracted therefrom. It was because of the disappearance of these articles that the charge was made against appellant upon which he was convicted. When the complaining witness left her apartment, she drove in her automobile to a certain residence, where she met appellant, who theretofore had been her associate and friend, and some other persons, among whom was one Akins. Shortly after she arrived at this place of meeting, the complaining witness discovered that a dog she had brought with her had disappeared. She then gave to appellant a bunch of keys, including those to her car, to the exterior door of the apartment house in which she lived, to her apartment, and to her trunk, and she asked appellant to drive her car about the neighborhood of the residence mentioned, in an endeavor to find the missing dog. This was the purpose of the delivery of the keys. Appellant immediately departed upon the quest, taking Akins with him. The two returned, after an absence of from 25 to 45 minutes, with the dog. After some considerable time spent at the residence, and after having been to a restaurant for supper, together with Akins and a fourth person, appellant and the prosecuting witness drove to the latter's apartment and entered it by means of her keys, which had meanwhile been returned to her. They reached the apartment at about 2:30 in the morning. From certain appearances about the rooms it was apparent to the prosecuting witness that the place had been entered during her absence. She at once unlocked her trunk with a key on the bunch she had earlier entrusted to appellant. She testified that four diamond rings, of the value of \$4,000, together with \$140 in currency, had been taken from drawers in the trunk.

"The evidence tended to show that the burglar had entered the apartment by means of a key, as there was no indication that the place had been broken into, in the ordinary acceptance of that term. The drawers in the trunk, five in number, were held in place by a metal bar which passed across their front and which it was necessary to move before they could be opened. The police found a print of appellant's thumb upon this bar. Other finger prints were upon it also, but none of them could be identified or plainly discerned. All the prints, except that alone of appellant's thumb, were, in the language of an expert upon the witness stand, but 'smears.' Before the night on which the burglary occurred, appellant was familiar with the 'lay' of the apartment of the prosecuting witness. He had visited her there at least as often as every other day for a period of two months. Particularly, according to some of

the evidence, he was familiar with the trunk and the mechanism by means of which it was opened, for he had often gone into it to get articles desired by the complaining witness when he was in the apartment with her, or to get articles which he himself desired. Indeed, it is contended by appellant that the sole distinguishable finger print on the metal bar was made by him upon some occasion earlier than the night upon which the burglary occurred. It will be remembered that the owner of the trunk had opened the drawers before she left her apartment at 10 o'clock and had seen the rings and money in their places. She had been compelled, necessarily, to handle the metal bar in order to open the drawers. Under all these circumstances the inference is perhaps possible that appellant's thumb print was impressed on the bar between 10 in the evening and 2:30 in the early morning of the night upon which the burglary was committed, although more will be said on that subject later. There was evidence also that, after appellant's arrest, and while he was in the county jail, he said to a police officer and to the complaining witness: 'If you would let me out for twenty-four hours I believe I can get the diamonds back for you.' It was testified by the officer that he further said that, if he was unable to produce the diamonds, 'he would pay her back in the way of an installment from time to time.' Appellant was not allowed to leave the jail, because he was unwilling to go after the diamonds in the company of an officer. We think there was sufficient evidence to support the verdict."

The next claim is that the trial court committed prejudicial error. We quote further from the opinion of the District Court of Appeal, as follows:

[2] "A witness for the defense, a Mrs. Howard, was on the stand when the time for a noon recess arrived. As the recess was about to be taken, and after the judge had given the usual admonition to the jury, counsel on both sides joined in the unusual request that 'this witness be instructed not to talk about this trial during the recess.' Thereupon the judge said to the witness: 'You are instructed not to discuss with any one or allow any one to discuss with you any subject connected with this trial between now and 2:00 o'clock, when you resume the witness stand.' Some time after Mrs. Howard had taken the stand following the recess, the district attorney, while conducting his cross-examination, charged in his questions that she had answered interrogations which she had failed to answer before noon, or had answered them differently. The officer then inquired whether she had talked with any one during the recess, the trial judge examined her at some length upon the same subject, and it seemed to appear that she had indulged in some conversation with at least

two persons. It was suggested by counsel that the judge ask her the specific question whether she had conversed about the case, and it was stated that she had been admonished not to talk upon that subject. The judge then said: 'I think that was made clear. At the request of both counsel the court admonished her to that effect, and I myself saw her talking in the back of the courtroom with Mrs. Van Cleave, the wife of the defendant, after court adjourned and while counsel was making an offer of proof, and also saw her walk into the courtroom with the lady dressed in black sitting in the front row; I don't know who she is, but they came into the courtroom together. Is that the mother of the defendant?' It is this statement of the judge which is assigned as misconduct. After making the statement, the judge questioned the witness further, and it developed plainly that she had talked with the two persons named by him, but she denied that her conversations were in relation to the case. It also transpired that the 'lady dressed in black' was the mother of appellant. The judge was in error in making the statement to which exception is taken. The matters of fact recited by him, if given a place in the record at all, should have come from the mouth of a witness, and he was no witness. He was neither called as a witness nor was he sworn. He could have become a witness, of course, but a judge should not be put even into such a position except as a matter of final necessity, especially in a criminal case, where there is always a likelihood that the judge who is made a witness will be deemed by the jury to have espoused one side or the other in the controversy being tried before him. The statements of fact made by the judge were intrinsically harmless. He said merely that he had seen the witness talking with the wife and mother of appellant, and she herself admitted that she had talked with them. Notwithstanding this truth, we think the remarks of the court constituted misconduct. Taking the context, as shown by the record, we think the jury must have believed that the judge held the view that the conversation related to the facts of the case. His remarks, therefore, operated to impeach the witness in the estimation of the jury. It is true that his observations were not assigned as misconduct at the trial, but we doubt whether their effect could have been wholly removed by an admonition to disregard them. When a jury believes that a judge has embraced the cause of the prosecution in a criminal case, it is most difficult to remove the impression.

[3] "After appellant's arrest, his finger prints were taken by an expert in the police department. The expert testified that the distinguishable thumb print on the metal bar which held in place the drawers in the trunk

of the complaining witness was the counterpart of a thumb print taken by himself from appellant, and that it was made by appellant. Some time later the prosecution offered in evidence finger prints upon a card found in the identification bureau of the police department, and bearing the name of appellant. The expert testified, over the objections of appellant, that he had examined this card as a part of the investigation leading up to the arrest of appellant, and that a thumb print upon it was made by the same thumb which made the print on the metal bar and the one taken by him from appellant after his arrest. The finger prints on the card were taken at some time before the burglary was committed with which appellant was charged and for which he was convicted in the present action. The card was admitted in evidence over the objection of appellant. This was error. The exhibit was offered merely because it was inspected by the finger print expert during the investigation which preceded appellant's arrest. It was not admissible for that reason, nor can we conceive of any other ground upon which it was entitled to a place in the record, and it demonstrated to the jury that appellant once before had been in the hands of the police.

[4] "Appellant asked the trial judge to give five instructions, each of which he says, was designed to inform the jury 'that conviction on circumstantial evidence must exclude any and every reasonable hypothesis of innocence based on the adduced facts,' and each of them was refused. We think the proffered instructions, although they were differently phrased, related only to the question of reasonable doubt, and the judge instructed the jury amply upon that subject. The requested instructions were therefore unnecessary.

[5] "In order to determine whether there has probably been a miscarriage of justice because of the errors committed at the trial, and in accordance with the provisions of section 4½ of article 6 of the Constitution, we have examined the entire cause, including the evidence. It will be observed that, with the exception of the testimony to the effect that appellant, after his arrest, made an offer to return the stolen diamonds if he were released, or to pay for them in installments, the evidence is purely circumstantial. Let us consider this excepted testimony first. Appellant denies that he made the offer. Not only so, but the testimony came from a police officer who said that the offer was made in the presence of the complaining witness, and she did not testify on the subject. The testimony concerning appellant's thumb print on the metal bar of the trunk was not as satisfactory as the prosecution might have desired. The trunk was of the wardrobe variety. It stood on end when it was to be opened. One side of it was arranged to accommodate clothing on hangers. The other side was complete-

ly occupied by five drawers, extending from top to bottom of the side. It was from the second of these drawers that the rings and money were taken. The metal bar ran from top to bottom of the trunk and extended, when in place, across one end of the five drawers. It was fastened at the top by a lock. The sole distinguishable finger print, that of appellant's thumb, was found near this lock. The other prints, 'smears,' as the expert called them, were at various places along the bar, and it is to be noticed that the record fails to show just where any of them was located and especially whether any of them was under the thumb print of appellant. It is particularly worthy of note that the expert declared that he could not determine whether the print of appellant's thumb was impressed upon the bar before or after any other of the prints upon it. Appellant denied strenuously that he committed the burglary, and in the denial he was fully supported by Akins.

"One other circumstance of the case deserves mention. Appellant was a married man, but it is evident from the record that the complaining witness was his paramour. The alleged burglary was committed on the night of July 11. Appellant's wife had left him on July 2 or 3. Before the burglary she had caused divorce papers to be served upon him. On the night of the burglary, appellant occupied the apartment of the complaining witness with her, and she drove him to another place in the morning. On this ride, before any charge was made against him and before the record shows that he was suspected of the burglary, appellant says he told the complaining witness that he was to go that morning to the office of his wife's counsel in order to effect, if possible, a reconciliation with her. He says that the complaining witness asked him not to do so. The mother of appellant, with whom the complaining wit-

ness was well acquainted, and another witness, testified that the complaining witness said, later in the same day, that things had gone so far between her and appellant that, if he returned to his wife, he would be sorry, that she would see that he never lived with her. Akins testified that on this same occasion the complaining witness said that appellant had been 'cheating' on her and that she would 'fix him' for it. Appellant and his wife had apparently become reconciled at the time of the trial, as there was testimony that they were then living together.

"It will be seen from all these circumstances that the case was a close one. It is quite likely that a miscarriage of justice has resulted from the errors committed at the trial. Appellant must have been harmed materially by the reception in evidence of the old finger print record found in the police archives. It is quite probable that this item of damaging evidence turned the scale against him."

The judgment and order are reversed.

We concur: LANGDON, J.; CURTIS, J.; SEAWELL, J.

WASTE, C. J. I dissent. The majority opinion admits, without qualification, that "there was sufficient evidence to support the verdict." The further analysis of the evidence made "in order to determine whether there has probably been a miscarriage of justice," because of the errors committed by the trial court, does not, in my opinion, establish that the case was "a close one." The evidence in the case, aside from, and unaffected by, any errors of the trial court, being sufficient to support the conviction, no miscarriage of justice resulted.

I concur: RICHARDS, J.

100 Cal. App. 676

In re JOHNSON'S ESTATE. (Civ. 7045.)

District Court of Appeal, First District, Division 2, California. Sept. 21, 1929.

1. Wills §303(4)—Undisputed testimony of one subscribing witness to will regarding testator's soundness of mind held sufficient.

Undisputed testimony of one subscribing witness to will regarding soundness of mind of testator *held* sufficient, though the other subscribing witness testified that he had never met testator before he signed the will and was unable to state whether testator was mentally competent.

2. Wills §120—It was not essential that testator make verbal and audible request of subscribing witness to sign will as witness.

It was not essential that testator make verbal and audible request of subscribing witness to sign will as witness, and witness' testimony that the only words spoken were that he asked in joking manner if testator wanted to make his will, and he stated he did, and that witness and the other subscribing witness and testator then signed the will, did not warrant decision that he became subscribing witness without request of testator.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Petition for the probate of the will of Charles Johnson, deceased. From an order denying the petition, the petitioner appeals. Reversed.

Charles A. Hill, of Fresno, for appellant.

Ray C. Wakefield, of Fresno, for respondent Wakefield.

KOFORD, P. J. This is an appeal from an order denying a petition for probate of the last will and testament of Charles Johnson, deceased. The appellant was the petitioner and was named in the will as an executor. The record on appeal is a clerk's transcript and a printed transcript which prints the clerk's transcript and also prints the bill of exceptions signed and approved by the judge. The notice of appeal and the appellant's brief were duly served upon the attorney for C. K. Wakefield, special administrator of the estate of said deceased. No brief or argument in support of the order appealed from has been filed. Appellant states that he does not know why the petition was denied, but assumes that it was on account of the supposed insufficiency of the testimony of the subscribing witnesses in respect to either the sound mind of the testator or in respect to his request of the witnesses to act as subscribing witnesses.

The witnesses to the will were F. J. Kitching and F. E. Wells. Both signed the will in the presence of the testator and of each other, subscribing to the usual statement reciting the details of the due execution of the will.

The subscribing witness Kitching testified to all the details of a due execution of a will, including the statements that he was acquainted with the testator, that the testator was of sound and disposing mind, free from fraud, undue influence, etc., and that he and the other subscribing witness signed as witnesses at the request of the testator. The other subscribing witness testified that he was requested by the petitioner to come to the sick room of the testator to witness a will, and, as to the execution of the will, he testified as follows:

"* * * There was there present at said time besides myself and said C. A. Dwarack and said Charles Johnson, D. T. Winne, an attorney at law, and I. J. Kitching. On entering the room of Charles Johnson, whom I had not met before, I asked him in rather a joking manner if he wanted to make his will and he stated he did; that these were the only words spoken to or by me while I was in Mr. Johnson's room; that said Charles Johnson then signed said instrument hereinbefore referred to which had been previously prepared; that said Charles Johnson signed the same in the presence of myself and said I. J. Kitching and said I. J. Kitching and myself then and there signed the same in his presence and in the presence of each other; that neither Charles Johnson or any other person in his presence requested me to sign said instrument as a witness; that I left immediately after signing said instrument;

"That at the time of the signing of said instrument said Charles Johnson appeared to be physically ill; that I am not able to state whether or not he was mentally competent; I believe that he knew he was signing an instrument purporting to be his last will, but I do not know whether or not he knew the contents thereof, as it was not read to him in my presence."

[1, 2] The soundness of mind was testified to by the subscribing witness Kitching and not denied by any other witness. The testimony of the subscribing witness Wells did not warrant a decision that he became a subscribing witness to the will without the request of the testator. It was not essential that the testator make a verbal and audible request of the subscribing witness Wells. We quote from *Estate of Silva*, 169 Cal. 116, at page 120, 145 P. 1015, 1016:

"It does not appear that the testator in words asked that these persons sign as witnesses, or declared to them that the document was his will, but from the whole transaction as shown by the testimony it is very clear that all of them understood that he was promulgating the document as his will, that he desired these persons to sign the same as witnesses, and that they were signing in compliance with his desire so manifested by his manner and actions.

"It is not necessary that the testator should have spoken words declaring the document to be his will, or that he should expressly request the witnesses to sign it as such. It is sufficient if this declaration and request are unmistakably indicated to the persons signing as witnesses by the testator's conduct and actions, although there is no declaration in words to that effect."

See, also, *Estate of Cullberg*, 169 Cal. 365, 368, 146 P. 888.

The order appealed from is therefore reversed.

We concur: NOURSE, J.; STURTEVANT, J.

100 Cal. App. 688

PEOPLE v. COSTELLO. (Cr. 1841.)

District Court of Appeal, Second District,
Division 2, California. Sept. 23,
1929.

Criminal law §935(1)—Granting new trial to defendant, convicted of maintaining nuisance but acquitted of selling liquor, held not abuse of discretion (27 USCA § 33; St. 1921, p. 79).

After conviction of maintaining liquor nuisance under 27 USCA § 33, order granting new trial held not abuse of discretion, where jury had acquitted defendant on charge of selling liquor under St. 1921, p. 79.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Dan Costello was convicted of maintaining a nuisance, and, from an order granting him a new trial, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

P. N. McCloskey and H. R. Griffin, both of San Bernardino, for respondent.

IRA F. THOMPSON, J. The defendant was charged in an information containing two counts with the offenses of "selling intoxicating liquor" and with "maintaining a common nuisance, to wit: a certain building in the town of Victorville, in the County of San Bernardino, State of California, in which intoxicating liquors were wrongfully kept and unlawfully sold." The jury found the defendant not guilty of count 1, charging him with the sale of intoxicating liquors in violation of the Wright Act (St. 1921, p. 79), but did return a verdict of guilty of the offense of maintaining a nuisance. The lower court granted the defendant's motion for a new trial, and the people prosecute this appeal from that order.

The defendant operated a pool hall and soft drink stand in Victorville. The evidence shows that he carried and sold "Amargo Bitters," "Padre Wine Tonic," "Power

Wine Tonic," and "Peptol Wine Tonic." The testimony of the prosecution was to the effect that the bitters were not only sold by the bottle but also by the glass. One witness testified that during November, 1928, or two months prior to the arrest of defendant, the sale of these bitters by the glass averaged in his judgment three bottles a day; that he had seen several people under the influence of this particular concoction and had been intoxicated therefrom himself. It is well to note that the witness to whom we have just referred had been arrested and convicted of a charge of burglary of defendant's place of business and had been granted probation. He also testified that he was instructed by his employer, the defendant, to sell bitters by the dose and not by the drink. Other witnesses stated that they had seen a number of persons under the influence of liquor in defendant's place of business, but it is not clear that they came under its influence by imbibing too freely of bitters. A witness who clerked for defendant during December, 1928, and January, 1929, testified that he sold bitters "probably twenty-four doses a day." The defendant, on the other hand, asserted his instruction to sell bitters by the dose and the bottle only, and that all persons under the influence of liquor, regardless of who they were, were to be refused service.

The prosecution called chemists to the stand for the purpose of proving the alcoholic content of the liquid sold and that it was fit for beverage purposes. They were unable to state the physiological effect of the bitters other than to testify concerning the effect it had upon them. They did recite that the alcoholic content of "Amargo Bitters" was 47 per cent. by volume. On the other hand, the defense introduced the testimony of a practicing physician and a graduate of Columbia University to the effect that the liquid was unfit for beverage purposes; that it contained pandomon, cloves, and ginger and extracts of that character, and senna, the active principle of which drug is called emodin. He gave it as his opinion that "the ordinary individual drinking that would get the action of those irritants, with either catharsis or their emetic effect before he could absorb enough alcohol to create intoxication"; that the preparation could not "be tolerated as a beverage by the ordinary individual" because "the physiological action would be such that the system would revolt and eliminate the drug in an abnormal way. I think it would create vomiting, and I think it would create distress." The evidence also discloses that the product known as "Amargo Bitters" is manufactured in Germany and imported to this country; that prior to its admission it is tested by federal prohibition authorities; that, when found by them to conform to a certain standard, it is classified as "unfit for beverage purposes." Testimony was not ad-

duced disclosing what is deemed to be a proper or improper amount to be taken for medicinal purposes other than the statement that the medical profession uses bitters in very small quantities. There was testimony that whisky glasses were used when sales were made by the glass.

We must note the provisions under which the respondent was convicted, keeping in mind that he was acquitted of the charge of selling intoxicating liquors. The material part of the section of the National Prohibition Act (title 2, § 21 [27 USCA § 33]) under which the respondent was found guilty reads as follows: "Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this chapter, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or be imprisoned for not more than one year, or both." For the purposes of the discussion, we may assume, in keeping with the authorities, that a person who sells medicated preparations, unfit for beverage purposes, to the ordinary person, but containing sufficient alcohol to produce intoxication, intending—or under circumstances from which it is fairly and reasonably inferable—that it is to be used for beverage rather than for medicinal purposes, may be guilty of an unlawful sale of intoxicating liquors. *Goode v. State*, 87 Miss. 495, 40 So. 12; *Young v. State*, 137 Miss. 188, 102 So. 161, 36 A. L. R. 717; *Massei v. United States* (C. O. A.) 295 F. 683. Inasmuch, however, as the jury acquitted the respondent of this charge, it must have found that the intent or the circumstances already mentioned did not exist. Undoubtedly the respondent could not have been prosecuted under the second count for merely possessing the medicated compounds carried by him. *Young v. State*, supra. A conviction, therefore, on the second count necessarily involves a finding of the sale of the preparation with intent or under circumstances from which it is reasonable to infer that it was to be used for beverage purposes. We do not find it necessary to determine, although it seems obvious, that the two verdicts are necessarily inconsistent, but an analysis of the situation must indicate that they were so at variance with each other as to at least give rise to a very serious doubt in the mind of the trial judge concerning the finding of the jury. Under such circumstances, taking into consideration the attack made upon the credibility of the witness who gave the most exact and damaging testimony, the statements of the physician, and the denials of the respondent, we do not find that clear and unmistakable

abuse of discretion which would warrant us in reversing an order granting a new trial. Order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

100 Cal. App. 678
WILSON v. MARDAKIS. (Civ. 6965.)★

District Court of Appeal, First District, Division 2, California. Sept. 23, 1929.

Rehearing Denied Oct. 22, 1929. Hearing Denied by Supreme Court Nov. 21, 1929.

1. Automobiles ⇨244(7)—Evidence supported implied finding that driver of taxicab, striking boy crossing street after leaving street car, was negligent.

In action against taxicab company for injury to boy, struck as he crossed street after leaving street car, evidence held sufficient to support implied finding that defendant's driver was negligent.

2. Automobiles ⇨244(55)—Evidence supported determination that boy, struck by taxicab while crossing street after leaving street car, was not contributorily negligent.

In action against taxicab company for injury to boy, struck as he crossed street after leaving street car, evidence that boy drew back after seeing taxicab, and then attempted to cross in front of it, because of narrow space between cab and car, held sufficient to support determination that he was not guilty of contributory negligence.

3. Automobiles ⇨246(51)—Instruction as to driver's duty to drive on right side of highway held not erroneous, under evidence in action for injury to boy leaving street car.

In action against taxicab company for injury to boy, struck as he crossed street after leaving street car, instruction relative to driver's duty to drive on right half of highway held not erroneous, under evidence, as against contention that it was not applicable to facts.

4. Appeal and error ⇨1066—Instruction respecting lawful speed for automobile at intersection held not harmful, though no intersection was involved (Motor Vehicle Act, § 113, subd. 2).

In action for injuries to boy struck by automobile, instruction as to lawful speed of automobile traversing intersection, under Motor Vehicle Act, § 113, subd. 2, held not harmful, even though no intersection was involved, and accident happened 46 feet from intersection.

5. Automobiles ⇨246(51)—Instruction stating ordinance confined to zones where traffic is congested held properly refused, under evidence in action for injury to boy struck after leaving street car.

In action against taxicab company for injury to boy, struck as he crossed street after leaving street car, refusal of instruction purporting to be statement contained in ordinance confined to zones where traffic is congested, held not error, where there was no evidence that place where accident happened was in such a zone.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Jesse Wilson, by his guardian ad litem, Mary La Baugh, against Chris Mardakis, doing business under the firm name and style of the Golden Gate Taxicab Company, to recover damages for injuries arising out of automobile accident. Judgment for plaintiff, and defendant appeals. Affirmed.

John Ralph Wilson and Carl E. Day, both of San Francisco, for appellant.

James F. Brennan, of San Francisco, for respondent.

STURTEVANT, J. Shortly after 10 p. m. on the night of April 29, 1927, plaintiff, a boy 13 years of age, and a friend, Arthur Mahoney, of about the same age boarded a west-bound McAllister street car, with the purpose of transferring at Larkin street, to go to their homes on Ellis street. Upon reaching Larkin street, the Mahoney boy alighted from the rear end of the car, ran around the back and across to the southerly side of McAllister street, with the object, apparently, of taking a north-bound Larkin street car at the southeast corner of Larkin and McAllister streets. The plaintiff followed. After he had taken a few steps to the south, he was hit by a taxicab traveling easterly on McAllister street, driven by an employee of defendant.

[1] The defendant claims he was not negligent. There was evidence that the taxicab entered the intersection of the two streets traveling at a speed of 15 miles or more, and that it so continued to travel until the accident; that it was riding the southerly track in McAllister street; that it was lighted, and there were such other lights that the persons in the street could be seen; and that they were seen. There was evidence that the space between the southerly track and the curb was not occupied by parked vehicles for a distance of 100 or 125 feet east of Larkin street. There were facts introduced in evidence from which it may be argued that the taxicab was traveling at a speed in excess of 15 miles per hour. The plaintiff contends that the taxicab was operated negligently, because the driver did not drive as close to the right-hand curb as was practicable under the circumstances, because the taxicab was being driven at an excessive rate of speed, and because it was not being driven in a careful and prudent manner and at a rate of speed that was reasonable and proper, having regard for traffic and the use of the highway. There was evidence which, if the jury believed it, would have justified the jury in placing its verdict on any one or all of the foregoing theories. The defendant attempts to justify the acts of his agent by

claiming that no one of the theories mentioned is wholly sustained as a charge. But he is responsible for the combination of facts, as well as for the separate factors. This court is unable to say that the implied finding that defendant was negligent is not supported by the evidence.

[2] The defendant also asserts that the plaintiff was guilty of contributory negligence. The facts are these: As he rounded the rear end of the street car, he looked west on McAllister street and saw the taxicab. It was riding both rails of the southerly track, or straddling the south rail. Plaintiff had taken a step out, but drew back until he was in danger of being brushed down by the street car, when it started to move. He saw the space he was standing in was only 4 feet wide, or less; that is, the space between the street car and the taxicab, if the latter continued forward in a straight line. He determined to try to get across ahead of it. He attempted to run. He took a couple of steps and was hit. The defendant concedes "that persons under the stress of a sudden emergency are not held strictly accountable for their acts," but he claims that principle is not applicable in this case. When it is considered that the person in question was a boy only 13 years of age, we think that the jury was within its rights when it reached the determination that the plaintiff, under all of the facts, was not guilty of contributory negligence.

[3] The plaintiff requested, and the trial court gave, an instruction: "I instruct you that the Motor Vehicle Act in effect at the time of the accident in question provided that on all occasions the driver of a vehicle shall drive the same on the right half of a public highway, and close to the right edge or curb of said highway, unless it is impracticable to travel on said side of the highway, and except when overtaking or passing other vehicles, in which latter case the vehicle may be driven on the left side of the highway, if said left side is clear and unobstructed for at least 100 yards ahead. If you find from the evidence in this case that defendant's driver was not driving his automobile upon the right half of the street, and close to the right-hand curb of said street, and that it was practicable to travel close to the right-hand curb of said street, then you are instructed that he was guilty of negligence as a matter of law." The defendant asserts it was not applicable to the facts. He points to the evidence that some cars were parked 100 or 125 feet easterly from the corner, and that it was not practicable to drive near the curb. This argument assumes facts. Just how far east these parked cars were from the point of the collision rests in argument. There was evidence to the effect that, as the taxicab proceeded east on McAllister street from the time that it approached the inter-

section, and from there to a point some distance east of the point of collision, the taxicab could have been driven next to the curb, because the street was otherwise unoccupied. It was only at a point some distance beyond and east of the point of collision that there were any parked cars next to the curb.

[4] The plaintiff requested, and the trial court gave, an instruction as to the lawful rate of speed when an automobile is traversing an intersection. Motor Vehicle Act, § 113, subd. 2. The defendant says in this case no intersection was involved; that where the accident happened was 46 feet east of the intersection. Conceding that to be the fact, the instruction was not harmful.

[5] The defendant requested, and the trial court refused to give, an instruction purporting to be a statement contained in Ordinance No. 4663 (N. S.). The court did not err. The ordinance is confined to zones "where the traffic is congested." There was no evidence that the place where the accident happened is a zone "where the traffic is congested."

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.



100 Cal. App. 649

PACIFIC BROADCASTING CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 7142.)

District Court of Appeal, First District, Division 1, California. Sept. 20, 1929.

1. Prohibition ☞17—One objecting to appointment of receiver should present objection to trial court in some proper form before applying for prohibition.

Where party objecting to appointment of receiver has opportunity to object thereto in trial court, objection should be brought to trial court's attention before application is made for writ of prohibition to prohibit trial court from proceeding in cause on jurisdictional grounds, since it is to be presumed that any valid objection properly brought to attention of court would generally prevail, and that all necessity for writ of prohibition would be obviated.

2. Prohibition ☞3(3)—Statute having provided for appeal from order appointing receiver and for undertaking pending appeal, prohibition will not lie, notwithstanding jurisdictional question (Code Civ. Proc. §§ 943, 963).

Since under Code Civ. Proc. §§ 943, 963, originally in St. 1897, pp. 55, 56, appeal may be taken from order appointing receiver and undertaking given to stay operation of order pending appeal, prohibition will not lie notwithstanding question of jurisdiction to make order may be involved.

3. Prohibition ☞3(3)—Facts showing remedy by appeal from order appointing receiver would be adequate, writ of prohibition was denied (Code Civ. Proc. §§ 943, 963).

Facts showing trial court granted ex parte order appointing receiver who gave bond for faithful performance of duties and took possession of property, and court on petition of receiver ordered sale of property, and no motion was made to vacate order appointing receiver claimed to be void because defendants were not served with copies of summons and complaint in action, nor with copies of petition, nor order for sale of property precluding trial court from acquiring jurisdiction, *held* not to warrant granting of prohibition, since remedy by appeal afforded by Code Civ. Proc. §§ 943, 963, would be adequate.

Application by the Pacific Broadcasting Company for writ of prohibition prayed to be directed to the Superior Court in and for the city and county of San Francisco and James G. Conlan, Judge thereof, and another. Application denied.

Shortridge & McInerney and Bronson, Bronson & Slaven, all of San Francisco, for petitioner.

PER CURIAM. An application for a writ of prohibition to prohibit the taking of any further proceedings under an order appointing a receiver, upon the ground that said order is void for want of jurisdiction to make it.

[1] It does not appear from the petition that any application has ever been made to the trial court to vacate the order now claimed to be void, and as held in *Havemeyer v. Superior Court*, 84 Cal. 327, 24 P. 121, 141, 10 L. R. A. 627, 18 Am. St. Rep. 192: "When a party has an opportunity of objecting in the lower court that it is proceeding, or is asked to proceed, in a matter without, or in a manner exceeding, its jurisdiction, he ought to make the objection there. It is only fair to the court that the objection should be brought to its attention in some proper form. If no objection is made, the party having every opportunity to object, the court may reasonably infer that no ground of objection exists; and not only is the court entitled to the advice and suggestions of the party with reference to objections apparent on the record,—there are many cases in which the ground of objection would not appear unless set forth by plea in some form, and it is to be presumed that any valid objection, properly brought to the attention of the court, would generally prevail, and that all necessity for a writ of prohibition would be obviated; therefore the interest of the public in preventing unnecessary litigation, as well as consideration for the judge of the lower court, demand that the objection should be made at the first opportunity."

[2] Furthermore, the following cases hold

that since under the amendment to the Code in 1897 (St. 1897, pp. 55, 56) an appeal may be taken from an order appointing a receiver and an undertaking given to stay the operation of the order pending the appeal, the remedy of prohibition will not lie, notwithstanding the question of jurisdiction to make the order may be involved: *Jacobs v. Superior Court*, 133 Cal. 364, 65 P. 826, 827, 85 Am. St. Rep. 204; *Campbell v. Superior Court*, 67 Cal. App. 728, 228 P. 354; *Lieberman v. Superior Court*, 72 Cal. App. 18, 236 P. 570. The decision in *Jacobs v. Superior Court*, supra, indicates, however, that there "might, perhaps, be exceptional facts in a case which would call for a writ of prohibition notwithstanding an appeal from an order appointing a receiver."

[3] No such exceptional facts are here pleaded. In substance they are as follows: Edward J. Cooke commenced an action against the Pacific Broadcasting Company, a corporation (the petitioner herein), station KYA, John Doe, Richard Roe and James Doe upon an assigned claim for the sale of merchandise, amounting to \$1,034.91, alleging that said company was insolvent, and that an attachment by another creditor for \$4,091.96 had been levied upon its property which would more than absorb all of the assets of said company; and upon those grounds Cooke asked for the appointment of a receiver and judgment for the amount of his claim. Thereupon, the petition alleges, the trial court granted an order, ex parte, appointing a receiver, who gave a bond in accordance with the order of court for \$10,000 for the faithful performance of his duties, and took possession of said broadcasting station; that five days thereafter, to wit, on August 31, 1929, on petition of said receiver, the court granted another order directing the sale of the assets of said broadcasting station; that pursuant to said order, the sale was noticed for September 26, 1929, in response to which the receiver obtained one bid. The petition further alleges that defendants were never served with copies of the summons or complaint in the action, nor with copies of the petition or the order for the sale of the property; and it is claimed therefore that the court was without jurisdiction to make any of said orders. Upon the grounds mentioned the petitioner, Pacific Broadcasting Company, seeks this writ to prohibit any further proceedings being taken under said orders and to have the orders declared void.

It is evident from the foregoing that the remedy by appeal afforded by the Code sections (Code Civ. Proc. §§ 943, 963), if it becomes necessary to invoke the same, will serve the full purpose of the writ which petitioner seeks, because upon taking such an appeal and giving an undertaking, all

proceedings based upon the order appointing the receiver will be stayed pending the determination of the appeal, and the validity of said order appointing the receiver will be determined on the appeal.

For the reasons stated we are of the opinion that the application should be denied, and it is so ordered.

100 Cal. App. 652

DOYLE et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 6744.)

District Court of Appeal, Second District, Division 1, California. Sept. 20, 1929.

1. Depositions ⇨32—Application to perpetuate testimony stating applicant expected to be plaintiff, setting out adverse parties, witnesses, facts to be proved, and that proof was necessary to perfect title, held sufficient (Code Civ. Proc. § 2084).

Application to perpetuate testimony of witnesses, alleging that applicant expected to be party plaintiff, and stating names of persons expected to be adverse parties, and that determination of question of validity of assessments was necessary to perfect title to plaintiff's property, with designation of parties whose testimony was expected to be perpetuated with place of residence and a general outline of facts expected to be proved, held sufficient under Code Civ. Proc. § 2084, requiring verified petition stating names of persons who will be adverse parties or that proof of some fact is necessary to perfect title to property in which applicant is interested.

2. Depositions ⇨11—Proceedings to perpetuate testimony are available to prospective litigant, or to establish title or relationship (Code Civ. Proc. § 2084).

Under Code Civ. Proc. § 2084, all that is necessary to warrant proceedings for perpetuation of testimony is that applicant expects to become party to suit, or that proof of some fact is necessary to establish title to property, or relationship or some other matter which may be necessary to establish.

Certiorari to Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Petition by M. F. Doyle and others for writ of certiorari to be directed to the Superior Court in and for Los Angeles County, and Hon. Marshall F. McComb and others, Judges thereof. Writ discharged.

Swaffield & Swaffield, of Long Beach (Lawrence Hall, of Long Beach, of counsel), for petitioners.

Chandler, Wright & Ward, of Los Angeles (H. C. Mabry, of Los Angeles, of counsel), for respondents.

HOUSER, J. From the petition herein it appears that heretofore, to wit, on June 4,

1929, pursuant to an application filed by Turner Oil Company, a corporation, in the superior court in the county of Los Angeles, for an order to perpetuate the testimony of each of four persons named in such application, four several orders were issued by said court by which each of said persons was directed to appear at a designated time and place for the purpose of giving his deposition; that following service of such order upon each of such persons, each of them duly appeared as directed in the order, but refused to give any testimony. Thereafter, in due course and because of such refusal to give his testimony as directed, each of such persons was ordered by the said superior court to appear before it on a specified date to show cause why he should not be punished for contempt of said court. Thereupon, the persons so cited for contempt, claiming that the application for the order to perpetuate their testimony was so lacking in essential allegations that it constituted no foundation for either or any of the several orders made by the superior court in the matter, applied to this court for a writ of review, to the end that such orders be annulled.

Without setting forth at length the application in question, it may suffice briefly to state that following its entitlement and address to the superior court of the county of Los Angeles, in effect the application contained the statements: That the applicant expected to be a party plaintiff in an action to be brought in said superior court; that said action would involve the determination of the validity of a certain agreement between the city of Long Beach and Charles Torson, by which agreement said Charles Torson was employed by the city of Long Beach to do certain construction work in connection with Pump sewer district No. 10, city of Long Beach; that by said action applicant proposed to furthermore determine the validity of all bonds issued in connection with the above work; that the names of the persons whom the applicant expected would be adverse parties in said action were the city of Long Beach, Charles Torson, Walter Horne, Long Beach Insurance Agency and/or its directors and/or certain of its stockholders; that applicant was the owner of about 50 acres of real property situate in Pump sewer district No. 10, Long Beach, Los Angeles county, Cal.; that said property had become subject to an alleged assessment of over \$20,000 for the aforesaid work done under the above-mentioned contract; and that it was necessary to determine whether or not the assessments were valid in order to perfect title to the above property in which applicant was interested as owner as aforesaid. Then followed a designation of each of the persons whose testimony was expected to be perpetuated, his residence address, the statement that he was a necessary and material witness for the applicant on the trial of the expected action and

that his testimony would be necessary and material in the prosecution thereof. The application also contained the statement that by the first of such named persons the applicant expected to prove that the Long Beach Insurance Agency was the agent for the Pacific Indemnity Company and/or Swett & Crawford, who issued various bonds on behalf of the contractor, Charles Torson, in connection with Pump sewer district No. 10, Long Beach, Cal.; that said person was general manager of the bond department of Swett & Crawford; that he was an officer or employee of the Pacific Indemnity Company and was familiar with the executing of said bonds. That by the second of said persons the applicant expected to prove that he was an officer and/or director of the Long Beach Insurance Agency; that the Long Beach Insurance Agency was the local agent for the Pacific Indemnity Company and/or Swett & Crawford in procuring the bond business from Charles Torson in connection with Pump sewer district No. 10, Long Beach; and that certain public officials of the city of Long Beach were materially interested in the Long Beach Insurance Agency as stockholders or directors. That by the third of such persons the applicant expected to prove that the Long Beach Insurance Agency was the local agent for the Pacific Indemnity Company and/or Swett & Crawford in procuring for said Charles Torson bonds in connection with the work done by him in Pump sewer district No. 10, Long Beach, Cal., and the amount of premiums paid for said bonds. And that by the last of such named persons the applicant expected to prove that the Long Beach Insurance Agency was the local agent for the Pacific Indemnity Company and/or Swett & Crawford in writing the bonds for Charles Torson in connection with the work done in Pump sewer district No. 10, Long Beach, Cal., and that certain public officials of the city of Long Beach were officers or substantial stockholders in the Long Beach Insurance Agency.

Specifically, the objections of petitioner herein to the application presented to the superior court are that said application does not set forth the nature of, or the issues to be tried in, the alleged anticipated controversy, nor the claims of the parties alleged to be adverse to applicant therein; and that such facts as are set forth are not alleged to be true, but merely that applicant "expects to prove" the same.

So far as concerns this proceeding, the effect of section 2084 of the Code of Civil Procedure, which prescribes what shall be contained within an application for an order to perpetuate the testimony of a witness, is that the applicant must produce to a judge of the superior court his verified petition in which shall be stated the fact that the applicant expects to be a party to an action in this state; and in such case, the names of the persons

whom he expects will be adverse parties; or, that the proof of some fact is necessary to perfect title to property in which he is interested. In either case in addition to the foregoing requirements, the applicant must state the name of the witness proposed to be examined, his place of residence, and a general outline of the facts expected to be proved.

[1] Tested by such statutory requirements, and referring to the application which was presented to the superior court, it will be noticed that in accordance with the demands of the statute the application does contain the positive statement that applicant expects to be a party plaintiff; and that the names of the persons whom the applicant expects will be adverse parties in said action are (naming them). Adverting to the statute, it will appear that beyond the naming of the witness proposed to be examined, the making of a statement as to his place of residence and "a general outline of the facts expected to be proved," no other preliminary demand is made of the applicant. In the instant case, however, so far as concerns what may be termed the foundational facts, the applicant has gone farther: In addition to the requirements set forth in the first subdivision of section 2084 of the Code of Civil Procedure, he has attempted to comply with the alternative requirements stated in the second subdivision of said section to the effect that in the absence of compliance by the applicant with the provisions contained in the first subdivision, the petition must contain a statement, "that the proof of some fact is necessary to perfect the title to property in which he is interested. * * *" In that regard, the application contains the statement that the applicant is the owner of "50 acres of real property * * *" which "has become subject to an alleged assessment of over \$20,000.00, * * *" and "that it is necessary to determine whether or not the assessments are valid in order to perfect title to the above property in which applicant is interested as owner as aforesaid." Resuming the examination of the application, and as affecting either of the alternative provisions of the statute, it appears that the name and place of residence of each of the persons proposed to be examined are clearly and unmistakably set forth. In view of the fact that the application is direct and specific in its statement as to what material facts are expected to be established by each of the persons whose testimony is sought to be obtained, it is equally manifest that the applicant has strictly and literally complied with the final statutory requirement that the application must contain

"a general outline of the facts expected to be proved."

[2] Although the petitioner in this proceeding has made a showing that under strict equity practice many things, other than those to which reference has heretofore been had herein, must appear in an application for an order to perpetuate the testimony of a witness, from a reading of section 2084 of the Code of Civil Procedure, it is apparent that its provisions offer a complete plan of procedure in the premises, and consequently that no occasion exists for ascertaining whether the application, as presented, complies either with the former equity practice or with the pertinent statutes, rules, or regulations concerning the subject which appertain to any jurisdiction outside this state. As is stated in 9 California Jurisprudence, 436: "Under the provisions of the Code of Civil Procedure all that is necessary to warrant the proceedings is that the applicant, or petitioner, expects to become a party to a suit in the courts of California, or, if no suit is anticipated, that the proof of some fact is necessary to perfect title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish."

In the case of *San Francisco Gas & Electric Co. v. Superior Court*, 155 Cal. 30, 99 P. 350, 361, 17 Ann. Cas. 933, where the general question of the right of a party to take a deposition was given thorough and painstaking consideration, in part the court said: " * * * It very clearly appears that it was the intention of the legislature, not only to provide a simple statutory proceeding by which litigants, actual or expectant, could secure all the relief formerly afforded by courts of equity, but *even ampler relief*, and *upon easier terms*. Prof. Pomeroy states in the sections above cited that the same literal extension of the remedy has been made by act of Parliament in England. This disposition to amplify the remedy is plainly apparent in the provisions of our code, both with respect to the proceeding to perpetuate testimony and the right to take depositions *de bene esse*, and, in view of this tendency of legislation, it seems clear to us that in any case which falls at once within the principle upon which the jurisdiction in equity was founded, and the letter of the statute, the right to take a deposition must be upheld."

It is ordered that the writ heretofore issued herein be and it is discharged.

We concur: CONREY, P. J.; YORK, J.

100 Cal. App. 702

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SUPERIOR COURT IN AND FOR COUNTY OF LOS ANGELES et al. (Civ. 6922.)

District Court of Appeal, Second District, Division 1, California. Sept. 24, 1929.

1. Executors and administrators ⇨31—Appointment and qualification of general administrator held revocation of special administrator's authority (Code Civ. Proc. § 1416).

Appointment and qualification of general administrator *held* in legal effect revocation of special administrator's authority under Code Civ. Proc. § 1416, and his duty to render accounting and be discharged from further liability is not different than if court had by direct order revoked his letters.

2. Executors and administrators ⇨79—General administrator during pendency of appeal from order appointing him cannot enforce right to take charge of assets (Code Civ. Proc. § 966).

General administrator during pendency of appeal from judgment or order appointing him cannot, under Code Civ. Proc. § 966, enforce his right as administrator to take charge of assets of estate.

3. Executors and administrators ⇨31—Appeal from order appointing administrator held not to restore or continue official character or powers of special administrator.

Appeal taken from order appointing administrator *held* not effective to restore or continue official character or powers of special administrator, and therefore court did not exceed jurisdiction in appointing another special administrator to care for assets of estate during pendency of appeal.

Certiorari to Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Application for certiorari by the Security-First National Bank of Los Angeles, special administrator of the estate of John H. Coolman, deceased, to review and annul an order of the Superior Court in and for the County of Los Angeles, and another. Writ denied.

Welburn Mayock and Alford P. Olmstead, both of Los Angeles, for petitioner.

CONREY, P. J. From the petition it appears that in the matter of the estate of John H. Coolman, deceased, certain contests were pending upon a petition for probate of will and for letters of administration. For the purpose of preserving the estate during time of contest, the Security-First National Bank of Los Angeles was appointed special administrator and duly qualified in that office. On May 7, 1929, the court made its order denying probate of the will and appointed Walter Armel administrator of the estate. On June 12th Armel qualified as such administrator. On June 18th and 22d appeals were taken to the Supreme Court from the order of May

7th. On June 18th Armel petitioned for special letters of administration. The bank and the proponents of the will objected to the granting of special letters of administration to Armel, basing their objections on the ground that the bank was the duly appointed special administrator and that its appointment had never been revoked. Thereafter, on September 26, 1929, the court appointed Armel special administrator of the estate, and directed that the bank deliver to Armel all the property of the estate in its possession. In this proceeding the petitioner contends that in making its order of September 26th the court acted without and in excess of its jurisdiction.

[1] In the first place petitioner directs our attention to decisions of the Supreme Court which hold that a new administrator of a decedent's estate cannot be appointed while a former administrator is in office, and that before there can be jurisdiction to make such appointment the former letters must be revoked. *Haynes v. Meeks*, 20 Cal. 288; *Estate of Hamilton*, 34 Cal. 464; *Barboza v. Pacific Portland Cement Co.*, 162 Cal. 36, 120 P. 767. The foregoing decisions relate to the ordinary general letters of administration, but it is claimed that in principle they apply to special administrators as well.

"When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands; and the executor or administrator may prosecute to final judgment any suit commenced by the special administrator." Code Civ. Proc. § 1416. Petitioner contends that under the foregoing section the appointment of a general administrator has the effect of suspending the powers of the special administrator, but that his letters are not revoked, and that his status as special administrator continues until he has completed his accounting and obtained his discharge. We find ourselves unable to agree with this contention. We think that the appointment and qualification of the general administrator in legal effect is a revocation of the special administrator's authority, and that thereupon he ceases to be special administrator. His duty to render an accounting and to be discharged from further liability is in no respect different from the same duty which would devolve upon him if the court had by direct order revoked his letters of administration.

[2, 3] It is further contended, however, on behalf of petitioner, that the appeal taken from the order appointing Armel as administrator suspends the operation of the order appointing such administrator, and that until the determination of said appeal the powers of the special administrator are revived and continue in being. We are referred to Estate

of Stough, 173 Cal. 638, 161 P. 1, wherein it was held that upon appeal taken from an order appointing an executor, the executor had no authority during the appeal to take any steps by virtue of his appointment, and that he was not authorized as executor to prosecute an action to quiet title to property of the estate. It should be noted, however, in that case the appointed executor had not qualified, and letters appointing him executor had not been issued when appeal was taken from the order appointing him.

Section 966 of the Code of Civil Procedure reads as follows: "When the judgment or order appointing an executor, or administrator, or guardian, is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed." It seems to have been determined, however, that said section 966 does not entitle the executor, administrator, or guardian to enforce his rights of administration during the pendency of appeal from his order of appointment. In *Coburn v. Hynes*, 161 Cal. 685, 120 P. 26, the Supreme Court commented on section 966 as follows: "We do not see that this section fixes the right of a guardian to act during the pendency of such an appeal as the section designates. On the contrary, its language would indicate that, statutorily, he has no such right, but that if he exercise his functions of guardianship in a case where the order appointing him is not void for want of jurisdiction, his acts will not be invalid." It is conceded by counsel for petitioner in the present proceeding that the appeal from the order appointing Armel as administrator is upon grounds of error, not raising any question as to jurisdiction of the court in appointing such administrator. In *Hellman Commercial Trust & Savings Bank v. Alden* (Cal. Sup.) 275 P. 794, 801, the Supreme Court commented upon the decision in *Coburn v. Hynes*, supra, as follows: "That case involved an application for a writ of superseas to prevent a guardian who had been appointed by the court from taking charge of the property of the ward pending an appeal from the decree. The question of suspending the effect of the adjudication of incompetency was not involved in that case. The court merely held that, since the statute did not authorize a guardian to take charge of the estate pending an appeal, he had no such power." So it may be said, and it so appears to us, that according to the decision in *Coburn v. Hynes*, the general administrator, Armel, during the pendency of said appeal, would be unable to enforce his right as administrator to take charge of the assets of the estate. This being so, a situation is presented which makes necessary, or at least appropriate, the appointment of a special ad-

ministrator to conserve the assets of the estate until the determination of the appeal. This condition is admitted by the petitioner here, except that petitioner itself claims to be an existing special administrator and contends that for that reason the court is without power to appoint another special administrator. In the case of *Hellman Commercial Trust & Savings Bank v. Alden*, supra, it appeared that in a proceeding instituted for that purpose one Bundy had been declared an incompetent person and a guardian of his person and estate had been appointed. Bundy appealed from said order. During the time when said appeal was pending, Bundy, who had in his possession a cashier's check which represented money belonging to him, indorsed and delivered the check to an indorsee who thereafter passed it on to the plaintiff bank. Subsequently, in an action concerning said cashier's check, it became necessary to determine whether Bundy had legal capacity to indorse and deliver the check. The Supreme Court held that the decision in *Coburn v. Hynes* did not support the contention of appellant that Bundy was restored to competency by virtue of the pending appeal.

Applying the principle indicated in the preceding paragraph, we are of the opinion that the appeal taken from the order appointing Armel administrator is not effective to restore or continue the official character or powers of the petitioner as special administrator. This being so, it seems clear that in appointing another special administrator to care for the assets of the estate during the pendency of the appeal, respondent court has not exceeded its jurisdiction.

The petition for writ of review is denied

We concur: HOUSER, J.; YORK, J.

100 Cal. App. 634

SCOTT v. SOUTHERN PAC. CO. (Civ. 6872.)

District Court of Appeal, First District, Division 1, California. Sept. 19, 1929.

1. Appeal and error §979(2)—Order granting new trial for insufficiency of evidence will not be disturbed, unless clearly abuse of discretion.

Insufficiency of evidence to justify verdict is ground for new trial peculiarly within province of trial court, and its orders granting new trial will not be disturbed on appeal, unless it clearly appears that there was abuse of discretion.

2. New trial §70—Order granting railroad new trial for insufficiency of evidence to support verdict for plaintiff, who overturned automobile attempting to avoid collision with train blocking crossing, held not abuse of discretion.

In action against railroad by one who overturned automobile in attempt to avoid collision

with side of train blocking crossing, in which there was verdict for plaintiff, order granting new trial on ground that evidence was insufficient to justify such verdict *held* not abuse of discretion, in view of evidence, considered in light of legal rules relating to duty imposed on persons about to cross railroad tracks.

3. New trial ⇨71—Order granting new trial for insufficiency of evidence is not abuse of discretion, where evidence is conflicting.

Where there is substantial conflict in evidence, trial court will not be deemed to have abused discretion in determining that verdict or finding is against weight of evidence, and that there should be new trial.

4. New trial ⇨70—Rule that verdict will be sustained, if sustainable on any reasonable theories, is inapplicable to trial court, considering motion for new trial.

Rule that, where verdict may be sustained on any reasonable theory, it will not be disturbed, is one governing appellate courts in reviewing evidence on appeal, and has no application to trial court exercising its discretion in passing on motion for new trial.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by William Scott, a minor, by Myrtle Scott, his guardian ad litem, against the Southern Pacific Company. From an order granting defendant a new trial, after verdict for plaintiff, plaintiff appeals. Affirmed.

M. F. Sylva and Hamilton A. Bauer, both of San Francisco, for appellant.

Kincaid & Fitzpatrick, of Redwood City, for respondent.

KNIGHT, Acting P. J. An action to recover damages for personal injuries alleged to have been caused by the defendant's negligence. The jury returned a verdict in plaintiff's favor, but the trial court granted a new trial upon the ground of the insufficiency of the evidence, and from the order made in that behalf plaintiff has taken this appeal.

The evidence adduced at the trial is conflicting on some points, but in the main is without dispute. Briefly stated, it is as follows:

Shortly after 2 o'clock on the morning of May 7, 1927, one of the defendant's freight trains, consisting of an engine and 53 cars, traveling easterly between Redwood City and Newark over the Dumbarton cut-off, stopped a short distance easterly of Redwood City to take water from a tank standing just beyond the so-called Middlefield road crossing in San Mateo county, and in doing so blocked the crossing, about one-third of the train not yet having passed over it. Just as the train was coming to a standstill, appellant approached the crossing from the north in an automobile. He was driving alone, and did not see the train until within 10 feet of

it, and then, in order to avoid colliding with the side of it, turned abruptly to the left, and by such manoeuver overturned his automobile and was injured. The train crew consisted of an engineer, a fireman, conductor, and three brakemen, and the train was made up of various kinds of cars, including tank and box cars. The "head" brakeman was stationed on the engine, the conductor and "swing" brakeman were riding about the middle of the train, and the "rear" brakeman was in the caboose. While crossing the highway the train traveled slowly, at a speed of about 2 miles an hour, and, as soon as it stopped the conductor and "swing" brakeman alighted, and the latter was instructed by the conductor "to go back and protect the crossing and cut the train, if necessary." He started back toward the crossing at once, but had gone not more than 50 feet when he heard a crash, and upon reaching the crossing found plaintiff's automobile overturned on the west-bound track within a few feet of the train. Appellant had already been extricated from the overturned automobile by friends, who had been following closely behind him in another automobile.

At the time of the accident appellant was 18 years of age and lived just off the Middlefield road, a short distance south of the railroad crossing. He had resided there for upwards of 7 years, and had traveled the road and over said crossing very frequently, going to and coming from Redwood City, and was therefore thoroughly familiar with the location of the crossing. Besides, there were railroad and other crossing signs erected along the side of the road about 365 feet from the crossing. On the night of the accident, appellant had been visiting friends near Redwood City and was returning home, and he testified that he knew when he was about to cross the tracks, and consequently slackened his speed to less than 15 miles an hour; that the headlights of his automobile were lighted and in good condition, but that it had been raining, and his vision was obscured by weather conditions and the moisture on the windshield of his car. He admitted, however, that because of the speed he was traveling when close to the crossing and the wet condition of the pavement a collision with the side of the train would have been inevitable, if he had not turned abruptly to the left. With reference to the question of visibility that night, the rear brakeman testified that as the train neared the crossing he looked ahead in the direction of the Middlefield road for a distance of a quarter of a mile and saw the headlights of an automobile approaching the crossing at a rapid rate of speed, and immediately after the train stopped he heard a crash; that, believing that the automobile had run into the train,

he instantly "cut" the air control of the train, so that it could not be moved; that he then saw a freight train approaching from the opposite direction on the west-bound tracks; and that he ran forward to flag that train. It was also shown that there was an electric street light suspended from a pole about 62 feet south of the crossing; that the light was burning at the time of the accident, and could be seen on the Middlefield road on the northerly side of the crossing, over the top of the train, for a distance of 60 feet or more.

[1-4] "The well-settled and familiar rules governing courts of appeal are that insufficiency of the evidence to justify the verdict is a ground for new trial peculiarly within the province of the trial court, and its order granting a new trial will not be disturbed on appeal unless it clearly appears that there was an abuse of discretion." *Smart v. Spangler*, 89 Cal. App. 351, 264 P. 806, 807. When the evidence in the present case is considered in the light of the legal rules established by the decisions of this state (*Billig v. Southern Pac. Co.*, 192 Cal. 357, 219 P. 992, and cases therein cited) relating to the duty imposed upon persons about to cross railroad tracks, it cannot be fairly held that the trial court abused its discretion in granting a new trial. True, as appellant contends, the evidence is conflicting on some of the issues of fact the jury was called upon to determine; but such conflict did not preclude the trial court from granting a new trial, if it was satisfied that the verdict was not supported by, or was contrary to, the weight of the evidence. As stated in *California Jurisprudence*, volume 20, page 117: "While a motion for new trial on the ground of 'insufficiency of the evidence to justify the verdict or other decision' may be properly refused, if there is a substantial conflict in the evidence, it is settled that the trial court is not bound by the rule as to conflicting evidence, as is the appellate court. The trial court may, and indeed should, grant a motion for new trial, where one of the grounds of the motion therefor is insufficiency of the evidence, if it is satisfied that the verdict or decision is not supported by, or is contrary to, the weight of the evidence, although the evidence is conflicting on the point or points at issue, since in passing upon a motion for new trial, the trial court must weigh and consider the evidence of both parties, and determine for itself the just conclusion to be drawn."

Many of the authorities supporting the foregoing rule are reviewed, and the rule is

restated, in *Rosenberg v. Moore*, 194 Cal. 392, 229 P. 34, 36, wherein the court says: "In *Gordon v. Roberts*, 162 Cal. 506, 123 P. 288, it was said: 'This court has frequently commented upon the wide extent of the discretion of the trial court, in granting or denying a new trial for insufficiency of evidence. "Its action," as was said in *Domico v. Cassassa*, 101 Cal. 411, 35 P. 1024, "is conclusive upon this court, unless there has been an abuse of discretion." And, if there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict or the finding is against the weight of the evidence, and that there should be a new trial. "When the evidence is conflicting, the trial court is authorized to review it, and if, in its opinion, the verdict is against the weight of evidence, it is its duty to grant a new trial."' *Merralls v. Southern Pacific Co.*, 182 Cal. 19, 186 P. 778; *Biaggi v. Ramont*, 189 Cal. 675, 209 P. 892; *Soto v. Globe Grain & Milling Co.*, 55 Cal. App. 532, 203 P. 830. In considering the question of the correctness of the order the presumption on appeal is in favor of the order and against the verdict. *Marr v. Whistler*, 49 Cal. App. 364, 193 P. 600; *Roberts v. Southern Pacific Co.*, 54 Cal. App. 315, 201 P. 958."

Appellant has attached to his brief as a supplement thereto a printed copy of the reporter's transcript of the evidence, but has made no attempt to point out by way of argument or transcript reference the portions of the evidence upon which he relies to show that the trial court abused its discretion in granting a new trial. He contents himself merely with the statement that the case cited by the trial court in its order granting the new trial "fails to show any reason in the case at bar why a new trial should have been granted, * * *" and in support of such statement he quotes from the case of *Rocha v. Garcia*, 203 Cal. 167, 263 P. 238, 240, as follows: "Where the verdict of the jury and the judgment based thereon may be sustained on any reasonable theory, it will not be disturbed by an appellate court." It is self-evident, however, that the rule just quoted is the one governing courts of the appellate jurisdiction in reviewing evidence on appeal, and has no application to the trial court in the exercise of its discretion in passing upon a motion for a new trial.

The order is affirmed.

We concur: CASHIN, J.; DEASY, Justice pro tem.

100 Cal. App. 639

PEOPLE v. STEELE et al. (Cr. 1546.)

District Court of Appeal, First District, Division 2, California, Sept. 19, 1929.

1. **Automobiles** ⚡355(8)—Evidence held to sustain conviction for failure to stop automobile after accident (St. 1923, p. 562).

In prosecution, under St. 1923, p. 562, for failure to stop automobile and render aid after accident, evidence held to sustain conviction of defendant, who had control of car, but was not driving, on theory that he had urged driver to flee after hitting pedestrian.

2. **Automobiles** ⚡323—One having control of car, by urging driver to flee after striking pedestrian, became equally guilty with driver of violating statute requiring driver to stop after accident (St. 1923, p. 562).

Where one who had control of car, which was being driven by another, urged driver to flee after striking pedestrian, he became equally guilty with driver of violation of St. 1923, p. 562, requiring driver to stop immediately and render aid after accident.

3. **Automobiles** ⚡323—Defendant, taking wheel of car four blocks from accident and speeding away from victim, became principal in violating statute (St. 1923, p. 562).

Where defendant, having control of car, but not driving, took wheel four blocks from accident and speeded in direction away from victim of collision, he became principal in violation of St. 1923, p. 562, relative to stopping car after accident.

4. **Automobiles** ⚡336—Failure to perform any of five acts required of automobile driver after accident is punishable as separate offense (St. 1923, p. 562).

St. 1923, p. 562, relative to stopping automobile and rendering aid after accident, requires five separate acts on part of driver, and failure to perform any one of them is punishable as separate offense.

5. **Automobiles** ⚡336—In statute requiring driver, after accident, to immediately stop and give name, and also render assistance, word "immediately" does not modify "render" (St. 1923, p. 562).

Under St. 1923, p. 562, requiring that driver of automobile, after accident, "shall immediately stop and give his name, * * * and shall also render to such person all necessary assistance," word "immediately" cannot be construed as modifying word "render."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Immediately.]

6. **Automobiles** ⚡356—What is required, under circumstances, by statute requiring automobile driver to stop after accident, is jury question (St. 1923, p. 562).

Whatever may be required, under circumstances, by St. 1923, p. 562, relative to stopping automobile after accident and rendering assistance, is question of fact for jury.

7. **Automobiles** ⚡356—Whether, when automobile stopped four blocks from scene of accident and defendant took wheel, there was still sufficient time to return and render assistance, held for jury (St. 1923, p. 562).

In prosecution for violating St. 1923, p. 562, requiring automobile driver to stop after accident and render assistance, evidence showing that car stopped four blocks from accident, where defendant took wheel, held to take to jury question whether there was then still sufficient time to return to point of collision and render necessary assistance, under statute.

8. **Automobiles** ⚡356—Whether defendant, taking wheel four blocks from accident, knew person had been struck, and aided and abetted previous driver in commission of offense, held for jury (St. 1923, p. 562).

In prosecution for violating St. 1923, p. 562, requiring automobile driver to stop and render assistance after accident, evidence held sufficient to take to jury question whether, when defendant took wheel four blocks from scene of accident, he knew that person had been struck, and whether, in driving away, he was guilty of aiding and abetting previous driver in commission of offense.

9. **Automobiles** ⚡357—In prosecution under statute respecting failure to stop automobile after accident, instruction requiring finding that defendant encouraged driver to leave to conceal identity held not error; "escape" (St. 1923, p. 562).

In prosecution for violating St. 1923, p. 562, requiring automobile driver to stop and render assistance after accident, instruction requiring finding that defendant encouraged driver to leave scene of accident to conceal identity of driver and vehicle held not error, as against contention that it added element of motive of flight, since there is distinction between escape to prevent apprehension for crime committed, and "escape" to conceal identity, which is itself commission of crime.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Escape.]

10. **Criminal law** ⚡1130(5)—Point on appeal need not be considered, where predicated on matters outside record.

On appeal in criminal case, point concerning attempt to impeach witness does not require consideration, where whole argument was predicated on matters outside record.

11. **Criminal law** ⚡706—In prosecution for failure to stop automobile after accident, cross-examination of character witnesses regarding defendant's previous violations of law held not misconduct (St. 1923, p. 562).

In prosecution, under St. 1923, p. 562, requiring automobile driver to stop and render assistance after accident, district attorney held not guilty of misconduct in cross-examination of character witnesses as to whether they had heard that defendant had previously run over child or man, or had frequently been charged with violations of traffic regulations, since rule is that character witness may be cross-examined as to his knowledge or reports of particular and

specific charges of acts inconsistent with character he is called on to prove.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Francis Steele and another were accused of manslaughter and a violation of the Motor Vehicle Act, § 141. Defendant Steele was convicted on both charges, and defendant Roderick Kearney was convicted of violating the Motor Vehicle Act, and they appeal. Affirmed.

Frank M. Carr and Richard Liebman, both of Oakland, for appellant Kearney.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The two defendants were jointly tried on an information charging manslaughter and a violation of section 141 of the Motor Vehicle Act (St. 1923, p. 562). The defendant Steele was convicted on both charges; the defendant Kearney was convicted on the latter charge, and, pursuant to an instruction of the trial court, was acquitted on the charge of manslaughter. Both defendants appealed from the judgments following the verdict and from the orders denying their motions for a new trial, but the defendant Steele has abandoned his appeal, and the judgment and order as to him are affirmed, without opinion.

The facts of the case, as presented on the Kearney appeal, are simple and without material dispute. Kearney and Steele, with two others, Roper and Graham, were out on a drinking "party," during which all but Graham had several drinks of gin and whisky. At Roper's home, where more drinks were served to the three mentioned, the four men got into an automobile owned by Kearney's employer, but over which Kearney had control. This was a Buick roadster, having what is called a "rumble seat." Steele took the wheel, with Kearney sitting beside him. Graham and Roper rode in the rumble seat. While traveling down Central avenue, in the city of Alameda, at an unlawful rate of speed, the machine struck a pedestrian, named Anne Murphy, at the intersection of Central avenue and Everett street, hurling her through the air about 3 feet from the ground, and causing her to roll some 10 feet after hitting the ground. As a result of these injuries, Mrs. Murphy died. The driver slowed momentarily, and then sped away, without rendering any aid to the victim of the collision. About four blocks from the point of collision, after turning two corners, Steele brought the car to a stop and exchanged seats with Kearney who then drove the car out of the city of Alameda and into the city of Oakland, where the four men were apprehended about an hour later.

Eyewitnesses testified to the high rate of speed at which the car was traveling at the time of the collision, and to the terrific sound

of the impact of the machine with the body of the deceased. One witness testified that he was walking down Central avenue, and heard the noise of the automobile coming behind; that with the noise of the crash he turned and saw the deceased flying through the air; that the speed of the machine was slackened, and he heard some one in the car urge the driver to flee; that the gears were then shifted, and the car sped away without stopping, until it had turned a corner and was four blocks from the point of collision. This testimony was corroborated by that of the witness Graham, who testified that, immediately after the collision, he heard a conversation between Steele and Kearney, in which the former said, "If I don't stop, I will be a hit-and-run driver." The same witness testified that neither he nor Roper had said anything to Steele at the time, but that both he and Roper had had their heads down to avoid the wind, and had not seen the body struck by the machine.

[1, 2] The main point raised by the appellant Kearney on this appeal is that the evidence is not sufficient to support this theory of the state's case. The witness Higgins testified that he ran after the defendant's car, called upon the driver to stop, but that some one in the car urged the driver to keep on going. He also testified that, immediately after striking the body, the car was momentarily slowed down, and that all four occupants turned around and looked back, without getting up out of their seats. The witness Graham testified that he heard a conversation between Kearney and Steele, in which Steele said to Kearney, "If I don't stop, I will be a hit-and-run driver." This same witness testified that he had said nothing to Steele at this time, and that as to Roper, who sat beside him in the rumble seat, the witness did not know whether or not he had said anything to Steele. Later on in his testimony this witness, in answer to the direct question whether Roper had said anything to either of the defendants at the time of the collision, he answered, "I don't recall him saying anything—no." Upon cross-examination of this same witness he was asked if he had heard the defendant Kearney say anything to Steele, or any one else in the car, and he answered:

"I did not hear him say anything until after the bump; there was some conversation in the front seat, but I could not tell you what he said.

"Q. Did you hear him talking, or hear Steele talking? A. I heard Steele talking.

"Q. You did not hear this defendant Kearney say anything; isn't that a fact, Mr. Graham? A. It was, as I said before, some conversation in the front seat.

"Q. You heard Steele make some remark to Kearney, if he did not stop he would be a hit-and-run driver? A. Words to that effect—

"Q. You did not hear the defendant Kearney say anything in response to that? A. No, sir."

Later on in the course of his testimony the court addressed this witness as follows:

"I don't understand your testimony. I don't know whether you said you heard Kearney's voice after you felt the bump or not. A. Are you asking me?"

"Q. Yes. A. Why, of course, you understand—

"Q. I am just asking you the question: Did you hear Kearney's voice after you felt the bump, before the machine came to a stop? A. I said there was a conversation going on in the front seat.

"Q. Between whom? A. Kearney and Steele. They were sitting there.

"Q. As I understand, at no time did you understand what Kearney said? A. No.; I did not.

"Q. You could not distinguish what he said? A. No, sir."

The only apparent conflict in this evidence is in the testimony of Kearney to the effect that he was asleep at the time, and did not witness the collision or feel the impact, and he did not awaken until the car was stopped four blocks later and Steele called to him to take the wheel.

It is the theory of the respondent that, having proved that Kearney and Steele alone occupied the front seat, and that some one of the passengers had urged Steele to continue on, the testimony of the witness Graham that he overheard the conversation between Steele and Kearney was sufficient to show that Kearney was the one who urged Steele to flee. From our view of the evidence, we are satisfied that it is sufficient to support this theory and to sustain the verdict. It is immaterial that the witness Graham did not distinguish or understand what Kearney said to Steele. His testimony as to overhearing the conversation between Kearney and Steele, that he himself had said nothing to Steele, and that he did not recall Roper having said anything to Steele, is sufficient to overcome the direct denial of the defendant Kearney, based upon his statement that he was asleep at the time, particularly as this testimony was directly rebutted by the witness Higgins, who testified that immediately after the impact he saw all four occupants of the car turn around and look back, where the body was lying upon the street. All the circumstances found in the evidence pointed unmistakably to Kearney as the one who urged Steele to flee immediately after the collision, and these circumstances as well negatived the possibility that any one else had done so, notwithstanding the direct denial; and we must conclude from its verdict that the jury found that the appellant was the one who urged Steele to flee. Thus Kearney, having control of the car which Steele was

merely driving with his permission becomes equally guilty with Steele of a violation of the section of the Motor Vehicle Act, within the rule of *People v. Maggio* (Cal. App.) 266 P. 813, a case arising under section 367c of the Penal Code, which contains provisions similar to those of section 141 of the Motor Vehicle Act.

[3-8] But the case against this appellant does not depend upon this theory alone. The conceded fact is that after the car had proceeded four blocks, which was a matter of seconds in time, this appellant took the wheel and speeded, at a rate faster than Steele had driven, in a direction away from the victim of the collision. By so doing the appellant became a principal in the violation of the section, as will hereafter appear.

The argument is made by this appellant that, as section 141 of the Motor Vehicle Act requires the driver of a car to stop *immediately* and render aid, this appellant cannot be held as a principal or as an accessory before the fact, under the evidence recited. This section (Stats. 1923, p. 562) reads in part as follows: "The driver of any vehicle which strikes any person * * * shall immediately stop and give his name and address and the names and addresses of all passengers * * * and shall also render to such persons all necessary assistance, including the carrying of such persons to a physician or surgeon for medical or surgical treatment, if such treatment is required."

It will be seen that the section requires five separate acts on the part of the driver of a car in collision with a person, a failure to perform any one of which is punishable as a separate offense. *People v. Scofield*, 203 Cal. 703, 265 P. 914. Though the section requires the driver to stop immediately, no time is fixed within which he must render aid or carry the person injured to medical treatment, if this is necessary. This is manifest from an analysis of the section. It reads that the driver "shall *immediately* stop and give his name, * * * and shall also render to such persons all necessary assistance." By no process of interpretation can the word "immediately" be construed as limiting or modifying the word "render," appearing in the latter clause of the section. To so hold would make the section ridiculous and unenforceable. Collisions such as render the section applicable usually occur when the driver is going at a high rate of speed, and the victim of the collision is often rendered unconscious or injured in such a way that the assistance required could not be given immediately. The clear purpose of the section is to "prohibit, under pain of severe punishment, negligent or wanton drivers of motor cars from seeking to evade civil or criminal prosecution by escape before their identity could be established, and similarly to prohibit all drivers, whether negligent or not,

from leaving persons injured in collisions with cars driven by them in distress and danger for want of proper medical or surgical treatment." *People v. Kaufman*, 49 Cal. App. 570, 573, 193 P. 953, 955. In *People v. Scofield*, 203 Cal. 703, 265 P. 914, the Supreme Court had occasion to comment on the provisions of this section of the Vehicle Act, pointing out that it required a reasonable interpretation, and did not require the driver to do an impossible or useless thing. That case involved a collision between two cars, in which the drivers of both were rendered unconscious. Scofield was tried upon a charge of having failed to give his name and address, or to render assistance to the driver of the other car. The Supreme Court pointed out that the statute cannot be literally applied in all cases of collision or accident, but that the driver is required to stop and give his name, if possible to do so, and to render such assistance as is necessary under the circumstances.

Thus, it is conceivable that a vehicle might be traveling at such a high rate of speed that it could not be stopped immediately after the collision, or that the highway is in such condition that the driver would be compelled to move on to a safe stopping place. Certainly it could not be argued that, because he is excused from stopping immediately, he is not required to perform any of the other acts specified in the section, because no one of them could have been performed *immediately* upon the collision. Then, again, the victim of the collision may have been pinned under his machine or thrown down an embankment, so that it would have been impossible for the driver to give his name *immediately*, or to have conveyed him to a place for medical treatment immediately; but he certainly would not be excused from rendering such necessary assistance as soon as it was possible or practicable to do so. Whatever may be required under the circumstances must therefore necessarily be a question of fact to be determined by the jury, and we cannot say as a matter of law that the failure to stop within four blocks, or four feet, is in all cases a violation of the section.

Here, the car having been stopped four blocks distant and this appellant having then taken the wheel, it was a question of fact for the jury to determine whether there was still sufficient time to return to the point of collision and render the assistance necessary under the requirements of the statute. Thus it was for the jury to determine whether, when this appellant took the wheel when the car was stopped, he knew that a person had been struck within the meaning of the statute, and whether, in driving away from the place of the collision, the appellant was guilty of aiding and abetting Steele in the *commission* of the offense, because at the time Kearney took the wheel the opportunity

was still present with Steele to return and perform the duty required by the statute.

[9] This appellant complains of the instruction which advised the jury that, to convict him on this count, it was necessary to find, among other things, that he "by words and actions aided, encouraged, or assisted the defendant Steele to drive the vehicle away from the scene of the accident to the city of Oakland to *conceal the identity of said Steele and said vehicle.*" The criticism is based upon the portion of the instruction which we have italicized, the argument being that there was no evidence to warrant it, and that it added the element of motive of flight and concealment as essential to make this appellant a principal. As to the evidence, the admitted fact that the car did not stop, but sped away at an increased speed and in a circuitous route, proved the charge that those in the car were seeking to conceal their identity. The argument upon the element of motive is really that this added a new and separate offense—the aiding of a criminal to escape *after* the commission of a crime—so that, if the jury believed that Kearney was an accessory after the fact, it could have found him guilty of the crime charged in the information.

But this is really a false issue raised for the first time on this appeal. During the trial before the jury there was no suggestion that the appellant Kearney might be guilty of the separate offense, as an accessory after the crime in aiding Steele to escape arrest for the crime he had committed. The theory of the state was that at the very time of the crime Kearney aided and abetted Steele in the commission of it. In an ordinary case the portion of the instruction complained of might be interpreted as including any act after the crime, aiding the criminal to escape arrest; but here the gist of the offense charged is "the failure to immediately stop, but instead to willfully drive the vehicle away from the scene of the accident to conceal the identity of the driver," as the trial judge had correctly instructed the jury in the instruction immediately preceding the one complained of. We cannot perceive how the jury could have been misled by the language of these instructions. It was the purpose of the trial judge to advise the jury, in line with the decisions heretofore cited, that the section of the Vehicle Act required more than the mere stopping of the vehicle; that its purpose was to prevent drivers of motor vehicles "from seeking to evade civil or criminal prosecution by escape before their identity could be established." *People v. Kaufman*, *supra*. There is a clear distinction between an escape to prevent apprehension for a crime already committed and an escape to conceal one's identity, which is itself the commission of the crime denounced by the statute. It was the latter

situation which the trial judge submitted to the jury, and we find no error in the instructions.

[10] The next point concerns the attempt to impeach the witness Graham; but, as the whole argument is predicated upon matters outside the record, it does not require consideration.

[11] Finally, it is claimed that the district attorney was guilty of misconduct in his cross-examination of certain witnesses and in his argument to the jury. In the cross-examination of the character witnesses called by this appellant, they were asked if they had heard that this appellant had run over a child in San Jose, or a man in Alameda, or had frequently been charged with violations of traffic regulations. The questions were objected to and assigned as misconduct. The district attorney was then challenged to prove the facts embodied in the questions, and, to meet the charge of bad faith, attempted to do so, but was stopped on objection of this appellant. Thereafter this appellant was called to the stand, and, in answer to questions propounded by his counsel, denied that he had run over any person in San Jose. No questions were asked as to the other occurrences referred to by the district attorney.

The rule is that a character witness may be cross-examined as to his knowledge or reports of particular and specific charges of acts inconsistent with the character which he is called on to prove. *People v. Fodera*, 33 Cal. App. 8, 11, 164 P. 22; *People v. Hightower*, 65 Cal. App. 331, 340, 224 P. 110; *People v. Sieber*, 201 Cal. 341, 349, 257 P. 64; *People v. Smith* (Cal. App.) 279 P. 1022. Such method of examination is always to be viewed with caution, because of the prejudice which might result to the defendant, where the district attorney is not acting in good faith; but here the good faith of the district attorney is questioned only in the arguments of counsel, and, in absence of any showing in the record, we must hold that the questions were within the proper bounds of cross-examination.

The judgments and orders denying a new trial as to both defendants are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

100 Cal. App. 715

MIDDELCAMP v. ZUMWALT. (Civ. 3791.)

District Court of Appeal, Third District, California. Sept. 24, 1929.

1. Sales $\S$ 477(1)—Vendor under conditional sales contract may waive right to declare forfeiture for failure to pay installment promptly.

Strict compliance with provisions of conditional sales contract providing for installment

payments may be waived so as to prohibit vendor from declaring forfeiture on account of failure to pay installment promptly upon date fixed in contract.

2. Sales $\S$ 477(5)—Oral agreement of conditional vendor, unsupported by consideration, to extend time for payment of vendee's note, did not constitute waiver of right to declare forfeiture, where note was due in entirety (Civ. Code, $\S$ 1550).

Oral agreement of conditional vendor to extend time for payment of promissory note given by vendee, where not supported by consideration, as required by Civ. Code, $\S$ 1550, did not constitute waiver by vendor of right under contract to take possession of property without notice and declare forfeiture where note was due in its entirety.

3. Sales $\S$ 477(5)—Oral agreement, unsupported by consideration, to extend time for payment of note over one year, held void (Civ. Code, $\S$ 1550, 1698).

Oral agreement of vendor under conditional sales contract, extending time for payment of note given by vendee for more than one year without consideration, as required by Civ. Code, $\S$ 1550, held void and ineffective on account of want of consideration, violation of statute of frauds, and violation of Civ. Code, $\S$ 1698, providing that contract in writing may be altered only by another written contract or executed oral agreement.

4. Appeal and error $\S$ 204(3)—Objection to testimony relative to oral agreement for extension of time for payment of note could be considered as matter of law, though testimony was introduced without objection (Civ. Code, $\S$ 1550, 1698).

Where oral agreement for extension of time for payment of note was void for violation of Civ. Code, $\S$ 1550, requiring consideration for every contract, and Civ. Code, $\S$ 1698, providing that contract in writing may be altered only by another written contract or by executed oral agreement, objection to evidence of the oral agreement could be considered as matter of law, though such testimony was admitted below without objection.

5. Sales $\S$ 477(1)—Conditional seller's mere delay in collection of note short of limitation period held not waiver.

Mere delay of conditional vendor in proceeding to collect note from vendee after it became due held not waiver of right to take proceedings for collection authorized by conditional sales agreement, where statute of limitations had not yet run.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by D. A. Middlecamp against I. G. Zumwalt, doing business under the name of the Colusa Implement Company. Judgment for plaintiff, and defendant appeals. Reversed.

U. W. Brown, of Colusa, for appellant.

George R. Freeman, of Willows, for respondent.

PLUMMER, J. The plaintiff began this action to recover possession of a certain "Harris" harvester and 55 horse power motor together with certain appurtenances described in the complaint, constituting a harvesting outfit, and in the event possession could not be had, then for the recovery of \$2,000 as damages. The complaint alleges that on the 21st day of March, 1928, the plaintiff was in the actual possession and entitled to the possession of said property. To this complaint the defendant made answer setting up conditional contracts showing that the property involved was sold by the defendant to the plaintiff upon a conditional note and contract containing the following provisions (it may be stated that the transcript shows a lease contract and a promissory note incorporated into a contract, but, as both agreements are identical in substance, we will treat the two instruments as one): Exhibit "B", being the contract containing the promissory note, we take the facts therefrom as follows: On May 1, 1925, the plaintiff executed and delivered to the defendant a promissory note, under the terms and conditions of which the plaintiff promised, one day after date, to pay to the defendant the sum of \$4,250, together with interest thereon from date until paid at the rate of 8 per cent. per annum, interest payable at maturity and every six months thereafter, and, if not so paid, to be added to the principal and bear interest at the same rate. The note also contained provisions for attorney's fees in the event suit was instituted. It was also provided in the note that the maker and indorser waived presentment for payment, protest, notice, etc. The writings to which we have referred also provided as follows: That, if one-half of the gross earnings of the harvester and tractor in harvesting grain should be promptly paid by the plaintiff to the defendant, then and in that case the note might run until August, 1926. It was further provided in the agreements that any equipment, repairs, or accessories placed upon the personal property by the purchaser during the continuance of the agreements should become a component part thereof and the title thereto immediately vested in the vendor of the property heretofore referred to, and should be covered by, and included in, the terms of the agreements. The writings just mentioned provided that, if the purchaser should fail to make payment as provided therein, then and in that case the seller, at his option, without notice, might exercise either one of the following remedies: (a) He might declare the entire remaining unpaid purchase price and interest to be immediately due and payable and sue therefor; or (b) he might, without notice, retake possession of said personal property, and without notice, resell the same at public or private sale, and, after deducting all expenses, etc., credit the net proceeds thereof to the unpaid

balance on the note herein mentioned, and that the purchaser agreed to pay the seller any deficiency remaining after such sale is completed and net proceeds applied; or "(c) that the seller might take immediate possession of the said personal property, equipment, repairs or accessories, wherever and whenever found, and without notice or demand, declare the purchaser in default, and in such event, all of the rights, titles and equities of the purchaser in and to said property should immediately cease and terminate, and said seller and his assigns released from all obligations to transfer or deliver said personal property to said purchaser, and all sums of money theretofore paid and then due and unpaid by the purchaser to said seller shall remain the sole property of said seller, * * * and be considered as compensation for the use, wear, tear and depreciation of said personal property by said purchaser, and said purchaser agrees to forthwith pay to said seller or his assigns, all payments of interest then due and unpaid, as part compensation for the use of said personal property, as aforesaid." The agreements made time the essence thereof. The plaintiff had judgment for the sum of \$1,271.11, and from this judgment the defendant appeals. The instruments to which we have referred by credits entered thereon, and the testimony contained in the transcript show that the plaintiff paid upon said promissory note, on July 6, 1925, the sum of \$500, on July 20, 1925, the sum of \$1,100, on July 27, 1925, the sum of \$600, and that on June 28, 1926, there was entered upon said note a credit of the amount of \$323, being that much credited on the note out of a sum of \$700 which was paid by the plaintiff to the defendant on an open account. The payment made on June 28, 1926, apparently covered the interest on the note up to the date of June 28, 1926, the day that the credit for that amount was entered upon the note. It thus appears that all of the payments referred to were made prior to the 1st day of August, 1926, the date on which the note became due, according to the terms of the agreements entered into between the parties.

After finding the facts concerning the conditional sale of the property to which we have referred, the court found as follows: That "in the year 1926, the defendant extended the time of payment of said note to August 1, 1927, and prior to August 1, 1927, again extended the time for payment to August 1, 1928; that the plaintiff was in the actual possession of said harvester above described on the 21st day of March, 1928, on which date the defendant, without plaintiff's consent, wrongfully took said property from the possession of the plaintiff; that at no time prior to said 21st day of March, 1928, did the defendant exercise any right to retake possession of said property, nor did he notify plaintiff of his intention so to do at any time.

until he actually took possession of said harvester, nor did he, at any time, give any notice to the plaintiff requiring the payment to be made of the balance of said purchase price; that during the period intervening between August 1, 1926, and March 21, 1928, plaintiff expended money and labor in caring for said harvester and the appurtenances thereto, and housed the same on his ranch during a portion of said period of time, to his prejudice, and, by his failure to exercise his right to terminate the rights of the plaintiff in and to said harvester, and under said contract, until March 21, 1928, defendant waived his right so to do under said contract." The court further found that the plaintiff had performed all of the conditions of said contract with the defendant which were to be performed by the plaintiff, except those conditions which were waived by the defendant, and that the amount unpaid on said contract at the time of its taking by the defendant was the sum of \$1,978.89.

The only support to the findings referred to found in the record is the oral testimony of the plaintiff that during the year 1926, the time of the maturity of the note was extended for one year, which would make the note payable on August 1, 1927. The testimony of the plaintiff upon this point is as follows: "In 1926 the crop was light and there was not much harvesting; the barley was cheap—I had quite a little barley of my own and I could see, before I got through harvesting, I was not going to be able to meet that note without selling my barley, and the barley was too cheap; I could not make anything out of it, so I asked Zumwalt for an extension of time, and he said he would give me another year's time on the harvester, so I did not pay off the note by August 1, 1926." As to the extension of time from August 1, 1927, to August 1, 1928, the testimony of the plaintiff is as follows: "I was in Zumwalt's office in the fore part of June, 1927, and the barley harvest was light the last year, and I had quite a lot of wheat in, too; I didn't make a deal where I could harvest it; I was in a little jam on it, so I asked Zumwalt if he would grant me an extension of time for another year on this, and he said he would, and I told him I could take it and harvest some other grain, but didn't want to take it out because about the time I would get to harvesting I was afraid the man that had a mortgage on the wheat crop would not advance me money enough to harvest it." The testimony further shows that during the year 1927 the plaintiff threshed a small quantity of corn and put some plates and chains on the machine with which to harvest his crop of corn; that the harvester and other machinery was kept housed on a place called the "Jameson" place. There is nothing in the testimony to show that the plaintiff did anything with relation to the machinery and property involved in

this action, during the years 1926, 1927, and the portion of the year 1928, before it was taken possession of by the defendant, which was not covered by the terms of the agreement, in relation to repairs that might be made thereon, nor that it was housed or kept at any place by the plaintiff at the request of the defendant, or that any expenditures were made thereon by the plaintiff at the request of the defendant. The property simply remained in possession of the plaintiff during that period of time, as provided for in the conditional sales agreement. It specified that possession might be taken by the plaintiff, but that title thereto should remain vested in the defendant. The defendant denied the testimony of the plaintiff as to the conversation relating to the extension of time, stating that no such conversation took place. On the 21st day of March, 1928, the defendant took possession of the property covered by the conditional contract of sale, without giving notice to the plaintiff, and between that date and the 26th day of March, 1928, sold the same to a third party by the name of Steidlmayer. On a date not given, but prior to the 26th day of March, 1928, the plaintiff had a conversation with the defendant relative to the plaintiff paying up the balance due on the note referred to herein, and being replaced in possession of the property. It appears from the testimony of the defendant that the defendant agreed to see Mr. Steidlmayer and ascertain if he (Steidlmayer) would release the defendant from the sale of said property that had been made to him by the defendant, and that he, the defendant, would resell the property to the plaintiff, provided the plaintiff would agree to take care of an old note in the sum of something in excess of \$1,200, which the plaintiff owed the defendant, and which note had apparently outlawed. According to the defendant the plaintiff refused to enter into any such agreement. Thereafter, and on the 26th day of March, 1928, after the property had been taken possession of by the defendant as herein stated, and after it had been sold by the defendant to Steidlmayer, the plaintiff tendered to the defendant a cashier's check covering the unpaid balance of the promissory note to which we have referred, acceptance of which was refused by the defendant. Thereafter the plaintiff began this action, as heretofore stated, and had judgment in his favor.

[1, 2] In support of the judgment the respondent cites a number of cases beginning with *Stevinson v. Joy*, 164 Cal. 279, 128 P. 751, to the effect that, where a contract of conditional sale contains provisions for the payment of installments on certain dates, and the payments are not made on those dates, the acceptance of payment after the dates mentioned without objection may constitute a waiver of the right to declare the whole amount of the obligation due, and repossession

sion of the property taken and forfeiture declared for failure to comply with the terms of the contract. There seems to be no question but what the law is well settled that a waiver of strict compliance with the terms and provisions of a conditional contract providing for installment payments may be made so as to prohibit the vendor from declaring a forfeiture on account of the failure to pay an installment promptly upon the date fixed in the contract. However, there seems to be no necessity to review the cases having to do with installment payments and the waiver of the right of the vendor to insist upon prompt payment, because the record in the instant case discloses nothing of that kind. Not a single payment appears to have been made upon the note after August 1, 1926. Upon that date the entire sum of the note was due. There were no installments remaining to be paid after that date. The note was due in its entirety, and, if there was no extension of time, then and in that case the defendant possessed the right, under the contracts to which we have referred, to take possession of the property without notice and sell the same without notice. The defendant in this case took possession of the property without notice, and as subdivision (c) of the contract provided that he might do, thereafter declared a forfeiture and proceeded to sell the same. The oral testimony relating to the extension of time upon which the court found that the time of payment of the note was extended, is relied upon by the respondent as a waiver of the right of the defendant to demand payment or insist upon a forfeiture or proceed to take possession of the property until after August 1, 1928. The testimony of course shows that it was in no sense a waiver. It was simply, if anything, an oral agreement for the extension of time of payment of a promissory note. In the first place, the testimony shows, and the record conclusively establishes, that there was no consideration of the promise to extend the time of payment of the promissory note in the event such promise was made. Section 1550 of the Civil Code provides that every contract must have a sufficient consideration. Whether the contract made in 1926, extending the time of payment of the promissory note until August 1, 1927, was or was not made as alleged by the plaintiff and found by the court falls within the category of an executed contract, is wholly immaterial from the fact that under the provisions of section 1550 of the Civil Code it never did rise to the dignity of an enforceable agreement and did not constitute, for lack of consideration, an extension of time.

[3] The court found that prior to August 1, 1927, the defendant extended the time of payment of the note until August 1, 1928. This finding is based upon the oral testimony to which we have referred. Likewise there is an absolute want of consideration for any

such extension of time. This so-called extension of time, being oral and not to be performed within one year, is void, as contrary to the statute of frauds, and furthermore is violative of the terms of section 1698 of the Civil Code, which reads: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." It is thus seen that the finding of the court as to the extension of time has no support in the testimony. While it does not seem necessary to cite authorities in addition to section 1550, Civil Code, with regard to the lack of consideration, we may call attention to the case of *Lynch et al. v. Sable, etc.*, 122 Or. 597, 260 P. 222, 223, 55 A. L. R. 180, where an automobile was sold upon a conditional contract and the property repossessed by the vendor, and the buyer claimed that the seller had promised to hold it as security until the balance of the purchase price was paid. The court said: "Plaintiffs rely upon a claim that defendant promised to hold the automobile after it repossessed itself thereof as security for the unpaid purchase price. Plaintiffs claim that defendant so promised to hold said automobile for plaintiffs until the 10th day of September. They allege in their complaint that this promise was made for a valuable consideration. A careful reading of the testimony, however, fails to disclose any consideration for the alleged promise relied upon by plaintiffs. The sole testimony of this feature of the case is an interview between one of the plaintiffs and the president of defendant on a street in the city of Portland. There is no testimony of anything of value having passed between them at that time. Plaintiffs do not claim that they paid any amount as earnest money. If the alleged agreement was supported by any consideration, this court would be bound by the verdict of the jury. But, inasmuch as there was no consideration for the promise on the part of defendant to so hold the automobile, its promise cannot be enforced in law. The complaint shows on its face that the title thereto was vested in the defendant."

[4] The record here shows that the title to the property involved was vested in the defendant. Again, if the promise made in 1927 to extend the time of payment of the promissory note to August 1, 1928, had any consideration to support it, it would still be vulnerable from the fact that it was not an executed oral agreement. The time for it to become an executed agreement, if otherwise valid, would have been August 1, 1928. The record does not show that any objection was made to the introduction of the testimony of the plaintiff as to the conversation relating to the extension of time of the promissory note. However, under the following authorities it would seem that the objection may be considered as a matter of law. In the case of *Dollar v. International Banking Co.*, 13 Cal. App. 331, 109

P. 499, 504, the court having before it the question as to whether a writing might be varied by parol evidence, held parol testimony introduced without objection, insufficient to change the terms of the writing, and in so doing, used the following language: "Whether or not a contract in writing may be varied by parol evidence is a question of substantive law, while the admission or rejection of secondary evidence is governed by the rules of evidence"—citing *Greenleaf on Evidence*. "Where a contract is reduced to writing, whether required by law to be written or not, the writing supersedes all other negotiations and stipulations concerning the matter made at the time or prior thereto." Again, in the case of *Rottman v. Hevener*, 54 Cal. App. 474, 202 P. 329, 331, where it was contended that the time of payment of a promissory note had been extended by an agent of the defendant, the court used the following language: "Equally unavailing as a defense is the fact, if it be a fact, that subsequently to the execution of the promissory note plaintiff's agent again told defendant that the instrument would not become payable until payment should be demanded. Under the statute of this state (Civil Code, § 1698) a contract in writing may be altered by a contract in writing or by an executed oral agreement but not otherwise. Therefore, whatever may be the rule in jurisdictions where there is no such statutory provision, it is the established rule in this state that the time of payment as fixed by the written contract may not be suspended or extended by a subsequent unexecuted oral agreement"—citing a number of cases. In the case of *Henehan v. Hart*, 127 Cal. 656, 658, 60 P. 426, 427, the court points out the change of the statute, and says: "The section, as amended, lays down a valuable and salutary rule in regard to written instruments. It prevents the parties who have made a promissory note, after it has become due according to the time written therein, from making the defense that it is not due by reason of a parol promise to extend the time, which promise would depend upon the credibility of interested witnesses." To the same effect is the case of *Estes v. Delphes*, 73 Cal. App. 643, 238 P. 1085, as is also the case of *Rathbun v. Security Mfg. Co.*, 82 Cal. App. 793, 256 P. 296, where such testimony was introduced for the purposes of explaining or excusing nonperform-

ance, and also upon the claim that the other party was estopped to take advantage of the nonpayment of the note when due. It was held that such contention was without merit. The cases heretofore referred to are cited in the opinion in that case on page 795, 256 P. 297. See, also, *Pacific, etc., Co. v. Steiner*, 192 Cal. 376, 220 P. 304.

[5] No question of estoppel is raised or pleaded in this case; no question of fraud; no question of being misled is raised or tendered; but the simple fact of an extension of time of payment, which we think the authorities herein cited show to be without merit. The finding of the court that the plaintiff had performed all the conditions on his part to be performed is shown to have no support by any testimony contained in the record. Nor do we find anything in the record to support the following, contained in one of the findings: "And by his failure to exercise his right to terminate the rights of the plaintiff in and to said harvester under said contract, until March 21, 1928, defendant waived his right to do so under said contract." No authorities have been cited, and we think none can be cited, to the point that mere failure to proceed to collect a promissory note after it has become due is a waiver of the right to make collection. At least not until the statute of limitations has run would the right of the holder of a promissory note, under such circumstances, be barred or held to have waived the right to seek payment and enforce whatever rights were guaranteed to him by the terms and conditions of the agreements entered into at the time of the sale. Mere delay cannot be held a waiver of the right to collect the amount due and payable on a promissory note. The terms of the contract entered into between the parties provided for the defendant doing exactly what the record in this case shows that he did do. The only defense is that of the alleged oral promise to extend the time of payment on the promissory note after it had become due, without any consideration whatever therefor, which defense we think, under the authorities cited, must be held to be without merit.

The judgment of the trial court is reversed.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

MOORE et al. v. MARYLAND CASUALTY CO. (Civ. 3735).★

District Court of Appeal, Third District, California. Sept. 20, 1929.

As Modified on Denial of Rehearing Oct. 19, 1929. Hearing Denied by Supreme Court Nov. 18, 1929.

1. Injunction $\S$ 252(4) — Value of grapes wrongfully converted by fruit company's receiver under temporary restraining order held recoverable as damages resulting from restraining order which prevented interference with receiver's marketing of crop.

Where receiver of fruit company, in suit to foreclose mortgage on grape crop, obtained temporary restraining order and gave bond, which provided for owners' recovery of damages by reason of the temporary restraining order, in case its issuance should be held improvident, owners of crop, on subsequent dismissal of action, held entitled to recover value of portion of grape crop seized and converted by the receiver, notwithstanding tortious nature of receiver's conduct, in view of language of restraining order enjoining owners from interfering with receiver in "supervising, controlling, packing, cleaning, shipping, disposing of, and selling the crop of grapes."

2. Injunction $\S$ 252(1)—Where language of injunction wrongfully issued is ambiguous, defendant may recover damages sustained in obedience to order as he reasonably construed it.

If an injunction which is wrongfully issued is framed in ambiguous terms, defendant therein is entitled to recover damages sustained in obeying it as he reasonably and in good faith construed it.

3. Injunction $\S$ 252(5)—Party wrongfully enjoined may recover damages sustained by reason of injunction within penalty of bond (Code Civ. Proc. $\S$ 529).

When injunction is wrongfully issued and subsequently dissolved, party enjoined, under Code Civ. Proc. $\S$ 529, will be entitled to recover such damages, within limit of penalty of bond, as he may have sustained by reason of issuing of injunction.

4. Injunction $\S$ 235—Subsequent dismissal of action amounted to determination that plaintiff was not entitled to injunction.

Subsequent dismissal of action in which plaintiff obtained temporary restraining order was equivalent to determination that he was not entitled to injunction prayed for.

5. Injunction $\S$ 252(4)—Damage recoverable for wrongful issuance of injunction is that actually, necessarily, and proximately resulting, and damages should furnish compensation for loss sustained.

Damage recoverable for wrongful issuance of injunction is limited to such as appears with reasonable certainty to be actual, necessary, and proximate result of injunction; but allowance of damage is controlled by equitable principles, and should furnish just and reasonable compensation for loss sustained.

6. Injunction $\S$ 252(4)—Surety on plaintiff's bond is liable, if damage to defendant may be reasonably anticipated and attributed to injunction.

Where damage sustained by defendant in injunction suit is not remote, but may be reasonably anticipated, and attributed to the effect of the injunction, surety on bond covering damages resulting from restraining order is liable.

7. Injunction $\S$ 252(8)—Counsel fees, recoverable on dissolution of temporary restraining order, must be confined to compensation for services in vacating order.

Counsel fees, to be recoverable as damages on dissolution of temporary restraining order, must be confined to compensation for reasonable value of services actually performed in vacating order alone.

8. Injunction $\S$ 252(8)—Undertaking given by plaintiff to secure damages resulting from temporary restraining order, granted pending hearing, included defendant's attorney's fees, where merits of case were not considered.

Where, in suit to foreclose crop lien, temporary restraining order was granted pending hearing of order to show cause and petition for vacation of restraining order, and restraining order was denied without any consideration of merits, and plaintiff thereupon dismissed action, legal services procured by defendant were necessarily performed in procuring dissolution of temporary restraining order, and defendant's attorney's fees were recoverable as damages under bond giving defendant damages sustained by reason of temporary restraining order.

9. Injunction $\S$ 251—Expert testimony as to reasonable value of services of plaintiff's attorneys in procuring dissolution of temporary restraining order was unnecessary.

In suit on indemnity bond for damages resulting from temporary restraining order, in which plaintiff sought to recover as damages amount of counsel fees incurred in procuring dissolution of order, expert testimony as to reasonable value of counsel's services was unnecessary, where extent, duration, and nature of services was shown by record.

10. Injunction $\S$ 251—Finding as to reasonable value of grapes converted held sustained by evidence, in action on bond for damages resulting from order restraining plaintiffs from interfering with harvesting and marketing grape crop.

In action by owner of vineyard land on an indemnity bond for damages resulting from order temporarily restraining them from interfering with harvesting and marketing of grape crop, evidence held sufficient to sustain trial court's finding as to reasonable value of grapes converted by the plaintiff in the former suit.

11. Injunction $\S$ 251—Price which portion of same variety and crop of grapes actually brought in market at time of conversion sufficiently established market value.

In absence of contrary evidence, price which portion of same variety and crop of grapes actually brought on market at time of conversion furnished ample proof of reasonable market

value of grapes converted, in action on bond for damages resulting from order which temporarily restrained plaintiffs from interfering with harvesting and marketing of grape crop.

12. Appeal and error ⚡931(5)—**For purpose of supporting judgment, it may be assumed court disregarded statement of witness inconsistent with judgment.**

For the purpose of supporting the judgment, it may be assumed that court disregarded statement of witness inconsistent with judgment, and accepted different statement of same witness with which judgment could be reconciled.

13. Injunction ⚡252(7)—**Court costs in foreclosure proceeding, not shown to have been expended strictly on account of restraining order, should not be allowed as damages on bond accompanying restraining order.**

In action on indemnity bond for damages resulting from temporary restraining order issued in suit to foreclose chattel mortgage, item incurred in payment of court costs in the foreclosure proceeding, not shown to have been expended strictly on account of restraining order, should be stricken.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by William Neil Moore and another against the Maryland Casualty Company. Judgment for plaintiffs, and defendant appeals. Modified and affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

O. C. Parkinson, of Stockton, for respondents.

ROLFE L. THOMPSON, J. This is an appeal from a judgment in an action on an indemnity bond for damages, resulting from an order temporarily restraining the owners from interfering with the harvesting and marketing of a grape crop.

Respondents are the owners of 11 acres of vineyard land in San Joaquin county, upon which there was growing, in 1926, a crop of grapes. E. G. Potter, as receiver of the Stewart Fruit Company, brought an action to foreclose a chattel mortgage on said crop. A temporary restraining order was granted, prohibiting these respondents from interfering with the harvesting and marketing of the crop by Potter. Upon the granting of this restraining order, the appellant executed and filed in the former case an indemnity bond for \$1,000, providing that "if the defendants, or either of them, recover judgment in said action, or if it be adjudged that said plaintiff is not entitled to said temporary restraining order, the said plaintiff will pay to said parties enjoined such damages not exceeding the sum of \$1,000 and costs as said defendants may sustain by reason of said temporary restraining order, if the said superior

court finally decides that the said plaintiff was not entitled thereto." Thereupon the said Potter picked and marketed a portion of said crop of grapes. Within about a week subsequent to the granting of said restraining order, these respondents employed counsel and moved the court in that action to vacate said restraining order, which motion was granted, and without further proceedings the action was subsequently dismissed by the said Potter. This action for damages for conversion of the crop of grapes, together with costs and counsel fees incurred in obtaining the release of the restraining order, was brought against this appellant. Judgment was rendered in favor of the respondents for the sum of \$494.90. The court found that:

"By virtue of the restraining order issued in action No. 20273 in this superior court, E. G. Potter, of the Stewart Fruit Company, upon whose behalf defendant executed and delivered the bond referred to in the foregoing findings, was permitted to seize and convert and injure a portion of said crop of grapes, of the reasonable value of \$365.90, and plaintiffs were restrained from interfering with said seizure, conversion, and injury, and by reason of the issuance of said restraining order plaintiffs herein were damaged in said sum of \$365.90. By reason of the issuance of said restraining order, plaintiffs were obliged to incur and pay, and did incur and pay, reasonable costs of suit in the sum of \$29 and reasonable attorney's fees in the sum of \$100, and were damaged in said sums."

The appellant claims that the surety on the bond is not liable, for the reason that the damage resulting from the conversion of the grapes was not "by virtue of said restraining order"; that the record contains no evidence of the market value of the grapes which were taken; that the record fails to show that the \$100 attorney's fee was incurred solely for services in dissolving the restraining order; and that the costs of suit were not incurred by reason of the restraining order.

[1, 2] It is argued that the restraining order was not the cause of the conversion of the grapes, but, upon the contrary, that the damage to the crop was the result of the tort of Potter, who alone became liable therefor. Potter, however, was the principal upon the indemnity bond which is the basis of this action. At his instance the owners of the grapes were wrongfully enjoined from interfering with his custody, or preventing Potter from "supervising, controlling, packing, cleaning, shipping, disposing of, and selling the crop of grapes." In effect, by means of this restraining order, Potter was authorized to retain and dispose of the grapes, and the respondents were prevented from exercising any right of ownership over them, which might enable them to protect, preserve, harvest, or market the crop. While the language of the

order does not specifically restrain the picking of the grapes, it recognizes the authority of Potter to handle them, and this is clearly implied, for respondents were precluded from handling or marketing the crop. Little aid in preserving the crop would accrue from merely picking the fruit, to turn it over to Potter. It would be a strained and unreasonable construction of the foregoing language to hold that the order left any authority in the respondents to control or preserve the crop.

Even if the language were uncertain in this respect, the owners were justified in assuming that they were thereby deprived of the right to pick, preserve, or market the fruit. If such construction of the language was not unreasonable, the sureties would be liable for damages resulting from a wrongful procuring of the injunction. In 14 Ruling Case Law, 482, § 184, it is said: "In case an injunction, which is wrongfully issued, is framed in ambiguous terms, the defendant therein is entitled to recover such damages as he has sustained in obeying it as he reasonably and in good faith understood it." 1 Joyce on Inj. 317, § 192.

[3] It is well-settled law that, when an injunction is wrongfully issued and subsequently dissolved, the party enjoined will be entitled to such damages, within the limit of the penalty of the bond, as he may have sustained by reason of the issuing of the injunction. Section 529, Code Civ. Proc.; *Asevado v. Orr*, 100 Cal. 293, 299, 34 P. 777, 779; *Rice v. Cook*, 92 Cal. 144, 28 P. 219.

[4, 5] On motion of the respondents, the restraining order was vacated, and an injunction denied. The subsequent dismissal of the action was equivalent to a determination that the applicant was not entitled to an injunction. In the *Asevado* Case, *supra*, it is said: "The voluntary dismissal of the action by the [plaintiffs] had the same effect as a decision of the court that [they] were not entitled to the injunction." *Frahm v. Walton*, 130 Cal. 396, 62 P. 618; *Dowling v. Polack*, 18 Cal. 625. It is true that the damage which is recoverable for the wrongful issuing of an injunction is limited to such as appears with reasonable certainty and accuracy to be the actual, necessary, and proximate result of the injunction. *San José Fruit Packing Co. v. Cutting*, 133 Cal. 237, 65 P. 565; 32 C. J. 464, § 807; 2 High on Inj. (4th Ed.) 1613, § 1663; 1 Joyce on Inj., 312, § 190. The allowance of such damage is controlled by equitable principles, and should furnish just and reasonable compensation for the loss sustained.

It cannot be logically argued that, because the restraining order did not purport to actually transfer title to the grapes, but merely prevented the owners from harvesting and marketing them, therefore the appropriation of the fruit by Potter was a mere tort, for which the surety is not liable, because the

wrongful act was not the direct result of the injunction. The restraining order was the direct cause of preventing the owners from picking, preserving, or disposing of their crop. It was the direct cause of preventing them from opposing the appropriation of the crop by Potter. Its effect was negative, rather than positive; but the result was the same. The crop was lost to the owners. It is immaterial whether the order resulted in the grapes rotting on the vines, or whether Potter appropriated them to his own use. In either event the result of the restraining order was the loss of the grapes to the owners, for the reason that the court had effectively enjoined the respondents from exercising any acts of ownership over the crop.

In High on Injunctions, 1624, § 1673, it is said: "In determining the amount of damages to be allowed upon the dissolution of an injunction restraining one from exercising acts of ownership, * * * damages for the crops which defendant was prevented by the injunction from harvesting may properly be allowed." The same section later illustrates the above declaration of law by saying: "Where a mortgagor obtains an injunction to prevent the mortgagee from selling the premises under a decree of foreclosure, and pending the injunction the mortgagor removes the emblements from the premises, the value of the emblements should be included in the damages awarded to the mortgagee upon dissolution."

The case of *Barton v. Fisk*, 30 N. Y. 166, is quite similar on principle to the case at bar. The plaintiff claimed title to certain timber, which was on defendants' land. A controversy over the title arose. Plaintiff brought suit to recover the timber, and procured a preliminary injunction prohibiting the defendants from exercising acts of ownership over the timber. The plaintiff was defeated in the action. Pending the trial the plaintiff appropriated the timber to his own use and disposed of it. Chief Justice Denio said:

"This seems to me a very plain case. * * * While the defendants' hands were tied, the plaintiff carried off the property, destroyed its identity, and disposed of and converted its proceeds to his own use. * * * The effect of the injunction manifestly was to allow the plaintiff to carry off and dispose of the property, while the defendants, who were, as the event has shown, its owners were precluded from doing anything whatever in court or out of court, to protect themselves in its possession. Prima facie, the value of the property which the defendants have lost, was the measure of the defendants' damages. * * * Under the existing facts it is the same thing as though it had been destroyed, while the owners were prevented from extending their hands for its preservation. The plaintiff's argument is, that the loss was not occasioned by the injunction, but by the tortious act of the plain-

tiff. * * * This is too narrow a view of the question."

In a concurring opinion Mr. Justice Hogeboom in the same case said:

"The damages in question are occasioned by the injunction. But for the injunction the defendants would not have lost their property. By the injunction the plaintiff was impliedly authorized to take it. * * * The loss which the defendants have sustained, was incurred by compliance with the order of the Court. * * * The liberal rule of damages declared * * * sustains the claim of the defendants in this case."

The author of Sutherland on Damages (3d Ed.) p. 1443, § 527, quotes with approval the foregoing language of the last-mentioned authority.

[6] We conclude that, where the damage is not remote, but may be reasonably anticipated and attributed to the effect of the injunction, as in the present case, the bond is liable. The cases relied upon by appellant may be readily distinguished from the present action.

In *Cummings v. Mugge*, 94 Ill. 186, the timber which was the subject of litigation was in the hands of the sheriff on a writ of replevin, at the time the injunction was issued. The owner therefore did not have the custody or right of possession while the injunction was in force. The language of the injunction does not appear. Pending the litigation, the complainant appropriated the timber. Upon dissolution of the injunction, the owner was allowed damages, but not for the full value of the timber which was taken. The value of the timber appropriated would be a proper subject of compensation in the replevin action. The court said: "The service of the writ of injunction in no way authorized or caused the wrongful act of appellee, in taking and converting the property." If the timber had remained in the hands of the sheriff, in the absence of the injunction, the owner would have had no power to exercise rights of ownership over it to prevent an appropriation thereof. In the present case the very restraining order, the construction of which is here involved, recognizes Potter's right to retain, control, and market the crop of grapes, and specifically enjoins the respondents from interfering therewith. There is a clear distinction between these cases in that regard.

In the case of *Gobbi v. Dileo*, 58 Or. 14, 111 P. 49, 113 P. 57, 34 L. R. A. (N. S.) 951, and the later case of *Burley Tobacco Growers, etc., v. Pennebaker, etc.*, 221 Ky. 718, 299 S. W. 734, it is held that the surety on an injunction bond is not liable for the theft or appropriation of the property by *strangers* to the litigation. This principle seems sound and reasonable, for under such circumstances the loss cannot be anticipated, or attributed to the wrongful act of the complainant, who procured the injunction, unless it could be

shown that his negligence in the lack of care of the property contributed to the loss or theft. But that feature was not involved in either cause. The court in these cases merely holds that the theft or appropriation of the property by a stranger to the litigation was not the proximate result of the granting of the injunction.

In the case of *Wood v. Hollander*, 84 Tex. 394, 19 S. W. 551, the recorded facts indicate that, subsequent to the issuing of an injunction, a receiver was appointed, and by order of the court the property involved in the litigation was intrusted to the receiver during which time the damage accrued. Upon dissolution of the injunction, damages were sought to be recovered against the surety. It was held that the injunction bond was not liable, for the reason that the responsibility had been transferred to the receiver, and the loss was therefore not by reason of the injunction, although the receiver would be liable on his bond, as such, for his mismanagement. 1 Joyce on Inj. 313, § 191.

[7] It is true that counsel fees, which are recoverable as damages upon dissolution of a temporary restraining order wrongfully procured, must be confined solely to compensation for the reasonable value of the services actually performed in vacating the order alone. *Curtiss v. Bachman*, 110 Cal. 433, 42 P. 910, 52 Am. St. Rep. 111; *Mitchell v. Hawley*, 79 Cal. 301, 21 P. 833; 1 Spelling on Inj. 821, § 969.

[8] In the present case the undertaking was given to secure damages which accrued by reason of a temporary restraining order, which was granted in a suit to foreclose a crop lien, pending the hearing of an order to show cause, which was set for a definite date. The order to show cause and the petition to vacate the temporary restraining order were necessarily heard together. The disposition of the temporary restraining order, and the order to show cause, necessarily determined the pending petition for injunction, which was merely incident to the chief issues of the case. The merits of the cause, which was primarily a suit to foreclose a chattel mortgage upon the grape crop, were in no wise involved in this hearing for which counsel fees are claimed as an element of damages. The case was never tried upon its merits. When the restraining order was denied, the plaintiff dismissed his action. The record in the present case sufficiently supports the findings of the court and the pleadings, to the effect that the legal services were all necessarily performed in procuring a dissolution of the temporary restraining order.

[9] The plaintiff William Neil Moore testified that he hired two lawyers to represent him in the injunction proceeding, that they were engaged three days in the performance of that service, and that he paid them \$100 therefor.

"Q. How many days were you engaged in the hearing of the injunction proceedings? A. Three days, I think.

"Q. Were these attorneys acting for you in court during those days? A. Yes.

"Q. Did they do any work for you other than in an appearance in regard to this injunction? * * * A. No, sir. * * *

"Q. Did they make any charge for their services in this matter? A. Yes.

"Q. What was that charge? A. One hundred dollars.

"Q. Did you pay that \$100? A. Yes."

Expert testimony of the reasonable value of the services was unnecessary. The extent, duration, and nature of the services, as shown by the record, furnished the court with ample evidence upon which to determine the value of the services. *Spencer v. Collins*, 156 Cal. 298, 104 P. 320, 20 Ann. Cas. 49; *Zimmer v. Kilborn*, 165 Cal. 523, 132 P. 1026, Ann. Cas. 1914D, 368; *Conner v. Blodgett*, 18 Cal. App. 787, 124 P. 733; 2 R. C. L. 1059, §§ 145-147.

[10-12] The appellant contends that the evidence fails to support the finding that he "picked, destroyed, or converted to his own use" grapes of the reasonable value of \$365.90. The evidence as to the quantity and value of the grapes which were appropriated might have been more definite and certain. However, we are of the opinion that the record sufficiently sustains the findings in this regard. The damage, which was allowed, was small compared with the usual production of the 11 acres of vines, and the evidence indicates that the major proportion of the crop was lost to respondents. While it is true that Mr. Burson, who was formerly the managing agent for the Stewart Fruit Company, and who directed the picking of the grapes in question for Potter, testified as a witness for respondents that they shipped only about 270 boxes, the shipping statements of the company which were introduced in evidence show that 198 crates of Tokay grapes were shipped from the Moore ranch in 1926, and brought a net market price of over 50 cents per box.

In the absence of evidence to the contrary, the price which a portion of the same variety and crop of grapes actually brought in that market at the time of the conversion furnishes ample proof of the reasonable market value thereof. 23 C. J. 57, § 1802. Mr. Burson further testified:

"The Stewart Fruit Company handled this property for several years. * * * Around 1,600 to 1,800 [boxes], maybe 2,000, Tokays were taken off the vineyard the year before, and I judge was something like that this year in question.

"Q. From 1,600 to 2,000? A. Something like that, I would say."

The plaintiff William Nell Moore testified that they had picked not more than 75 boxes of grapes from the vineyard that year before they were stopped by the restraining order; that no other persons picked grapes in that vineyard that season, except himself and men who were employed by the appellant, and that after the restraining order was dissolved there remained unpicked only "415 lugs, consisting of 245 Black Prince, 152 Tokays," etc.

For the purpose of supporting the judgment, it may be assumed, from the foregoing state of the record, that the court disregarded the statement that only 270 boxes were shipped, and accepted the same witness' statement that the vineyard that year produced 1,600 to 2,000 boxes of Tokay grapes, and that appellant was responsible for the destruction or conversion of the entire crop, except the 75 boxes which plaintiff testified were picked before the restraining order was issued, together with the 152 boxes of Tokay grapes, which were all that remained after the dissolution of the order. This would leave over 1,300 boxes of Tokay grapes, which were lost by the respondents. The actual sales of Tokay grapes from this crop that season netted over 50 cents a box. The record contains no other evidence of the value of the grapes. This is therefore prima facie evidence of their reasonable market value, amounting to a sum far in excess of the damages allowed on that account by the court.

Furthermore, there is some evidence that the grapes were picked prematurely, with the inference that the market price which was received was materially less on that account. There was also evidence of loss sustained in permitting the grapes to mold, and in upsetting and spilling a quantity of them. We are not apprised of the basis upon which the trial court computed the damages which were allowed, and merely suggest the foregoing as a plausible theory, which finds ample support in the record, sufficient upon which to warrant the upholding of judgment in that regard.

[13] The damages which were allowed by the court included an item of \$29, which was incurred in the payment of court costs in the foreclosure proceeding. It does not appear what proportion of this sum, if any, was expended strictly on account of the issuing of the restraining order. Upon the authorities heretofore cited, this item was therefore improperly allowed, and the judgment should be modified to that extent.

Accordingly, the judgment is modified, by striking therefrom the sum of \$29, and, as so modified, the judgment is affirmed, the respondents to recover their costs.

We concur: FINCH, P. J.; PLUMMER, J.

HENDERSON et al. v. GENERAL ACCEPTANCE CORPORATION. (Civ. 6638.)★

District Court of Appeal, First District, Division 2, California. Sept. 21, 1929.

Rehearing Denied Oct. 21, 1929. Hearing Granted by Supreme Court Nov. 18, 1929.

1. Sales ⇨467—Where retail dealer, given possession of automobile and authority to sell for cash, sold on credit under conditional sales contract, purchaser became equitable owner (Civ. Code, §§ 1142, 2026).

Where owner of automobile delivered it to retail dealer as factor, under Civ. Code, § 2026, with authority to sell for cash, one purchasing in good faith from retail dealer for credit under conditional sales contract obtained equitable title, under Civ. Code, § 1142, and legal title remained in former owner, with right of possession in purchaser so long as he kept up payments.

2. Appeal and error ⇨931(4)—Judgment for plaintiff must be regarded on appeal as involving finding against defense of estoppel.

Where judgment of trial court was entered in defendant's favor, case must be regarded on appeal as one in which court actually made finding against defense of estoppel, where evidence was received on that defense, although it was not pleaded in answer.

3. Estoppel ⇨116—One taking assignment of conditional sales contract from factor had burden to prove that owner of car sold was estopped.

In suit by owner of automobile sold by factor under conditional sales agreement, against one taking assignment of conditional sale contract from factor for prior indebtedness, burden of proving estoppel of plaintiff was on defendant.

4. Chattel mortgages ⇨138(1)—**Sales** ⇨473 (1)—Seller's title under conditional sales contract is superior to that of subsequent mortgagee or purchaser.

Title retained by seller under conditional sales contract is, until full payment, superior to that of subsequent mortgagee or purchaser of personal property from the conditional buyer, even if subsequent mortgage or purchase was made without knowledge or notice of reservation of title, and was for full value.

5. Factors ⇨51—Finding that owner of automobile, who transferred it to dealer for cash sale, was not estopped to assert title as against one to whom dealer assigned conditional sales contract, held justified (Civ. Code, § 2026).

In action by owner of automobile delivered to retail dealer as factor, under Civ. Code, § 2026, for sale for cash, against one to whom dealer assigned conditional sales contract for value after unauthorized sale on credit, evidence which indicated that defendant knew method of marketing automobiles, and often employed similar plan, and knew of dealer's untrustworthiness, justified trial court's finding that plaintiff was not estopped to assert title to automobile, subject to equitable rights of purchaser.

6. Estoppel ⇨75—Estoppel of owner to assert title as against one purchasing property from third party must be based on owner's act or omission.

Estoppel of owner to assert title as against subsequent purchaser of property from third party must be based on act or omission of true owner.

7. Factors ⇨51—Automobile dealer had no apparent authority to sell conditional sales contract because of mere possession thereof.

Dealer's possession of conditional sales contract entered into by him without authority from owner of automobile did not amount to apparent authority to sell, or clothe dealer with indicia of ownership of contract.

8. Factors ⇨51—Title to conditional sales contract transferred by agent did not pass, where owner did not transfer possession of contract to agent, together with power to dispose thereof (Civ. Code, § 1142).

Provisions of Civ. Code, § 1142, for transfer of title, where possession of personal property with power to dispose thereof is transferred by owner to another person, who sells for value in ordinary course of business, did not apply to transfer of conditional sales contract, where owner of contract did not transfer possession of contract to agent with power to dispose of it.

9. Factors ⇨66—Owner of automobile, suing assignee of dealer's conditional sales contract, entered into by dealer without authority, need not elect between action for quieting title to car and possession of contract (Civ. Code, § 2026).

Owner of automobile, who designated dealer factor under Civ. Code, § 2026, to sell automobile for cash, was not required, in suit against one to whom dealer assigned conditional sale contract after unauthorized sale of car for credit, to elect between causes of action for quieting title to automobile and for recovery of possession of sale contract.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Charles P. Henderson and others against the General Acceptance Corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

Arnold C. Lackenbach, of San Francisco, for appellant.

Franklin T. Poore, of San Francisco, for respondents.

KOFORD, P. J. Henderson Securities Corporation, hereinafter called the respondent, purchased from Pacific Nash Motor Company a certain automobile, and delivered or caused it to be delivered to P. A. Hunter, who was a retail dealer of automobiles doing business as Vallejo Motor Sales Company. Respondent and Hunter entered into a written agreement which constituted Hunter a factor, under Civil Code, § 2026, and which authorized Hunter to sell the said automobile within 30

days for *cash*, the selling price to be and remain the property of the respondent. Hunter, in violation of the agreement with his principal, the respondent, sold said automobile to George A. Jewatt, a bona fide purchaser, upon terms of *credit*. Hunter took from Jewatt, in exchange for the said automobile, the old automobile of Jewatt, and executed with him a conditional sale installment contract by which Jewatt was permitted to pay in monthly installments, and by which title to the automobile was withheld from Jewatt pending final payment to be made by him. At the time this action was commenced, Jewatt had made some of the payments. At the time of the trial he had made most of them, and shortly after the trial he had made the last two payments into court, pursuant to stipulation.

Hunter had been doing business with appellant in substantially the same way as with respondent, and was indebted to appellant on that account. Appellant was pressing him for payments, and even contemplating criminal prosecution against him for having given it a bad check. Hunter, instead of assigning Jewatt's contract to the respondent, as he should have done (as a possible acceptable substitute for a cash sale price), assigned the contract to the appellant, and was credited by appellant for the value of the contract upon his prior indebtedness. Respondent soon heard of this and made demand on appellant for the contract, claiming to be the owner thereof and of the automobile, subject to the rights of Jewatt, who was in the position of a bona fide purchaser from a retail dealer. The demand being refused, this action was commenced. The complaint contained two causes of action. The first was in replevin for the contract, treating that document as specific personal property. The second was an action to quiet title to the automobile itself. Jewatt was not made a party, but the parties hereto fully concede his rights, and understand that any judgment in this action must necessarily adjudicate the rights of the parties hereto, subject to Jewatt's rights. The court gave judgment for the plaintiff upon both causes of action, and the defendant appeals.

[1] The respondent, in making Hunter its factor and delivering to him the automobile to sell for cash, did not part with the legal title to the automobile, but thereby gave Hunter the power to transfer the same to the purchaser on its behalf. The purchaser, Jewatt, obtained the equitable title when he purchased in good faith from the retail dealer, Hunter, under the provisions of Civil Code, § 1142, even though he did not buy for cash in accordance with Hunter's factor contract. Immediately after Hunter contracted the sale to Jewatt, therefore, the respondent still held the legal title of the automobile, and Jewatt, as purchaser under a conditional sale installment contract reserving title in seller, was the equitable owner in possession and en-

titled to possession so long as he kept up his payments. This condition of title existed at the time this action was commenced.

The complaint alleges no equitable matter. It alleges that plaintiff is the owner and entitled to the possession of the contract and that it is "the absolute legal and equitable owner of the automobile * * * in the possession of Jewatt. * * *" The answer of the defendant does not plead equitable matter, does not plead an estoppel, but simply denies the allegations of the complaint. The findings follow the pleadings, and do not find upon equitable matter such as estoppel. The judgment is for respondent for the possession of the contract, or in the alternative for \$158, the value thereof, that sum being the amount remaining unpaid by Jewatt at the time of trial, and for the further sum of \$790 against appellant, the amount collected and received by appellant from Jewatt, since the contract was assigned to it by Hunter. The judgment further declared that respondent was entitled to collect the unpaid installments from Jewatt and it quieted respondent's title to said automobile as against appellant.

[2] Appellant claims upon this appeal that the respondent is estopped from asserting its ownership in the contract by the fact that it put Hunter in possession of the automobile with power to sell the same. Appellant claims to be a purchaser of the contract in good faith for value and without notice of respondent's ownership. This equitable estoppel should have been pleaded in the answer (10 Cal. Jur. 654); but, notwithstanding this omission, the cause was fully tried, evidence was received upon this defense and no point is here made of this defect in pleading. The judgment of the court being in favor of respondent, we must regard the case as one where the court has actually made a finding against the defense of estoppel.

[3,4] The evidence does not establish the defense of estoppel to the extent that a finding against that defense should be held on this appeal to be unsupported. The burden of proving this defense was, of course, upon the appellant, for without all the elements of an estoppel the following rule would apply as between respondent, Hunter, and appellant: "The owner of personal property has the right to make an agreement to sell the same and deliver possession thereof to the buyer, upon the condition that the title thereto shall, nevertheless, remain in the seller until the price agreed on has been fully paid, and the title so withheld by the owner will, until full payment, be superior to that of a subsequent mortgagee or purchaser of such personal property from the buyer, even if such subsequent mortgage or purchase was made without knowledge or notice of the reservation of title and paid full value for the property." *Oakland Bank of Savings v. California P. B. Co.*, 183 Cal. 297, 191 P. 524, and cases cited.

See, also, *Marker v. Williams*, 39 Cal. App. 674, 179 P. 735, and 25 Cor. Jur. pp. 416 and 417, § 149.

[5] The evidence showed that appellant well knew the method of marketing automobiles. Appellant had often sold automobiles through Hunter's salesrooms upon substantially the same plan employed by respondent. Hunter's indebtedness to appellant grew out of such transactions. Appellant knew Hunter was untrustworthy. Its agent, Burke, expressed doubt about the title Hunter was giving. It examined the record of registrations of automobiles at Sacramento, but found none for this automobile. Hunter told said Burke that he had purchased the car outright from Pacific Nash Sales Company, but Burke did not inquire of the last-named company. As stated in *Marker v. Williams*, supra: "Was he justified in accepting, without further investigation, the statement of these people that they had paid for it, when he knew it had been installed under circumstances consistent with the retention of its character as personalty by a conditional vendor? In other words, if he had notice which suggested that this machinery was not what it appeared to be—an integral part of the real property—he was bound, in due caution, to consider all the contingencies which might apply to personal property so installed, and among these was the very likely circumstance of its having been purchased under a conditional contract of sale."

"The law of California very properly favors the conditional contract of sale. It has become very largely a factor in the purchase and sale of personal property, and, too, of that class of machinery and appliance commonly used in connection with real estate. It should be the policy of courts to afford every proper protection to upholding the conditions of such sales, both in the interest of the buying and selling classes."

[6, 7] Respondent acted promptly upon receiving information of the sale to Jewatt. The contract with Jewatt was assigned to appellant June 3, 1927. Respondent learned of the sale to Jewatt June 6, made a trip to Vallejo on the same day, and made demand upon appellant on June 8, 1927. An estoppel must be based upon some act or omission of the true owner. The true owner in this case did not give Hunter the right to enter into a conditional sale installment contract. It only gave him the right to sell for cash. Appellant cannot assert, therefore, that respondent clothed Hunter with the indicia of ownership of the contract with Jewatt which he had no right to make. Mere possession is not apparent authority to sell. *Akron Cereal Co. v. First National Bank*, 3 Cal. App. 198, 84 P. 778.

Herein lies the distinction between this case and *Anglo-California Trust Co. v. Pacific Acceptance Corporation*, 70 Cal. App. 41, 232 P. 489, 491, strongly relied on by appellant.

That case applies in favor of one situated substantially the same as appellant here, the principle of estoppel, following the analogy of Civil Code, § 1142, which is based on that principle. That section reads: "Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind, and does rescind the transfer made by him."

But we do not understand the decision last cited to hold the provisions of that section applicable to the *paper* resulting from a sale of personal property simply because the provisions of that section in a given case are applicable to the personal property sold. In the cited case, the true owner not only clothed the agent with possession and power of sale of the automobile, but expressly gave the agent power to make a conditional sale contract in his own name. It thus clothed him with apparent ownership not only of the automobile, but of the very contract of sale as well. It is there said: " * * * It appears without conflict that the true owner not only gave to its agent possession of the automobile, with power to dispose thereof, but by permitting him to make the contract for its sale in his own name clothed him with the apparent ownership of such contract, which was eventually transferred to the defendant, who paid full value for it without notice of the rights of the plaintiff therein. Under these circumstances the defendant is entitled to be protected."

[8] Of course, the provisions of Civil Code, § 1142, do not apply to a contract of sale, unless the owner thereof transfers the possession of that contract to the agent, together with the power to dispose of said contract. The case cited is therefore not based directly upon the section, but upon the principle of equitable estoppel. In that case the owner did not transfer to the agent possession of the contract together with "power to dispose thereof," but vested the agent with the possession and *apparent* power of sale of the contract. The section, of course, applies directly to the automobile itself in this case, and fully protects Jewatt, the buyer thereof.

The other authorities cited by appellant relate to an automobile itself and not to the contract of sale of an automobile. They would each be good authority in support of the title of Jewatt, even though he bought on credit when Hunter's real authority was only to sell for cash; but they are of no assistance to appellant, which did not buy the automobile that Hunter was authorized to sell, but the Jewatt contract, which Hunter was not authorized either to make or sell.

[9] There was no error in denying appellant's motion to compel respondent to elect

between his two causes of action. They were not inconsistent with each other. Respondent, being the owner of the automobile subject to the contract, was entitled to have that title quieted. Being the real owner of the contract of sale and the money to be paid thereon, it was also entitled to the possession of it. Respondent was not put to an election between automobile and contract, unless Jewatt defaulted in his payments. Whether Jewatt would make all the payments, as he subsequently did, could not be determined at the time of the trial.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

100 Cal. App. 730

In re SPRINGER'S ESTATE. (Civ. 3933.)

District Court of Appeal, Third District, California. Sept. 24, 1929.

Executors and administrators ⇨ 17(3)—**Daughter of intestate's predeceased wife by former marriage held entitled to administration over public administrator** (Code Civ. Proc. § 1365; Civ. Code, § 1386, subd. 8).

Under Code Civ. Proc. § 1365, and Civ. Code, § 1386, subd. 8, where decedent died intestate leaving no issue, and his entire estate consisted of property which during lifetime of his predeceased wife was community property or separate property of his wife, daughter of said wife by a former marriage was entitled to letters of administration in preference to public administrator.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Application by Virena V. Russell for letters of administration in the estate of A. W. Springer, deceased. From an order denying petitioner's application and from an order granting the petition of R. S. Jay, Public Administrator of Madera County, for letters of administration, petitioner appeals. Reversed, with directions.

W. M. Conley, Philip Conley, Matthew Conley, and David E. Peckinpah, all of Fresno, for appellant.

Barcroft & Barcroft, of Madera, for respondent.

PER CURIAM. The parties have stipulated to submit this appeal for decision upon the appellant's opening brief. The cause therefore may be decided on the statement of facts contained in such brief. Rule V of the Supreme Court and District Courts of Appeal. The following facts are stated in such brief:

"This is an appeal by Virena V. Russell from the order of the court denying her ap-

plication for letters of administration and from the order granting the petition of R. S. Jay, public administrator of the County of Madera * * * for letters of administration in the estate of A. W. Springer, deceased. * * * A. W. Springer died intestate, leaving no issue, and his entire estate" consists of property which, during the lifetime of his predeceased wife, Martha W. Springer, "was community property, or separate property" of his wife. The appellant is the daughter of Martha W. Springer by a former marriage.

It is clear that the appellant is entitled to letters of administration in preference to the public administrator. Code Civ. Proc. § 1365; Civ. Code, § 1386, subd. 8; 11 Cal. Jur. 320; In re Mercer's Estate (Cal. Sup.) 271 P. 1067; Estate of Hill, 179 Cal. 683, 178 P. 710.

The orders appealed from are reversed, and the trial court is directed to order the issuing of letters of administration to the appellant, Virena V. Russell, as prayed for in her petition.

100 Cal. App. 682

HESSEL v. PICKWICK STAGES SYSTEM, Inc., et al. (Civ. 6785.)★

District Court of Appeal, First District, Division 2, California. Sept. 23, 1929.

Rehearing Denied Oct. 22, 1929.

1. Automobiles ⇨ 375—**Lien for repairs on automobile in amount exceeding \$100 was valid, subject to objection of legal owner not notified** (Civ. Code, §§ 3051, 3051a).

Lien against automobile for repairs in amount exceeding \$100 was valid to full amount, under Civ. Code, § 3051, giving lien to garage keeper, subject to objection of legal owner not notified before rendering services, under section 3051a, providing that portion of lien in excess of \$100 for work rendered at request of one other than legal owner shall be invalid, unless legal owner was notified before services were rendered.

2. Automobiles ⇨ 375—**Liens of claimants for towing, repairing, and storing automobile were each valid up to \$100 without notice to legal owner, though total claims exceeded \$100** (Civ. Code, §§ 3051, 3051a).

Where each of three claimants performed services in towing, repairing, and storing automobile at request of registered owner, and no notice was given to legal owner before such services were rendered, as required by Civ. Code, § 3051a, providing that without such notice lien shall be invalid as to portion in excess of \$100, claim of each of defendants was valid to extent of \$100 under section 3051, giving lien to garage keepers, though combined claims amounted to over \$100.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by M. Hessel against the Pickwick Stages System, Inc., and others, in which defendants filed a cross-complaint. Judgment for defendants, and plaintiff appeals. Modified and affirmed.

Edward J. Jose, of San Francisco, for appellant.

Thomas M. Foley, of San Francisco, for respondents.

STURTEVANT, J. The plaintiff commenced an action in claim and delivery. The defendant appeared and answered, and also filed a cross-complaint. The cross-complaint was answered, and later the parties entered into an agreed statement of facts, and on that statement the case was heard and determined in the trial court. The court ordered a judgment in favor of the defendants, and from that judgment the plaintiff has appealed.

It is admitted that on the 25th day of July, 1925, a certain automobile was in the possession of Elmette L. Nielson and William Nielson, and that they were the registered owners; that on that date West American Finance Company was the legal owner thereof; that between the said date and the 8th day of February, defendant S. N. Thames, at the request of Elmette L. Nielson, performed services in towing the automobile, and that said services were of the reasonable value of \$61.50; that about the same time, and on a like request, defendant R. H. Wren performed services in repairing the automobile, and the services were of the reasonable value of \$128.37; and that thereafter, on a like request, defendant Pickwick Stages System, Inc., performed services in storing said automobile, and that said services were of the reasonable value of \$89.50. On February 15, 1926, the legal owner assigned his interest to the plaintiff, the plaintiff demanded possession of the automobile, and at the same time plaintiff tendered defendants \$100 in full discharge of the claims of the defendants. Both the tender and demand for possession were refused. It was further stipulated that no notice was given to the West American Finance Company before said services were rendered.

[1, 2] The plaintiff contends that the evidence does not sustain the findings that the defendants held good and valid liens, and that the tender was not sufficient. He cites and relies on section 3051a of the Civil Code. If it were the fact that the sum of \$247 was demanded by one and the same person for services done and performed on one and the same automobile, there would be much merit in plaintiff's contention. However, the agreed facts show that the defendant S. N. Thames rendered services in towing of the admitted value of \$61.50; thereupon his lien became a perfect lien. There is nothing in the Code

section to the contrary. Later the defendant Wren rendered services of the admitted value of \$128.37. Before rendering those services the legal owner was not notified. Subject to the objection of the legal owner, Wren's claim was valid to the full amount. Civ. Code, § 3051.

As to the legal owner that statement must be qualified by virtue of the provisions of section 3051a of the Civil Code: "That portion of any lien, as provided for in the next preceding section, in excess of one hundred dollars, for any work, * * * rendered or performed at the request of any person other than the holder of the legal title, shall be invalid, unless," the legal owner is notified before the services rendered. It is therefore clear that Wren's claim under the facts should have been reduced, as against the legal owner, to a sum not exceeding \$100. Still later the Pickwick Stages System, Inc., rendered services admitted to be of the value of \$89.50. Its lien was not subject to any infirmity. It thus appears that the combined claims of all of the defendants were valid to the extent of \$251; however, the amount of the judgment appealed from was \$247; in other words, \$4 less than it should have been.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 706
SHIPLEY CO. v. ROSEMEAD CO. et al.
(Civ. 5497.)

District Court of Appeal, Second District,
Division 2, California. Sept. 24, 1929.

1. Bills and notes $\S$ 518(1)—Evidence did not support finding that discharge of mechanic's lien was only part of consideration for note.

In action on note, evidence held not to support finding that discharge of mechanic's lien was but part of consideration for execution of note for amount for which lien was filed.

2. Bills and notes $\S$ 97(1)—Where plaintiff agreed to discharge mechanic's lien in consideration for defendants' execution of note, plaintiff's obligation was to discharge lien at once (Civ. Code, § 1657).

Where plaintiff agreed to discharge mechanic's lien in consideration for execution of note by defendants, and there was no dispute as to amount for which lien had been filed, plaintiff's obligation was to pay off and discharge lien at once, under Civ. Code, § 1657, providing that, where no time is specified for performance of act and act is capable of being done instantly, it must be performed immediately upon the thing to be done being exactly ascertained.

3. Bills and notes **↔97(1)**—Where plaintiff agreed to discharge lien in consideration for defendants' executing note, failure to discharge lien at once amounted to failure of consideration.

Where plaintiff agreed to discharge mechanic's lien in consideration for execution of note by defendants, failure to discharge lien at once amounted to failure of consideration for note.

4. Bills and notes **↔90**—Promissory note is "contract," and essential element is sufficient cause or consideration (Civ. Code, § 1550).

A promissory note is a "contract," and, under Civ. Code, § 1550, one of its essential elements is a sufficient cause or consideration.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Contract.]

5. Contracts **↔50**—There can be no consideration where there is no benefit to promisor or detriment to promisee (Civ. Code, § 1605).

There can be no consideration, under Civ. Code, § 1605, where there is no benefit to promisor or detriment to promisee, but some advantage, no matter how slight, must accrue to promisor.

6. Bills and notes **↔539**—Judgment for payee on note could not stand, where findings showed consideration for note was discharge of lien on payee's own property and there were no findings showing defendants were responsible for lien or would benefit by discharge (Civ. Code, § 1605).

Judgment for payee on note could not stand, where it appeared from findings that consideration for defendants' executing note was discharge of lien on payee's own property and there were no findings that defendant makers were in any way responsible for lien or that they would benefit by discharge of lien, since there was no consideration, under Civ. Code, § 1605.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action upon a promissory note by the Shipley Company against the Rosemead Company and others. From the judgment, defendants appeal. Reversed, with directions.

R. D. Wickham, of Alhambra, for appellants.

Edward Judson Brown and Minor Blythe, both of Los Angeles, for respondent.

BURNELL, Justice pro tem. The complaint in this action is upon a promissory note in the ordinary and usual form, executed by the Rosemead Company, a common-law trust, and indorsed by the individual defendants. By way of answer, the defendants, appellants here, admitting nonpayment, set up as an affirmative defense that prior to the execution of the note a building contract had been entered into by one Jones and the defendants for the erection of certain improvements by Jones on a specified lot; that Jones

procured a vault to be built in the building under construction at a cost of \$945, of which sum the defendants paid \$230, and that a mechanic's lien was filed against the premises for the unpaid balance of \$715. It is further alleged that the consideration for the note in question was the agreement of the plaintiff to pay off and satisfy said lien, and that this agreement was not performed, and hence that there was a failure of the consideration for which the note was given. By a supplemental answer they allege the execution of an agreement between plaintiff and themselves subsequent to the filing of their original answer, which, they assert, operated to fully satisfy all claims of plaintiff against them and to terminate its cause of action. On the issues so framed the court found that prior to the execution of the note plaintiff was the record owner of the lot, and "that certain persons without the knowledge or consent of plaintiff caused a certain vault to be constructed in said building at a cost of \$945, of which sum these defendants paid \$230, leaving a balance of \$715 due for the construction of said vault, for which a mechanic's lien was filed against the real property of the plaintiff, which lien was still unsatisfied at the time of the execution of said note." The court further found: "That at the request of plaintiff the defendants executed and delivered to it the note * * * to reimburse it to the extent of the balance of \$715, for which said lien was upon said property;" and "that the said Shipley Company, as part consideration for said note, was to cause said lien to be discharged and cleared from its property, but that no specific time was agreed upon for so doing." The court also found: "That thereafter, and prior to the commencement of this action, the said Shipley Company caused the suit which was then pending to foreclose said lien to be dismissed, and that at the time of the filing of the complaint herein there was no longer any mechanic's lien upon said property for the cost and construction of said vault or any part thereof."

Upon the issue of the effect of the subsequent agreement as operating to satisfy respondent's claim and terminate its cause of action, the finding was adverse to appellants.

Appellants urge that certain of the findings are not supported by the evidence and that the findings in turn fail to support the judgment, and we are of the opinion that this contention must be sustained in the particulars to be pointed out herein.

[1] We can find no evidence in the record to support the finding that the agreement to discharge the lien was "part consideration" for the execution of the note. No testimony whatever was offered by respondent, which, after introducing the note into evidence, rested. Mr. Bentel, one of the defendants, testified that about 30 days prior to the execution of the note there was a conference be-

tween Mr. Jones (admittedly president and owner of 95 per cent. of the stock of the Shipley Company), Mr. Edeler, and himself, at which Mr. Jones "asked Mr. Edeler and I to give him a note that he could turn in to the Shipley Company, covering the amount of \$715, which represented a lien that was on the building, * * * that if we gave this note they would—he could satisfy the Shipley Company that the transaction—in other words, the lien that was on the building would be paid by the Shipley Company. * * *" Again, the same witness testified: "At the time this note was given that was one of the representations, that they were to dismiss the lien."

Mr. Edeler testified as to this same conference: "We met concerning the disposition of the vault lien that had been filed and Mr. Jones said that he wanted us to give him a note, and when that was done, that he would discharge the lien, so the note was given."

This was all the testimony adduced at the trial with respect to the consideration for the execution of the note. It establishes the fact that the sole consideration for the execution of the note was the discharge of the lien, and does not support a finding that the same was but part consideration.

The question we have just decided is important in view of appellants' contention that there was a total failure of consideration and hence that judgment should have been in their favor. On this point it is their position that, at the time of the commencement of the action on February 24, 1925, and up to the time their answer was filed on March 17, 1925, the lien had not been discharged, and that it was not discharged until some eighteen months after execution of the note, or twelve months after the action thereon was commenced.

We have set forth the trial court's finding to the effect that the Shipley Company had procured the dismissal of the action to foreclose the lien and that at the time of commencing this action the lien no longer existed. This finding is not supported by any evidence at all. Strangely enough, neither party to the action saw fit to produce the best evidence of the date of discharge of the lien, namely, the official record thereof, but what meager testimony there is on this subject, together with the unchallenged statements of counsel at the trial, supports appellants' contention and is diametrically opposed to the finding. During Mr. Bentel's examination, the court asked him, "Well, did the Shipley Company discharge this lien?" to which the witness replied: "The Shipley Company did not discharge the lien, and that is a part of our answer. They never paid the lien. It stood there and stood there and stood there * * * the lien was not discharged. They still held the note and they brought suit on the note, this suit that is now pending." Later on in the examination of the same witness

he was asked whether he had a conversation with Mr. Jones as to the discharge of the lien, but before he could answer one of respondent's counsel interpolated, "Now, if your Honor please, I understand there isn't any dispute about the fact that the suit to foreclose the lien was pending and that suit has been dismissed." To this statement the court replied, "Well, that ought to be a matter of record here. Can't counsel agree whether the suit has been dismissed?" to which one of appellants' counsel answered, "Yes, your Honor, since this suit was brought, since our answers were in." Again, Mr. Bentel testified: "*The lien wasn't discharged for a year and a half after this transaction*"—referring to the execution of the note. (Italics ours.) Again, the court said: "He says the lien was not discharged for a year and a half, and the other side admits that it wasn't discharged until at least the time the suit was dismissed, so why ask him any more about it? The fact is now established." During Mr. Edeler's examination he was asked about the discharge of the lien; before he could answer the question, the court said: "No, that fact has already been covered. It has been admitted that the lien was never discharged until the action was dismissed and that it is a matter of record." This is all there is in the record before us upon this subject.

[2-4] It being established by the uncontradicted evidence, despite the trial court's findings above discussed, that the sole consideration for the note was the agreement of respondent payee to discharge the lien and that this was not done until some eighteen months after the execution of the note and subsequent to the cause becoming at issue, we will next take up the question as to whether appellants' defense of failure of consideration should have been upheld. It is to be noted that there was at no time any dispute as to the amount for which the lien had been filed. The amount thereof was fixed, definite, and certain. No time was specified within which the lien was to be satisfied and discharged by respondent, and the court so found. Manifestly, then, respondent's obligation, the consideration for the note, was to pay off the sum of \$715. The time within which such an obligation is to be performed is thus specified in section 1657 of the Civil Code: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained."

On the authority of this Code provision, it was held in the following cases that the obligation was for immediate payment: *Peters v. George*, 1 Cal. App. 239, 81 P. 1117, where a widow and sole heir at law had sold property inherited by her from her husband's estate, for a down payment to her, the buyer agree-

ing to pay the balance to a creditor of the estate; *Whittier v. Gormley*, 3 Cal. App. 489, 86 P. 726, 727, where a memorandum evidencing a sale of land specified the purchase price as \$5,500, "less commissions," without specifying a time for payment or the amount of commissions to be deducted. Quoting section 1657, Civil Code, the court said, "It follows, therefore, that the money was payable upon delivery of the deed. The amount of commissions is susceptible of ascertainment, and its certainty in amount is not disputed"; *Clairmonte v. Napier Motor Company*, 11 Cal. App. 265, 104 P. 712, holding commissions on sales of automobiles payable immediately on completion of each sale; and *Price v. Smith Mfg. Co.*, 53 Cal. App. 303, 200 P. 53, holding that, under a contract whereby an inventor was to receive a royalty on each machine sold, with no provision as to time of payment, the agreed royalty became due immediately upon the sale of each machine.

In the case at bar we are constrained to hold that the obligation of respondent was to pay off and discharge the lien at once, and that its failure to do so amounted to a failure of consideration for the note in suit. A promissory note is, of course, a contract, and as such one of its essential elements is "a sufficient cause or consideration" (section 1550, Civ. Code), and "before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself" (section 1439, Civ. Code). If, therefore, respondent's promise to pay off the lien could be regarded as a good consideration for the execution of the note by appellants, that consideration had failed upon failure of respondent to perform.

[5, 6] There exists an additional reason why, in our opinion, the judgment cannot stand, namely, that the findings affirmatively show a lack of any consideration whatever moving from respondent to appellants.

The court found that at the time of the construction of the vault "the plaintiff was the record owner" of the lot on which it was installed. It was further found that the vault was constructed "by certain persons without the knowledge or consent of plaintiff" (there is no finding that defendants or any of them had anything whatsoever to do with the building of the vault, or were in any way obligated to pay for it), and that the mechanic's lien "was filed against the said real property of the plaintiff." It therefore appears from the findings that the "consideration" for appellants executing the note was the discharge of a lien *on its own property* by appellants, a lien for which the findings do not state or even intimate defendants were in any way responsible or from the discharge of which they, or anyone except respondent itself, could benefit. Consideration is thus defined in section 1605 of our Civil Code: "Any benefit conferred, or agreed to be conferred, upon the promisor,

by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." There can be no consideration where there is no benefit to the promisor or detriment to the promisee. *Bernstein v. Downs*, 112 Cal. 197, 44 P. 557; *Visalia Gas, etc., Co. v. Sims*, 104 Cal. 326, 37 P. 1042, 43 Am. St. Rep. 105; *Gifford v. Carvill*, 29 Cal. 589. Some advantage, no matter how slight, must accrue to the promisor. *Heim v. Butin*, 109 Cal. 500, 42 P. 138, 50 Am. St. Rep. 54; *Jordan v. Scott*, 38 Cal. App. 739, 177 P. 504.

The facts as found by the court below do not disclose, rather do they negative, the existence of a good consideration for the note, as consideration is above defined.

The situation disclosed by the findings is somewhat akin to that in *Pacific Railways Advertising Co. v. Carr*, 29 Cal. App. 722, 157 P. 529, 530, where an advertising contract with the plaintiff had been executed on behalf of a corporation by its secretary, without any authority to do so. Under the contract the plaintiff claimed a sum of money to be due to it. Thereafter the defendant acquired an interest in the corporation and agreed to assume the indebtedness claimed to be due on the contract, and as evidence thereof executed her note to the plaintiff, and at the maturity of this note she, in renewal thereof, executed the note which was the subject of the action, whereupon the plaintiff released the corporation from liability on the original contract. The court there used the following language: "The consideration for her note was the purported obligation of the company upon this contract; but there was no obligation, either express or implied. This being true, it cannot be said there was any consideration for the execution of the note sued upon. Clearly, if suit had been brought upon the contract against the Amritam Company, no recovery could have been had thereon upon a showing of the facts here presented; and, if there was nothing upon which to base an action against the Amritam Company, it must follow that plaintiff in releasing the company from liability which did not exist suffered no prejudice by reason thereof. A promise to perform a legal obligation is not a sufficient consideration for a contract based thereon. *Sullivan v. Sullivan*, 99 Cal. 187, 33 P. 862. Neither is the release of a purported claim against one upon whom there rests no legal or moral obligation to pay the same a sufficient consideration for a third party's promise to pay such nonenforceable claim, unless it be upon the compromise of a doubtful or disputed claim. At the time of executing the note, there existed no dispute between plaintiff and the Amritam Company. * * *

We are not unmindful of the finding "that

It is not true that there was no consideration for the execution of said note," but we regard this finding as in the nature of a conclusion of law as to the legal effect of the specific facts found with regard to the transaction between the parties rather than as a finding as to a matter of fact. *Kriess v. Faron*, 118 Cal. 142, 50 P. 388. We hold, therefore, that the findings do not support the conclusions of law or the judgment based thereon, and that the judgment should have been in favor of the defendants.

With respect to the finding as to the effect of the subsequently executed agreement between the parties, we are satisfied that it is amply supported by the evidence, and that appellants' point with regard thereto is not well taken, but, as the case is disposed of by our ruling on the other points in controversy, it is unnecessary to further discuss the question.

The judgment is reversed, with directions to the trial court to enter judgment for the defendants, with costs.

We concur: WORKS, P. J.; CRAIG, J.

100 Cal. App. 692

STREHLOW et al. v. MOTHORN.
(Civ. 6382.)

District Court of Appeal, First District, Division 1, California. Sept. 24, 1929.

1. Appeal and error $\S$ 717—Judge's opinion, though no part of record, could be considered on appeal as incorporating into findings evidence presented by examining premises.

Where trial judge, at request of defendant, visited premises involved in action to enjoin interference with ditch and road, opinion of trial judge, though no part of record, could be considered on appeal to extent that judge necessarily incorporated into findings evidence presented to him through actual examination of physical conditions.

2. Waters and water courses $\S$ 158½(2)—Use of ditch on defendant's land to drain water from plaintiffs' land held not concealed, though water was conducted through underground pipes.

In action to enjoin interference with ditch and road, evidence that water was conducted from plaintiffs' land through underground pipe into ditch, but that entry into ditch was apparent, and evidence that there was large cement bulkhead erected, to prevent erosion of land where water came out of pipe, together with entire geography of site, did not show that use of ditch on defendant's land was concealed.

3. Waters and water courses $\S$ 154(2)—Right to discharge waters on plaintiffs' land through ditch on defendant's land held acquired by prescription by 40 years' exercise of right established by common owner.

Where common owner of plaintiffs' and defendant's land burdened defendant's land with

easement on behalf of plaintiffs' land, and defendant took his land burdened with easement existing for more than 40 years, right to discharge accumulated waters on plaintiffs' land through ditch on defendant's land was acquired by prescription.

4. Waters and water courses $\S$ 158½(2)—Defendant, enjoined from interfering with ditch carrying drainage water, was required to refrain from interference, though flood waters might flow through ditch.

Where court properly enjoined defendant from interfering with ditch on defendant's land, carrying seepage or drainage waters from land of plaintiffs, defendant was required to refrain from interfering with ditch, though ditch, if kept open, might carry flood waters, which defendant might have prevented from encroaching by filling up ditch.

5. Highways $\S$ 86—Abutting owner has public right in highway, and private right, regardless whether owning fee of highway.

An abutting owner has public right in highway enjoyed in common with all other citizens, and certain private rights arising from ownership of property contiguous to highway, not common to public generally, regardless of whether fee of highway is in abutting owner or not.

6. Eminent domain $\S$ 85—Abutting landowner has special easement in highway for access purposes, which cannot be taken away without due compensation.

Abutting landowner on public highway has special right of easement and user in public road for access purposes, which is property right, and cannot be damaged or taken away from him without due compensation.

7. Highways $\S$ 87—Injunction against defendant diverting water on road, or interfering with plaintiffs' use of road for travel, did not restrain defendant as far as general public might be concerned.

Decree enjoining defendant from diverting water on road dividing plaintiffs' and defendant's property, or in any wise interfering with plaintiffs in use of road as means of travel, did not place restraint on defendant as far as general public might be concerned, where plaintiffs' right as easement appurtenant to land was established.

Appeal from Superior Court, Sonoma County; H. L. Preston, Judge.

Action by William Strehlow and others against Pressley Mothorn. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. M. F. Soto, of San Francisco, for appellant.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for respondents.

PARKER, Justice pro tem. In this action plaintiffs sought injunctive relief against defendant's interference with their right to use a certain ditch and road. The court be-

low granted the relief prayed for, and defendant appeals.

The record comes before us by means of a bill of exceptions. The facts may be briefly summarized:

Plaintiffs are the owners of a certain tract of land lying in the county of Sonoma, which said land is used for general farming and the raising of fruit. A description of plaintiffs' lands, by metes and bounds, would serve no useful purpose. It is sufficient to note that the eastern boundary of these lands is the center of a certain stream or waterway known as Dry creek. The general contour of the land is sloping, and throughout are many depressions and likely places for the settling and accumulation of both drainage and flood waters. The defendant owns a tract of land immediately adjoining the lands of plaintiffs on the south. Some 20 or more years ago the lands of both plaintiffs and defendant were in a common ownership and farmed as one tract. At or about the boundary line common to the south line of plaintiffs' land and defendant's land is a road, which said road lies partly on the land of plaintiffs and partly on the land of defendant. On the land of defendant, and south of the road, lies the ditch in question here, which said ditch has its entire length upon the land of defendant. Up to this point there is no controversy.

Proceeding, we detail not the conflicting facts as claimed by the respective parties, but we confine ourselves to those facts supported by competent and sufficient evidence in support of the judgment. As indicated, the ground lies in such a position that the drainage from plaintiffs' holding would, to a great extent, flow off onto and across the land of defendant. Many years ago, concededly sufficient in point of time, and while the lands were still under a common single ownership, conduits were built and pipes laid, which carried the collected waters and such of the flood waters as at times came from the creek, through and under the roadway, and into the ditch located on the land which subsequently came into the ownership of defendant, from which point these waters were carried into the creek and away from the land entirely. The road involved is a public road, used since 1880, and even before. It was a generally used road at a time before the railroad entered Sonoma county, and has since been maintained as such by the county, though the travel thereover has much lessened. It is one of that class of country roads, apart and separate from the main highways, which serve the needs of a back country, and have not yet attained the dignity of concrete.

In 1918, long after the rights claimed had attached, the defendant and his predecessors conceived the plan and idea of cultivating the land through which the ditch ran. Accord-

ingly, and in pursuance of this plan, defendant commenced filling up the ditch, and cutting down the trees and growth on the banks thereof, which growth had become an integral part of the bank and necessary thereto, and for the protection of the land adjacent to the ditch. This caused and causes the water coming from plaintiffs' land to back up on the said lands, and to destroy and wash out the road and roadbed between the ditch and plaintiffs' lands. To enjoin these acts on the part of defendant this action was instituted.

The findings of the trial court are as follows, in epitome:

That the road in question is laid out, opened, abandoned, and dedicated to the public by prescription and user, and is 30 feet, more or less, in width, and partly upon the land of plaintiffs and partly upon the land of defendant; that for more than 40 years last past the plaintiff and his predecessors in interest have so used this road as to acquire a prescriptive right in and to the use thereof for the purpose of ingress and egress to and from their land; that said road abuts upon the land of plaintiffs, where it traverses the land of defendant, and that said road and the right to use the same was and is an easement appurtenant to the lands of plaintiffs, and the right to travel and use the road is necessary for the complete enjoyment by plaintiffs of their land and the easement attached thereto, and any obstruction thereof or interference therewith will work great and irreparable damage to plaintiffs and their lands; that along and upon the southerly side of said road, and commencing at a point 200 yards from the westerly boundary of the plaintiffs' land, there is a ditch and waterway, which extends easterly and along the southerly side of said road for a distance of 75 yards, and the ditch is an average depth of 6 feet and of an average width of 3 feet at the bottom, with an average width of 12 feet at the top; that said ditch was constructed, and has ever since on or before the year 1870 been continuously maintained, by plaintiffs and their predecessors in interest and the predecessors in interest of defendant, until the obstructions by defendant herein complained of; that during all of the time the said ditch and waterway has been maintained for the purposes of carrying away surface water and drainage water from the lands of plaintiff, and in time of freshets has also served to carry away waters overflowing from Dry creek onto the lands of plaintiffs, and during all of said time the said plaintiffs and their predecessors in interest have openly, notoriously, continuously, and uninterruptedly, and under a claim of right, so used the said ditch for the purpose above stated against the said defendant and his predecessors in interest and all other persons; that originally the western portion of said ditch was a natural gully formed by the

flow of surface waters, and was a natural way meandering along the line and course where the said ditch is now constructed, and thereafter and more than 20 years before the commencement of this action the said last-mentioned natural ditch was enlarged and straightened, and has been maintained continuously since said time at the place described. The findings then go on to detail the claim of defendant to obstruct the said waterway and road and to find these claims without right. Continuing, it is found that irreparable damage will follow to plaintiffs and their land unless defendant is enjoined.

The decree of the court, from which this appeal is taken, orders in substance as follows: That the road, 30 feet wide, more or less, is appurtenant to the land of plaintiffs, and that plaintiffs have the lawful right to travel the same, and that said right is an easement appurtenant to the lands of plaintiffs. That the ditch is an easement appurtenant to and with the lands of plaintiff, for the purpose of collecting therein seepage, drainage, surface, and overflow waters, and discharging the same through said ditch. The decree then enjoins, perpetually and forever, the defendant from in any manner digging up the soil in the road, or removing the same, or permitting or causing water to flow thereon from the said ditch, and is also likewise enjoined from in any manner interfering with the flow of seepage, drainage, surface, or overflow waters in said ditch, and from diverting the said waters onto the said road, or onto the lands of the plaintiffs, and from removing or cutting down trees or vines growing on the embankments, and is enjoined from doing any act that will in any manner obstruct or interfere with plaintiffs in the use of said road as a way for travel, or in the use of said ditch as a conduit for carrying said water. The decree, however, provides that the defendant may extend the said ditch across his own land, as long as the extension will in no way interfere with the rights adjudged in plaintiffs.

The foregoing will sufficiently present the case as it appears for review.

[1] The bill of exceptions contains some 47 specifications of the insufficiency of the evidence. None of these are especially urged in the briefs of appellant. Nevertheless, after a careful study of the entire record, we find that these specifications have no convincing force. Though in some instances there appear conflicts in the testimony, there was sufficient competent evidence to support the findings made and the decree following. In addition to the transcript of evidence taken, it appears that at the end of the trial the defendant invited and urged the trial judge to visit the premises and the territory referred to in the testimony, and view for himself the exact situation. The learned judge adopted this suggestion, and, while the opin-

ion of the trial judge is no part of the record, yet it may be considered here to that extent, as he did incorporate into his findings, necessarily, the evidence thus presented to him through an actual examination of the physical conditions existing.

[2] Appellant attacks the judgment upon two main grounds: First, as to the adjudication of plaintiffs' right to the use of the ditch; and, second, as to their right to maintain the action with regard to the road. Appellant contends that the alleged easement as to the use of the ditch on defendant's land was not only nonapparent and noncontinuous, but practically concealed or hidden underground, and the ditch was located wholly on the defendant's land. We find no merit in this contention, as a matter of fact. It is true that the water was conducted from plaintiffs' land through an underground pipe, but its entry into the ditch was most apparent. Likewise there was a large cement bulkhead erected to prevent erosion of the land where the water comes out of the pipe, and the entire geography of the site made the user most plain. No one contended at the trial that the use was a hidden use, or that there was not ample evidence thereof. The entire argument of the defendant is that, under the conditions, the actual flowing of the water through the underground pipes could not be determined without digging to the pipes. In the face of the court's finding, supported by the evidence, that the user was actually open and notorious, we deem this point worthy of no further note.

[3, 4] It is next claimed by appellant that plaintiffs were without right to discharge, into the ditch on the defendant's land, waters gathered or accumulated by them upon their own land. As a strict matter of right, in the abstract, and in the absence of grant or prescription, it might be conceded that an upper owner has not the absolute right to divert flood or accumulated waters upon the land of a lower owner. But the question here presented is not one of asserted absolute right, merely by reason of the ownership of the upper land. The record supports the conclusion that the owner of both parcels did burden this lower land with the easement created for the enjoyment and cultivation of the upper portion; that the defendant and his predecessors in interest took the lower land thus burdened; and that for more than 40 years the plaintiffs and their predecessors in interest exercised and claimed the right openly and continuously, and in all respects as required by law to acquire the right equally as though conferred upon them by express grant. No authority is cited to the effect that a right to discharge flood or accumulated waters upon the land of a lower owner cannot be acquired by prescription.

Further than this, the discharge of the accumulated water is merely occasional, and

only at such times as the same becomes commingled with the usual drain or seepage waters naturally flowing off the land of plaintiffs. In any event, the question of flood or storm waters is not primarily involved in the action. The decree of the court enjoins defendant from interfering with the ditch carrying the seepage or drainage waters. The court found that defendant and his predecessors filled up and threatens to fill up the natural channel, where waters were wont to flow, and, even if such filling were permissible to prevent the encroachment of flood waters, yet the defendant must refrain from interference with the ditch or channel, and it is clear that, if the ditch were filled, neither surface nor flood waters could flow through it, and it is quite immaterial that, if the ditch be open and kept open, on occasions it might carry flood water. The gist of appellant's attack on the judgment concerns the question of the road. In fact, he makes the question of the road appear the main issue in the case, rather than as merely incidental to the right the plaintiffs seek to have protected. It seems apparent that the character of the roadway, whether private or public, is of little importance here.

[5, 6] Plaintiffs pleaded both a public road and an easement appurtenant to their lands. The court found in their favor on both grounds. An abutting owner has two kinds of rights in a highway, a public right, which he enjoys in common with all other citizens, and certain private rights, which arise from his ownership of property contiguous to the highway and which are not common to the public generally; and this regardless of whether the fee of the highway is in him or not. An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right, which cannot be damaged or taken away from him without due compensation. 29 C. J. 547; Fairchild v. Oakland & Bay Shore R. Co., 176 Cal. 629, 169 P. 388; Cushing, etc., Co. v. Gray, 152 Cal. 123, 92 P. 70, 125 Am. St. Rep. 47; Smith v. Southern Pacific R. Co., 146 Cal. 164, 79 P. 868, 106 Am. St. Rep. 17. This right of an adjoining landowner has been expressly recognized and announced by the Supreme Court as recently as the past month in the case of Lane v. San Diego Electric Railway Co. (Cal. Sup.) 280 P. 109, in which case are cited the authorities hereinbefore noted and many others to the same effect.

All of the contentions of the appellant in respect to the road are based upon a negative of this proposition. It is therefore needless to pursue the inquiry. However, it may be noted that the question, as to this defendant, is more or less academic. The main purpose of the action was to prevent interference with the ditch or the run-off of the water

from plaintiffs' lands. The plaintiffs, in addition to other allegations found to be true, and of themselves sufficient to support the judgment, alleged further that the acts of the defendant interfered with their easement in and to the public road. The proof showed this easement to the road, irrespective of whether the right existed as an abutting owner on a public highway, or whether it was a right existing in plaintiffs without regard to the public.

[7] The decree of the court enjoined the defendant from diverting the water upon the road, or in any wise interfering with plaintiffs in the use of the said road as a means of travel. There was no restraint placed upon defendant, as far as the general public might be concerned, and in view of the court's determination of plaintiffs' right as an easement appurtenant to their land, sufficiently supported as hereinbefore detailed, the point has already received more consideration than the record warrants.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

100 Cal. App. 685

TIGHT v. PAGE. (Civ. 5457.)

District Court of Appeal, Second District, Division 2, California. Sept. 23, 1929.

1. Brokers $\Rightarrow$ 86(4)—In broker's action for commission, evidence held to establish prima facie that plaintiff was procuring cause of sale.

In broker's action against another broker to recover real estate commission, where negotiations were begun while defendant was working out of plaintiff's office, and sale was completed by defendant within week after leaving plaintiff's office, evidence held to establish prima facie case for plaintiff as procuring cause of sale.

2. Trial $\Rightarrow$ 139(1), 165—Evidence must be viewed in light most favorable to plaintiff on motion for nonsuit, and, if, when so viewed it is sufficient to make out case, motion should be denied.

In deciding motion for nonsuit, evidence must be viewed most favorably to plaintiff, and, if when so construed case has been made out, motion should be denied.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Mabel L. Tight against William C. Page. From a judgment of nonsuit, plaintiff appeals. Reversed.

Thornton, Turner & McCurdy, of Los Angeles, for appellant.

CRAIG, J. The parties to this cause were realty brokers, and, while it was stipulated that they were not copartners, it appears

that they had an understanding whereby one should receive a portion of any commissions involved in any escrow which he might assist the other in closing. It is admitted that respondent "worked in and out of" appellant's office during the month of December, 1924, and a part of February, 1925. Prior to December, 1924, Mrs. J. R. Butler and her husband listed with appellant's office certain real property, which appellant and respondent sold to H. E. Wells and wife, and the latter entered into possession thereof. The agreement for sale was escrowed with a Los Angeles bank, \$1,000 of a total consideration of \$15,500 being deposited with the escrow as commission, \$775 of which was paid to said brokers. Said bank was then negotiating for a loan upon certain property belonging to Wells, and it was testified that the sale above mentioned was for cash, contingent upon the consummation of the loan. At the same time other brokers held an exclusive agency to sell the Wells property. The bank failed to make a loan, and the parties to the escrow transferred their escrow agreement to a Glendale bank, designated by respondent as "a friend of Mrs. Wells." Thereafter the Butlers purchased the Wells property, and appellant instituted proceedings for a portion of the commissions paid by the Butlers to respondent for effecting the second sale, or conveyance, from Wells to Butler. After a trial before the court, without a jury, the defendant moved for a nonsuit, which was granted, upon the asserted ground that the so-called first transaction terminated when the Los Angeles bank declined to make a loan to Wells, and that the sale by the latter to the Butlers was a subsequent, separate, and distinct transaction, consummated by respondent, without the aid of appellant.

[1] We are not assisted upon this appeal by a brief on behalf of the respondent, but from a careful examination of the record we are convinced that the plaintiff succeeded in establishing a sufficient prima facie case to entitle her to a judgment. She testified in her own behalf, and the defendant was called by her counsel as a witness. No other witnesses were examined or evidence offered. The plaintiff testified that respondent was absent from her office during the greater part of the month of January, 1925, but that she occasionally inquired as to the progress of the Butler-Wells sale, and was assured by Page that he was taking care of it, and that "it would come all right"; that she suggested, "if anything comes up in any manner, anything comes up, let me know." She also swore that, when she later inquired at the bank regarding the matter, she was informed that the sale had been converted into an ex-

change; that she had not previously known of a proposed Wells sale to Butler. From the respondent's own testimony it appears that, although out of the office much of the time during January, 1925, he was in touch with the Butlers. He testified that Mrs. Butler "kept after me why she didn't get her money"; that he did not finally sever his connection with Mrs. Tight's office until January 31, 1925, and that on February 4th, or five days later, he "figured she (Mrs. Butler) was in a bad position; so, on February 4th, after the expiration of the Frank Meline Company's exclusive listing, why, I suggested to Mrs. Butler, I said, 'Why don't you buy this South Brand [Wells] property?'" He admitted that after negotiations with Wells he succeeded in reducing the price of their property to \$40,000, persuaded them to "take back the \$22,500 paper" which they had escrowed toward the purchase of the Butler property, and "then \$14,500 which she had coming in cash was to apply on that." It was also admitted by respondent that he did not relinquish the key to appellant's office until two days before he initiated the Wells sale, or February 2d—two days after having ostensibly abandoned his real estate brokerage vocation. Within a period of less than one week Page vacated the office of his partner in the transaction, noted the expiration of the Meline Company's agency, interested Mrs. Butler in the Wells property, and consummated the original sale through a conveyance in lieu of cash. By such change merely in form of the consideration the escrow was closed. However, but for the sale initiated by the appellant, the Wells property would not have been conveyed. Mrs. Tight was therefore the procuring cause of a transaction which through an unbroken chain of events entitled her to compensation, and she is entitled to the agreed proportionate share of the commission earned. *Sessions v. Pacific Improvement Co.*, 57 Cal. App. 1, 206 P. 653.

[2] The foregoing statement of facts is of course made from the evidence construed favorably to the appellant. It is possible that, had the trial been completed, this same evidence might have been viewed in a different light by the court when it came to a final determination of the issue presented. But it is elementary that in deciding a motion for nonsuit the evidence must be viewed most favorably to the plaintiff, and that, if as so construed a case has been made out, the motion should be denied.

The judgment is reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

209 Cal. 318

MENSING v. CROTER. (Civ. 6671.)★

District Court of Appeal, First District, Division 2, California. Sept. 19, 1929.

Rehearing Denied Oct. 18, 1929. Hearing Granted by Supreme Court Nov. 18, 1929.

1. Trial ☞143—Conflicts in evidence are for jury.

Conflicts in contradictory statements in evidence held for jury.

2. Bastards ☞6—Evidence held sufficient to show association and opportunity at conception, requiring admission of evidence that plaintiff, suing for support of illegitimate child, was mistress of another man (Code Civ. Proc. § 1960, subd. 1).

Evidence held sufficient to show association and opportunity at about date of conception, to require admission of evidence that plaintiff, suing for support of her illegitimate child, was mistress of another man, Code Civ. Proc. § 1960, subd. 1, providing that an inference must be founded on fact legally proved.

3. Bastards ☞5—Circumstantial evidence of acts of sexual intercourse with other men at about date child was begotten is admissible in action for child's support.

Circumstantial evidence of acts of sexual intercourse with other men at about date child was begotten is admissible in an action for support of an illegitimate child.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Edith Frida Mensing, for and on behalf of her minor son, David Mensing Croter, against Jacob Croter. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

Raymond Benjamin, of San Francisco, and Myron Harris and Leo A. Sullivan, both of Oakland, for appellant.

Thornton Wilson, of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to compel him to support her illegitimate son, and alleged that the defendant was the father. He appeared and answered, and a trial was had before the court sitting with a jury. The jury returned a verdict against the defendant, and from a judgment entered thereon the defendant has appealed, under section 953a of the Code of Civil Procedure.

[1, 2] The defendant claims the trial court should have allowed him to introduce, for a limited purpose, evidence of previous acts of sexual intercourse with other men. The plaintiff replies that he was not denied that right. That in this class of cases the defendant will be allowed to prove that, at about the date of the conception of the child, the plaintiff had sexual intercourse with other men, is admitted by both parties. *Kelly v.*

State, 133 Ala. 195, 32 So. 56, 91 Am. St. Rep. 25; *Maynard v. People*, 135 Ill. 416, 25 N. E. 740; *State v. Gereke*, 74 Kan. 196, 86 P. 160, 87 P. 759; *Burris v. Court*, 34 Neb. 187, 51 N. W. 745; *Humphrey v. State*, 78 Wis. 569, 47 N. W. 836; *State v. Ginger*, 80 Iowa, 574, 46 N. W. 657; *Nimmo v. Simms* (Ark.) 13 S.W. (2d) 304; *In re Gird's Estate*, 157 Cal. 534, 108 P. 499, 137 Am. St. Rep. 131. Furthermore, both agree that ordinarily other acts with other men are collateral matters, which are not admissible. But the defendant claims that there is an exception to the proposition last stated. The plaintiff admits there is, but states that the limits of the exception are not as claimed by the defendant.

The defendant argues that, if it is first shown that the plaintiff, at about the date of the conception, had an association and an opportunity to have sexual intercourse with another man, then, but not until then, will the defendant be allowed to show that at some date prior thereto the plaintiff actually did have intercourse with such other man. *Odewald v. Woodsum*, 142 Mass. 512, 8 N. E. 347; *Walker v. State*, 165 Ind. 94, 74 N. E. 614; *State v. Woodworth*, 65 Iowa, 141, 21 N. W. 490; *State v. Borie*, 79 Iowa, 605, 44 N. W. 824; *Guy v. State*, 20 Ala. App. 374, 102 So. 243. The plaintiff admits the rule, but claims that in the instant case there was no showing of "association and opportunity," within the meaning of the rule.

In this contention we think the plaintiff fails to take into consideration all of the facts that had been proved. Whether the jury may draw a certain inference depends in the first place on "the facts legally proved." Code Civ. Proc., § 1960, subd. 1. Now, in this case the witness Smith had deposed that the plaintiff, while with child, called on him as an assistant probation officer and discussed her case. Among other statements she told him that about the date of conception she had intercourse with a man other than the defendant, but she knew such other man was not the father of her child; she "could tell by her woman's intuition." Prior to the date of conception, the plaintiff, Raiche, and Millam had been acquainted in Sacramento. About the 1st of September, 1923, Raiche and Millam went to Los Angeles and took bachelor quarters in an apartment, and at that time other men were members of the same household. Raiche was a married man, whose wife had obtained a divorce, but no final decree had been entered. The men had no woman to cook for them, but one of them did the cooking.

In the latter part of September, 1923 (date of conception), the plaintiff, a young stenographer, went to Los Angeles to obtain employment. She was not married; she was unescorted, and had no kith or kin at that place. She knew this defendant, who resided there.

She also knew Raiche and Millam. The plaintiff testified that she had had intercourse with the defendant at Sacramento in April, 1923. She arrived in Los Angeles on September 26, 1923, and on that day called at the defendant's place of business. He was out, but they met the next day and had intercourse. There was evidence that, while the plaintiff was living at the Y. W. C. A. in Los Angeles, she went with Raiche to his apartments, and that at other times she went there with him. She testified that she lived at the Y. W. C. A. September 26, 27, 28, and 29, 1923. At least some of the calls she made to the bachelor quarters were made after night. We think the foregoing facts show an "association," within the rule. We think they also show an "opportunity," within the rule. True, there were contradictory statements, but the conflicts were for the jury to unravel. Now, at one time the defendant, through Mr. Benjamin, said: "I offer to prove, on the basis of the testimony in the record at the present time, together with such other testimony as may be admitted, that in 1922 Miss Mensing was the mistress of one Alfred L. Raiche in Sacramento, * * *" etc. The offer was refused. Later, when all of the evidence which we have recited above had been introduced, the defendant renewed his offer. The offer was refused. That last ruling, we think, was error, and that it was prejudicial.

The plaintiff contends that the ruling was correct, because the defendant had not shown that, during their association in Los Angeles, the plaintiff and Raiche were seen in any compromising position. That was not necessary. If the defendant could have shown an act of sexual intercourse between the plaintiff and Raiche at Los Angeles in September, 1923, such act, both parties admit, would have been admissible, and it would be wholly unnecessary for us to conduct this specific inquiry regarding acts committed at Sacramento in 1922. An association together in Los Angeles in September, 1923, was admitted. Moreover, the uncontradicted evidence was that at that time the two were not restrained by family ties or physical obstacles, and that they were strangers in the large city of Los Angeles, and free to claim that they were man and wife, and were free to be by themselves and indulge their passions. Therefore they had "an opportunity," within the meaning of the rule.

Cal.Rep. 278-280 P.—63

In the following cases the evidence of "opportunity" consisted of various combinations of facts which were held to constitute a sufficient foundation to introduce evidence of other acts as showing or tending to show such acts also took place about the date of conception: In *State v. Woodworth*, 65 Iowa, 141, 21 N. W. 490, it was shown that the pair resided in the same house. In *Walker v. State*, 165 Ind. 94, 74 N. E. 614, it was shown that the pair were alone together for a time on that evening. In *State v. Borie*, 79 Iowa, 605, 44 N. W. 824, it was shown that the pair took a 20-mile ride together, and the plaintiff stayed at his house two nights, sleeping with the man's mother. In no one of those cases were additional facts shown than those we have cited. Counsel have not cited, and we have searched the books, but cannot find, any cases at variance with these authorities.

[3] There is yet another angle from which we may view the specific question before us. It is settled law that circumstantial evidence of acts of sexual intercourse with other men at about the date the child was begotten is admissible. *Estate of Gird*, 157 Cal. 534, 547, 108 P. 499, 137 Am. St. Rep. 131. When following that rule, the courts have allowed to go to the jury a set of facts no more convincing than the offer made by this defendant. *State v. Creager*, 97 Kan. 334, 155 P. 29, 30, 32; *De Mund v. State*, 167 Wis. 40, 166 N. W. 328, 329; *Anderson v. State*, 65 Utah, 512, 238 P. 557, 559; *State v. Gereke*, 74 Kan. 196, 86 P. 160, 87 P. 759, 761; *Maynard v. People*, 135 Ill. 416, 25 N. E. 740, 744; *Burris v. Court*, 34 Neb. 187, 51 N. W. 745, 746; *Kelly v. State*, 133 Ala. 195, 32 So. 56, 57, 91 Am. St. Rep. 25. If, in connection with the evidence which was admitted, there had been admitted also the testimony of witnesses that in Sacramento, about one year prior to the conception of the child, the plaintiff lived as the mistress of Raiche, there is no doubt but what the jury might have drawn the inference that at Los Angeles, about the date of the conception, the plaintiff had sexual intercourse with Raiche, and that the jury might have concluded that the plaintiff had failed to show by a preponderance of the evidence that the defendant, and not Raiche, was the father of her child.

The judgment is reversed, and the action is remanded for a new trial.

We concur: KOFORD, P. J.; NOURSE, J.

100 Cal. App. 725

ARMSTEAD v. JACKSON et al. (Civ. 3828.)★

District Court of Appeal, Third District, California. Sept. 24, 1929.

Rehearing Denied Oct. 24, 1929. Hearing Denied by Supreme Court Nov. 21, 1929.

1. Appeal and error ⇨616(1)—Papers used at trial, but not included in record on appeal, and brought to appellate court under statute, must be authenticated (Code Civ. Proc. § 953).

Papers used in trial court, but not included in record on appeal, and brought to appellate court under provisions of Code Civ. Proc. § 953, must be authenticated as having been used on hearing below, since only papers used at trial constitute record on appeal, and papers not properly authenticated cannot be considered on appeal.

2. New trial ⇨165—Proper proceeding to set aside order granting new trial for insufficient notice is on affidavits to set aside order as improvidently made (Code Civ. Proc. § 1005).

If notice of time of hearing of motion for new trial, as required by Code Civ. Proc. § 1005, was not given, proper proceeding is to move on affidavits showing facts to have order set aside as improvidently made for lack of sufficient notice.

3. Appeal and error ⇨933(1)—Where record on appeal was insufficient, appellate court could not assume absence of sufficient notice to present defense on motion for new trial (Code Civ. Proc. §§ 650, 670, 952, 953).

Where appellants, appealing from order granting new trial, did not make up any record in case, under provisions of Code Civ. Proc. §§ 650, 670, 952, 953, which appellate court was authorized to consider, appellate court could not assume that appellants did not have sufficient notice to present defense they had, or show reasons to trial court, if any existed, why motion for new trial should not be granted.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Kathryn H. Armstead, as administratrix of the estate of A. H. Armstead, deceased, against Fred C. Jackson and another. From an order granting a new trial, defendants appeal. Affirmed.

J. Hampton Hoge, of San Francisco, and Len H. Honey, of Stockton, for appellants.

Rich & Weis, of Marysville, and Downey, Brand, Seymour & Dunn, of Sacramento, for respondent.

PLUMMER, J. This cause is before us upon the defendants' appeal from an order of the trial court granting the plaintiff's motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict.

The action is based upon the alleged negligence of the defendant Fred C. Jackson, in driving an automobile in such a manner as to result in the death of A. H. Armstead, the husband of the plaintiff. The verdict of the

jury was in favor of the plaintiff, sustaining the allegations of the complaint as to the negligence of the defendant Fred C. Jackson, but rendered damages in favor of the plaintiff in the sum of only \$663.40.

Upon this appeal no question is tendered, no argument is made, and the court's attention is not called to anything in the record which would tend to show that the order of the court granting a new trial for the grounds stated is erroneous. The only question tendered for consideration upon this appeal is the alleged want of notice to the defendants of the time of hearing the plaintiff's motion for a new trial.

The clerk's record in this case shows the following papers: Affidavit of mailing of notice of appeal; affidavit of mailing notice that transcript be prepared; amended answer; amended complaint; certificate to judgment roll; clerk's certificate to transcript; clerk's certificate; notice of appeal and affidavit of mailing; judgment; minutes on motion for new trial; minute order granting plaintiff's motion for new trial; notice of appeal; notice of intention to move for new trial; notice that transcript be prepared and notice of appeal; verdict. Nothing in the judgment roll, nor in any papers just referred to, shows that the defendants did not have notice of the time and place of hearing of plaintiff's motion for a new trial. The minute order of the trial court relating to the hearing and submission of plaintiff's motion for a new trial does recite that counsel for the defendants were not present.

[1] The reporter's transcript, as requested by the appellant, contains simply the testimony introduced upon the trial of the action, and was certified to as correct on the 25th day of March, 1929. So far as the record was made in the court below, there is not a word or syllable indicating that notice of the hearing of the motion for new trial was not given. In fact, appellants, in their briefs, do not claim that notice was not given, but only that notice, as required by section 1005 of the Code of Civil Procedure, was not given. Be this as it may, there is nothing in the record to support the contention of appellants in this particular. Whether the motion for a new trial was or was not heard by the trial court after due notice thereof, or whether the order granting the motion for new trial was improvidently made, on the ground that no sufficient notice of the hearing of the motion for new trial was ever presented to the trial court for determination. No motion was ever made in the trial court to set aside the order granting the motion for a new trial on the ground that it was improvidently made, or upon the ground that no notice or sufficient notice of the time of hearing the motion was ever given to the appellants; the appeal is simply from the order granting a new trial. And the record, so far as made up and con-

sidered by the trial court, is a blank as to the subject of notice of the time of hearing of the motion for a new trial.

A novel proceeding appears to have been adopted in this case. Attached to the reporter's transcript is an affidavit, made by one of the attorneys for the plaintiff and respondent, setting forth copies of a correspondence, consisting of a number of letters passing between the attorneys for plaintiff and the attorneys for the defendants relative to the hearing of the motion for a new trial. Following the affidavit of counsel and the letters referred to is an order of the trial court directing that copies of the affidavit and letters be made and attached to the reporter's transcript, to be used and considered by the District Court of Appeal. This order, if it could be considered for any purpose whatever, would show upon its face that the affidavit referred to and the copies of the letters attached thereto were never presented to the trial court for its consideration, or upon any motion seeking to have the order granting the new trial vacated, as having been made without sufficient notice of the time of hearing being given to the appellants.

Section 670 of the Code of Civil Procedure specifies what papers shall constitute the judgment roll. Notice of motion for a new trial is not included in the list. Section 952 of the Code of Civil Procedure sets forth the duty of an appellant in relation to presenting a bill of exceptions in appealing from a motion granting a new trial. This section refers to section 650 of the same Code as to what shall be included in the bill of exceptions or statement showing that all matters which were considered by the trial court which the appellant desires to have considered upon appeal shall be set forth. Section 953 of the Code of Civil Procedure provides a method of bringing to the Appellate Court all papers used in the trial court which are not included in the record on appeal.

As stated in section 233, volume 2, California Jurisprudence, at page 486: "These papers must be authenticated as having been used on the hearing below, for only the papers used below constitute the record on appeal and not the papers on file." And as further set forth on page 601 of the same volume, section 325: "It is axiomatic that papers not properly authenticated as having been used in a hearing resulting in a judgment or order or decree cannot be considered on appeal. Where the record does not authenticate the papers used at the hearing below in the manner required by law, the appeal, if taken, whether under the old method or under the alternative method, is ineffectual." Further: "The obvious purpose of authentication is to show upon what evidence or papers the court below made its order, and thus enable the reviewing court to determine whether, upon the record

as made before it, the court below was legally authorized to make the order complained of."

[2, 3] If, as contended for by appellants, notice was not given of the time of hearing the plaintiff's motion for a new trial as required by section 1005 of the Code of Civil Procedure, then, as stated in Hayne on New Trial and Appeal, volume 1, page 859, section 164: "The proper proceeding is to move upon affidavits showing the facts, to have the order set aside as improvidently made." After referring to the fact that the record made up on the motion for new trial would not show the error complained of, it is then said: "But the fact that the party was deprived of a hearing can be shown by affidavits upon a motion to set aside the order. That such is the proper practice appears from the cases of *Morris v. De Celis*, 41 Cal. 331, and *De Gage v. Lynch*, 42 Cal. 362."

The cases referred to show that in this instance the defendants should have moved the court to set aside the order granting plaintiff's motion for a new trial on the ground that it was improvidently made for lack of sufficient notice, if such were the fact. Not having made any record in this case which we are authorized to consider, we are not at liberty to assume that the appellants did not have sufficient notice to present any defense they had or show any reasons to the trial court, if any existed, why plaintiff's motion for a new trial should not be granted.

It necessarily follows that the order of the trial court granting a new trial must be, and the same is, hereby affirmed.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

100 Cal. App. 621

APPLING v. MINARETS & WESTERN RY. CO. (Civ. 6686.)★

District Court of Appeal, First District, Division 2, California. Sept. 18, 1929.

Rehearing Denied Oct. 17, 1929. Hearing Denied by Supreme Court Nov. 14, 1929.

I. Evidence ☞75—Failure of purchaser of bankrupt's estate to produce inventory and schedule raised presumption that they contained no reference to claim against defendant (Code Civ. Proc. § 1963, subd. 6; Bankr. Act § 70b, 11 USCA § 110b).

In action by assignee of purchaser of bankrupt's estate against defendant for breach of contract with bankrupt, where neither schedule of assets required to be filed by bankrupt nor inventory of bankrupt's estate required by Bankruptcy Act § 70b, 11 USCA § 110b, were offered in evidence, reviewing court would presume that such schedule and inventory did not contain any reference to claim against defendant, in view of Code Civ. Proc. § 1963, subd. 6,

creating disputable presumption that higher evidence would be adverse from inferior evidence being produced.

2. Bankruptcy $\hookrightarrow$ 265—Statement that account of sale was intended to convey all assets of bankrupt estate held insufficient to convey chose in action (Bankr. Act § 30, 11 USCA § 53; § 47, 11 USCA § 75; § 70a, 11 USCA § 110(a)).

Under general orders in bankruptcy, made in pursuance to Bankruptcy Act § 30, 11 USCA § 53, where bankrupt's estate is sold through private sale to show conveyance of chose in action, belonging to bankrupt's estate, such chose must be listed in account of sale filed with referee in bankruptcy together with purchase price and to whom sold, and statement that it was intended to convey all assets of estate is not sufficient under Bankruptcy Act § 70a, 11 USCA § 110(a), and Bankruptcy Act § 47, 11 USCA § 75.

3. Bankruptcy $\hookrightarrow$ 268—In action by holder of claims of bankrupt's estate for breach of contract which defendant had with bankrupt, holder must prove his title.

In action by assignee of purchaser of bankrupt's estate against defendant for breach of contract claimed to be part of property assigned, plaintiff must prove his title to such claim, it having been denied.

4. Evidence $\hookrightarrow$ 158(12)—Parol evidence as to what property of bankrupt's estate was sold at private sale by trustee was properly excluded; proceedings being matters of record (Code Civ. Proc. § 1905).

In action by assignee of purchaser of bankrupt's estate against defendant for breach of contract claimed to be part of property assigned, court properly excluded parol testimony offered for purpose of showing what transpired at bankruptcy sale, since such proceedings were matters of record and should be proved by certified copies thereof, as provided by Code Civ. Proc. § 1905.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by D. F. Appling against the Minarets & Western Railway Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Cosgrave & Barstow, of Fresno, for appellant.

Goudge, Robinson & Hughes and Lee A. Dayton, all of Los Angeles, and Everts, Ewing, Wild & Everts and Dan F. Conway, all of Fresno, for respondent.

BURROUGHS, Justice pro tem. This is an appeal by the plaintiff from a judgment of nonsuit.

The complaint states a cause of action for damage. At the opening of the trial, the court directed the plaintiff to proceed with proof of his title to the claim sued upon. At the close of such evidence the court granted the motion for a nonsuit.

The evidence discloses: That the A. Meister Sons Company was, on January 20, 1923, a corporation engaged in the business of manufacturing rolling stock and equipment for railroads and also machinery of a general character. That on the day mentioned the said corporation proposed to the Minarets & Western Railway Company, a corporation, the defendant herein, that it would manufacture for the defendant two certain type gasoline rail cars for a total consideration of \$12,340 each. This offer was accepted January 29, 1923. It was for an alleged violation of this agreement that the plaintiff brought this action. The evidence further disclosed that on June 26, 1924, the A. Meister Sons Company was adjudicated a bankrupt in the District Court of the United States for the Northern District of California and J. O. Boyd was appointed trustee. There was also received in evidence a certified copy of an order of sale of the assets of said bankrupt, directing the trustee to sell the personal property belonging to said estate at private sale, subject to the confirmation of the court. The next document received in evidence was the order confirming the trustee's sale, which recited: "Application having been made by the trustee herein for the sale of stock in trade, fixtures, accounts receivable and other personal property mentioned and described in the inventory on file herein, and belonging to the above estate * * * and said stock in trade, fixtures, accounts receivable and other personal property having been sold to Feigenberg Bros., for the sum of twenty-five thousand dollars, * * * it being the intention of said sale that said Feigenberg Bros. shall receive all of the assets of the estate for Twenty-five Thousand Dollars (\$25,000.00) as is and subject to liens of encumbrances. * * * It is hereby ordered that said sale be and the same is hereby confirmed as hereinbefore set forth. * * *" Then follows in evidence an assignment dated November 18, 1924, by Feigenberg Bros. to the plaintiff, D. F. Appling, by which the former sold and assigned to the latter "all the property, real and personal, conveyed to first parties by sale made by J. O. Boyd, trustee of the estate of The A. Meister Sons Company, a corporation, bankrupt, * * * and being all the property of the said bankrupt, including leasehold interests, machinery, equipment, stock in trade, supplies, material, office equipment, notes, bills and accounts receivable, patent rights, good will of business, including all items set forth and described on four separate inventories describing property of said bankrupt estate, located at Sacramento, Fresno and Woodland, in California. * * * It is the object and purpose of this instrument to convey to and vest in second party above named all right, title and interest in and to the property of the said The A. Meister Sons Compa-

ny, bankrupt, conveyed to or acquired by first parties or either of them at such bankrupt sale." There was then introduced in evidence the report of J. O. Boyd, the trustee of the estate, who reported to the court that upon his appointment he immediately took possession of the property of the bankrupt and had filed an inventory of the same. That thereafter "all of said property mentioned in said inventory and all the personal property of the estate was offered for sale." It then recited the numerous endeavors made to sell the same and it was finally sold to Feigenberg Bros. Plaintiff then offered proof that at the sale mentioned in the foregoing evidence, the claim against the defendant was discussed as a probable source of income to the purchaser. An objection to the offer was sustained. Plaintiff also sought to prove his alleged cause of action for damage, objection to which was sustained on the ground that plaintiff had not proved ownership of the cause of action. The plaintiff then rested, and the court granted a judgment of nonsuit.

It appears that the nonsuit was granted upon the ground that neither the plaintiff nor his predecessors ever acquired title to the alleged cause of action set forth in the complaint for the following reasons: That the cause of action was never listed as an asset of the bankrupt estate, nor in the proceedings leading up to the sale of property of the estate to the predecessor in interest of the plaintiff herein was there ever any attempt made by the trustee to sell the same nor any attempt made to confirm such a sale. The evidence introduced by plaintiff does not disclose any reference to a claim owned by the A. Meister Sons Company, the bankrupt, against defendant. The verified schedule of assets required to be filed by the bankrupt was not offered in evidence. Neither was there offered in evidence by plaintiff the inventory in said estate, although the court suggested that it be introduced. The law requires that such inventory be made by the trustee and filed in the proceedings in bankruptcy. Section 70b of the Bankruptcy Act (11 USCA § 110(b)). Such an inventory was made and filed in said estate and at several places in the trustee's report reference was made to the inventory.

[1] We believe that we may proceed upon the theory that such schedule and inventory does not contain any reference to the claim upon which the plaintiff brings this action. Among the disputable presumptions, section 1963 of the Code of Civil Procedure, subdivision 6 thereof, provides: "That higher evidence would be adverse from inferior being produced." It has been held that the foregoing presumption is very strong when documentary evidence is not produced. 10 Cal. Jur. 780; *Del Campo v. Camarillo*, 154 Cal. 647, 98 P. 1049; 10 Cal. Jur. 850.

[2] The Bankruptcy Act provides that the Supreme Court of the United States shall prescribe all necessary rules, forms, and or-

ders as to procedure and for carrying said act into effect. U. S. Compiled Stats. § 9614, 30 Stats. at Large, c. 541, § 30 (11 USCA § 53). In conformity with this statute said court has prescribed the general orders in bankruptcy. Rule 18 of said orders (see 11 USCA § 53) provides that sales shall be made by public auction unless otherwise ordered by the court and, further, that upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold and the price received therefor and to whom sold, which account he shall file at once with the referee. The sale here made of the property of the estate was made at a private sale. The order confirming the sale recites that "application having been made by the trustee herein for the sale of the stock in trade, fixtures, accounts receivable, and other personal property mentioned and described in the inventory on file herein and belonging to the above estate * * * and the same having taken place and said stock in trade, fixtures, accounts receivable, and other personal property having been sold, * * * it is hereby ordered that said sale be and the same is hereby confirmed as hereinbefore set forth." At no place does the record of this action disclose any claim to the cause of action upon which this suit is based. Neither has the schedule of assets made and filed by the bankrupt in the bankruptcy proceeding nor the inventory of the property of the trustee filed in the action been offered in evidence, and, as heretofore stated, the presumption is that they would be adverse to appellant. There is therefore no mention made in any of the proceedings in bankruptcy of this claim of the plaintiff. In the assignment from Feigenberg Bros. to appellant it is recited that the assignment is of "all the property, real and personal, conveyed to first parties by sale made by J. O. Boyd, as Trustee of the estate of The A. Meister Sons Company, a corporation, bankrupt, on or about October 15th, 1924, and confirmed by the United States District Court of the Northern District of California, on or about said date and being all the property of the said bankrupt, including leasehold interests, machinery, equipment, stock in trade, supplies, material, office equipment, notes, bills and accounts receivable, patent rights, good will of business, including all items set forth and described on four separate inventories describing property of said bankrupt estate. * * *" There is no mention made in said bill of sale of the cause of action here sued upon. In the opening brief, appellant claims that, because the trustee of the bankrupt is vested by operation of law with the title of the property of the bankrupt (Bankruptcy Act § 70a, 11 USCA § 110(a)), and, further, that because it is the duty of the trustee to collect and reduce to money the property of the estates for which they are

trustees, under the direction of the court, and further to close up the estate as expeditiously as is compatible with the best interest of the parties in interest (Bankruptcy Act § 47 [11 USCA § 75]), and that under section 2 of said act, courts of bankruptcy are invested with such jurisdiction at law and in equity as will enable them to cause the estates of bankrupts to be collected, reduced to money, and distributed, and these being the only directions in the act respecting sales, sales are entirely informal, and the trustee may sell without order of the court and on such terms as he chooses.

We are of the opinion that, the sale having been made at private sale, it was necessary under rule 18 that an accurate account of the sale of the chose in action, here sued upon, together with the price and to whom it was sold, be filed with the referee in bankruptcy. Under the record here made, the claim sued upon is nowhere mentioned in the bankruptcy proceeding. A general statement to the effect that it was intended to convey all of the assets of the estate as heretofore set forth, is relied upon by appellant to establish a sale of this alleged cause of action. We believe the record is not sufficient to show a conveyance of title to this plaintiff.

In *Ellis v. Feeney & Sheehan Bldg. Co.*, 187 App. Div. 481, 176 N. Y. S. 61, it was held that, as certain property was not inventoried as an asset of the bankrupt estate, nor as property to which the trustee claimed to have any right or title, nor mentioned in the appraisal nor in any transfer from the trustee to plaintiff's assignor, there was no assignment of the cause of action proved. It is true that in this case it was held that an unauthorized sale could be ratified by the court, but we are of the opinion that, to ratify such a sale, the record must show that the court knew it was so doing. In the case at bar, the claim there sued upon is nowhere mentioned.

In *Shesler v. Patton*, 114 App. Div. 846, 109 N. Y. S. 286, at page 287, it is said: " * * * The first question requiring consideration is whether or not such purchase vested in him a cause of action against defendant. This question must be answered in the negative. The schedules of the bankrupt contained no claim against the defendant. No claim against her was attempted to be sold by the trustee."

In *Re Butler Candy Co., Inc.* (D. C.) 8 F.(2d) 311, it was held that a sale of a bankrupt's assets at private sale, on petition of the trustee, describing the property, and on which the offer was based, did not include life insurance policies, which were not scheduled, mentioned in the petition, nor known to the trustee or creditors, and which, if known, were not such property as would have been sold.

In *Segen v. Fabacher*, 136 La. 568, 67 So. 369, it was held that a sale of a bankrupt's assets must be made in accordance with the Bankruptcy Act and title to any of said assets cannot pass from the estate of the bankrupt

to a purchaser except by a sale in accordance with the provisions of said statute.

In *Cook v. Teitelman*, 102 Conn. 574, 129 A. 546, 6 A. B. R. (N. S.) 256, a lease had not been inventoried as a part of the bankrupt's estate. Under an order authorizing the trustee to sell all goods, wares, and merchandise and fixtures of said bankrupt, a sale was made to defendant. Notwithstanding that defendant at the time of the sale understood he was buying the interest of the bankrupt in the lease and the trustee assented thereto, and the lease was assigned and transferred to him as the purchaser, the court held the sale was void because the referee never authorized the sale nor approved of it after it was made.

Among the cases cited by appellant is *In re Levinson, etc.*, 1 F.(2d) 851, which he claims is directly in point. This case was before the Circuit Court of Appeals, Ninth Circuit. The opinion and decree of the District Court in the same case is reported at 297 F. 490, said decree being affirmed. It was held in the opinion of the District Court that one Clinton, a trustee, who resigned as such trustee to become a bidder at a sale of the assets of his bankrupt, and who purchased the assets of the estate, was held not to have acquired title at said sale to notes which he knew belonged to the estate, but which were not scheduled nor mentioned in the inventory on which the sale was based, nor known to his successor to be in existence, though the bill of sale executed to him purported to convey all the assets. But Clinton, having color of title, could file proof of such claim with the trustee of the estate against whom the claim was a charge, within the time allowed by law and it could be amended after the expiration of the said time by substituting the real owners as the claimants. In *re Levinson* (C. C. A.) 1 F.(2d) 851, is the same case upon appeal. The question there presented and decided was that Clinton, the former trustee, who presented the claim as his own, had a color of title which permitted the filing of the amended claim by the real owner. No question of the real ownership of the claim was decided by the court of appeal. It was merely held that Clinton had "color of title," and the claim presented by him was sufficient to allow the real owners to be substituted in the claim and thereby defeat the time limit for the presentation of claims. "'Color of title' is defined to be that 'which in appearance is title, but which in reality is no title.'" Words and Phrases (1st Ed.) vol. 2, p. 1264, and cases there cited. In our opinion the case is not in point.

[3] It is also claimed by appellant that sales of the character in question are not subject to collateral attack. In the case at bar plaintiff is seeking to recover upon a chose in action, and alleges in his amended complaint that on June 26, 1924, the A. Meister Sons Company was adjudicated a bankrupt, and, by proceedings duly and regularly had, all of

the assets of the said corporation were sold by the trustee in bankruptcy and the plaintiff has succeeded to and now owns all the assets of the A. Meister Sons Company, bankrupt. This allegation is denied by the answer of defendant. Having alleged his title and it having been denied, it was incumbent upon him to prove it. *Bovard v. Dickenson*, 131 Cal. 162, 63 P. 162; *Gilbert v. Miller*, 68 Cal. App. 40, 228 P. 662.

[4] Appellant further contends that the court erred in excluding parol testimony to show what transpired at the sale. But we are of the opinion that such evidence was properly excluded, the sale in bankruptcy being a judicial sale, the proceedings held in the matter of the estate of the bankrupt were all matters of official record and should be proved by certified copies thereof (section 1905, Code Civ. Proc.), as they contain the legitimate evidence of the sale.

We are of the opinion that the plaintiff, having failed to prove his ownership of the cause of action, the court was right in granting the motion for a nonsuit.

The judgment is affirmed.

We concur: **NOURSE, Acting P. J.; STURTEVANT, J.**

100 Cal. App. 800

D. F. APPLING, Plaintiff and Appellant, v. SUGAR PINE LUMBER COMPANY (a Corporation), Defendant and Respondent. (Civ. 6667.)★

District Court of Appeal, First District, Division 2, California. Sept. 18, 1929.

Rehearing Denied Oct. 17, 1929. Hearing Denied by Supreme Court Nov. 14, 1929.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Cosgrave & Barstow, of Fresno, for appellant.

Goudge, Robinson & Hughes and Lee A. Dayton, all of Los Angeles, and Everts, Ewing, Wild & Everts and Dan F. Conway, all of Fresno, for respondent.

BURROUGHS, Justice pro tem. The questions presented in this case are the same as those raised by appellant in the case of *D. F. Appling, Plaintiff and Appellant, v. Minarets & Western Railway Company, Defendant and*

Respondent (Civ. 6666) 90 Cal. App. —, 280 P. 1029, this day decided by this court.

Upon the authority of that case, the judgment herein is affirmed.

We concur: **NOURSE, Acting P. J.; STURTEVANT, J.**

Ex parte BEERS. (Cr. 1863.)

100 Cal. App. 796

District Court of Appeal, Second District, Division 1, California. Sept. 27, 1929.

Habeas corpus ⇨ 120—Order discharging habeas corpus writ held "final adjudication," requiring discharge of writ in subsequent proceedings between same parties on identical facts.

Order discharging writ of habeas corpus to secure custody of minor child constitutes a "final adjudication," requiring discharge of subsequent writ by same petitioner on behalf of same minor child on identical state of facts and against same parties.

Application for writ of habeas corpus by Donald B. Beers to be directed to Paul McMillan and another to secure custody of petitioner's minor child. Writ discharged.

Nelson & Burns, of Santa Ana, for petitioner.

Head, Wellington & Jacobs, of Santa Ana, for respondents.

HOUSER, J. Through the medium of a writ of habeas corpus issued by order of this court, the father of a minor child (petitioner herein) seeks its custody.

By the answer and return to the writ it appears that in a former habeas corpus proceeding instituted in the superior court by the petitioner herein in behalf of the same minor child, on the identical state of facts as are alleged in this proceeding, and against the same persons who are respondents herein, the writ was discharged. That such order constitutes a final adjudication as to the parties in this proceeding is squarely decided in each of the cases entitled *In re Holt*, 34 Cal. App. 290, 167 P. 184; *In re Frazier*, 50 Cal. App. 45, 194 P. 510; and *In re Gille*, 65 Cal. App. 617, 224 P. 784.

The writ is discharged.

We concur: **CONREY, P. J.; YORK, J.**

100 Cal. App. 669

MARYLAND CASUALTY CO. v. HOLLMAN
et al. (Civ. 6859.)★

District Court of Appeal, First District, Division 2, California. Sept. 21, 1929.

Rehearing Denied Oct. 21, 1929. Hearing Denied by Supreme Court Nov. 18, 1929.

1. Trover and conversion ⇨17—Equitable owner should possess automobile or be registered owner, to sue for conversion (Motor Vehicle Act, § 45; St. 1923, pp. 517, 524; St. 1925, pp. 398, 402, § 7).

Equitable owner of automobile should either have actual possession thereof or be registered owner, under Motor Vehicle Act, § 45 (St. 1923, pp. 517, 524; St. 1925, pp. 398, 402, § 7), to maintain action for possession or conversion thereof.

2. Execution ⇨179—Creditor, levying on automobile under judgment against registered owner, could not recover against sheriff or successful third party claimant, who was equitable owner and possessed car at time of seizure (Motor Vehicle Act, § 45; St. 1923, pp. 517, 524; St. 1925, pp. 398, 402, § 7; Code Civ. Proc. §§ 710, 710½).

Where judgment debtor's wife, interposing third party claim to automobile after levy thereon by execution, was equitable owner by purchase and by virtue of having made payments thereon, and was in actual possession of automobile at time of seizure, and was unaware that her husband, who acted as her agent in purchasing it, had registered automobile in his name, husband's judgment creditor was not entitled to recover in action against sheriff and his surety, and such third party claimant, to whom sheriff delivered the automobile, notwithstanding want of registration in third party claimant's name, as required by Motor Vehicle Act, § 45 (St. 1923, pp. 517, 524; St. 1925, pp. 398, 402, § 7); undertaking of third party claimant being required by Code Civ. Proc. §§ 710, 710½, to provide for payment of value of property claimed, if property is finally adjudged to belong to judgment debtor.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Maryland Casualty Company against Eleanore Hollman and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John Ralph Wilson and Carl E. Day, both of San Francisco, for appellant.

R. P. Wisecarver and Redman, Alexander & Bacon, all of San Francisco, for respondents.

KOFORD, P. J. Plaintiff first obtained a money judgment against John E. Hamilton and others. An execution upon said judgment was issued against the property of said Hamilton and levied upon an automobile, which was registered in Hamilton's name. Defendant Eleanore Hollman, who is now

Hamilton's wife, filed a third party claim with the sheriff, and a bond under the provisions of Code of Civil Procedure, §§ 710 and 710½. The sheriff released and delivered the car to her. Plaintiff then brought this action against the sheriff, joining Mrs. Hollman and the Aetna Casualty & Surety Company, the surety on the bond. Judgment was for the defendants. Plaintiff's motion to vacate the judgment and for a judgment in its favor upon the findings was denied. Plaintiff appeals upon the judgment roll alone, claiming to be entitled to judgment upon the findings.

The findings, so far as necessary to a consideration of the points on appeal, are as follows:

"That at the time of the levy of said execution on said automobile the said automobile was in the actual possession and custody of defendant Eleanore Hollman. That at said time the said automobile was registered with the state of California in the name of John E. Hamilton, and the name of the legal owner registered with the state of California was H. O. Harrison Company. That the said John E. Hamilton had no right, title, or interest of any kind whatsoever in said automobile. That the said car had been purchased from the said H. O. Harrison Company by the said Eleanore Hollman on March 8, 1924. That on said date said John E. Hamilton was acting as the business agent of said Eleanore Hollman. That on said date said Hamilton purchased said Cadillac automobile from said H. O. Harrison Company for said Eleanore Hollman. That said Hamilton used the funds and moneys and property of said Eleanore Hollman to so purchase said Cadillac automobile. That said John E. Hamilton signed the contract of conditional purchase with the H. O. Harrison Company for said Cadillac car, but said signature to and execution of said document was for and on behalf of and as agent of Eleanore Hollman, and said John E. Hamilton did, without right and without authority, register said car with the state of California in his own name as registered owner. That subsequently to March 8, 1924, said Eleanore Hollman did pay each and every of the monthly payments due under the conditional contract of sale to the said H. O. Harrison Company and said John E. Hamilton paid none of them. That said Cadillac automobile was, subsequently to March 8, 1924, and to and including the 10th day of November, 1924, and at the time of the said levy of execution, in the possession of and was owned by Eleanore Hollman. That she in good faith believed that the said Cadillac automobile was registered in her name as owner, and she was in fact the actual owner of said automobile on said November 10, 1924, and said John E. Hamilton had no right, title, or interest of any kind in or to said automobile on said date, save and ex-

cept only that it was improperly registered with the state of California in his name as registered owner."

"That the levy of the execution of said automobile on said date was the first actual notice to Eleanore Hollman that the said Cadillac car was not registered in her name, and that on November 12, 1924, the registry of said car was transferred to her name, and upon November 19, 1924, said Eleanore Hollman did reclaim said Cadillac automobile from Thomas F. Finn, sheriff of the city and county of San Francisco, and did give to said sheriff a bond. * * *

Appellant contends that, because the automobile was not registered in the name of Mrs. Hollman, as required by section 45 of the Motor Vehicle Act (Stats. 1923, p. 517, at page 524; Stats. 1925, p. 398, at page 402, § 7), she had no title, and hence appellant should have prevailed in this action. The section referred to requires the parties to a transfer of a motor vehicle to report such transfer to the division of motor vehicles, and subdivision (e) of the section reads:

"Until said division shall have issued said new certificate of registration and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

Appellant relies upon the following authorities: General Motors Acceptance Corporation v. Dallas, 198 Cal. 365, 245 P. 184, Parke v. Franciscus, 194 Cal. 284, 228 P. 435, and Crandall v. Shay, 61 Cal. App. 56, 214 P. 450. The first case cited deals with section 8 of the Motor Vehicle Act of 1919 (St. 1919, p. 199). It holds that the plaintiff, who had purchased a motor vehicle from the registered legal owner, Modesto Motor Company (subject to conditional sale contract with a motorist in possession), but who had not caused the registration to be changed to its name, could not maintain an action in conversion against the sheriff for having attached the vehicle as for the debt of the Modesto Motor Company. The plaintiff was the equitable owner, but not the registered owner. The decision emphasizes the fact that the plaintiff was not in possession. The second case above listed holds that, under section 8 of the Motor Vehicle Act of 1919, a purchaser and transferee who has neglected to register is estopped from maintaining a possessory action against a subsequent purchaser, who has purchased for value and in good faith from the registered owner. The third case, which, appellant asserts, is direct authority for its position here, holds that a purchaser of an automobile who has not yet had the transfer registered in his name may not maintain an action for possession and for damages for detention against a sheriff for seizing under a writ of attach-

ment issued against the property of the seller, who was in possession and still the registered owner at the time of the attachment. The purchaser in that case was not in possession, however, as was Mrs. Hollman in this case.

[1] Respondents contend that the foregoing cases are distinguishable from the instant case, in that they are either based upon estoppel, or hold that the equitable owner who is not in possession cannot maintain an action for possession or conversion, if he has neglected to make himself also the registered owner, by complying with section 45 of the Motor Vehicle Act. In other words, an equitable owner must either have actual possession or be registered. This may not be the true and only distinction between the several cases cited herein, but it at least reconciles them with others cited by respondent, particularly *Pendell v. Thomas* (Cal. App.) 272 P. 306. There it is held that plaintiff, who was the purchaser, equitable owner, and in possession of an automobile, could maintain an action in conversion against a defendant who took it from his possession under a writ of attachment issued against the property of the one who still remained the bare registered owner and not in possession. We quote from the decision: "It will be observed that the plaintiff not only had possession of the property, but that he had a right to its possession; also that he was the equitable owner of it. To enable one to recover for the conversion of personal property it is not necessary to have legal title. A person in the actual and rightful possession is entitled to maintain such an action, even though upon a transfer to him there was a failure to comply with section 45 of the Motor Vehicle Act. *Moody v. Goodwin*, 53 Cal. App. 693, 200 P. 733."

It is not contended by appellant that the findings in the instant case contain any facts which would operate as an estoppel. The facts as found by the court show that Mrs. Hollman, the third party claimant, was both the equitable owner and in actual possession at the time of the seizure by the sheriff, and that she was unaware that her husband had not registered the automobile in her name. For these reasons she could have maintained an action for conversion under the authority of *Pendell v. Thomas*, supra, notwithstanding she was not the registered owner.

Appellant contends this point is immaterial, because Mrs. Hollman, by her third party claim and bond, claimed *ownership* of the automobile levied upon by the defendant sheriff; that she is not the *owner*, because not registered, and that plaintiff should, therefore, have judgment against the sheriff, and upon the bond which Mrs. Hollman gave the sheriff. The bond given the sheriff by Mrs. Hollman was given pursuant to Code of Civil Procedure, § 710 (appearing second in Deering's Code of Civil Procedure) and 710½. The said section 710 reads as follows:

"Where property levied upon under execu-

tion to satisfy a judgment for the payment of money is claimed, in whole or in part, by a person, corporation, partnership or association, other than the judgment debtor, such claimant may give an undertaking as herein provided, which undertaking shall release the property in the undertaking described from the lien and levy of such execution."

Section 710½ requires that "such undertaking * * * shall be executed by the person * * * claiming in whole or in part, the property upon which execution is levied; * * * and said undertaking shall be conditioned that if the property claimed by the person, * * * is finally adjudged to be the property of the judgment debtor, said person, * * * will pay of said judgment upon which execution has issued a sum equal to the value, as estimated in said undertaking, of said property claimed. * * *"

[2] The bond given was executed by Mrs. Hollman as principal, and respondent the Aetna Casualty & Surety Company. It ran to the sheriff, and in terms indemnified him against all damages which he might suffer in consequence of the release of the property, and guaranteed that Mrs. Hollman would pay the judgment upon which the execution was issued, if the automobile be finally adjudged to be the property of the judgment debtor, Hamilton.

We cannot see that the wording of these sections and of the bond make the instant action essentially different from an action in conversion, even conceding that the action is properly brought against the claimant and her surety in addition to the sheriff. The complaint alleged the judgment and the levy upon the automobile, "* * * which property was then in the possession of said judgment [debtor] John E. Hamilton, who had an interest therein and right to the possession thereof. * * *" It alleged the filing of the third party claim by Mrs. Hollman, the giving of the bond, and the release from the levy by the sheriff. It alleged that Mrs. Hollman had no interest in and no right to the possession of the automobile. The prayer was that it be adjudged that at the time of the levy the automobile was the property of the judgment debtor, Hamilton, that he was entitled to the possession thereof prior to the levy, that Mrs. Hollman was not at that time entitled to the possession thereof, and that she and her surety be required to pay the judgment.

If there is a distinction between this action and an action in conversion against the sheriff alone, it is one which is of no materiality, when we consider the simple and outstanding fact that the question to be determined in the action was whether the judgment creditor had the right to collect its judgment against Hamilton out of an automobile not in his possession at the time of the levy, and in which he

had no right of possession and no interest, but of which he was the bare registered owner. It would be an anomalous condition if Mrs. Hollman could maintain conversion against the sheriff, as she could under the authority of *Pendell v. Thomas*, supra, but could not prevail in an action brought against her after she had taken the property from the sheriff under a third party claim and bond.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.







